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GEORGETOWN UNIVERSITY LAW CENTER  
Washington, DC, USA

## **WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA: PROMOTING GENDER EQUALITY**

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WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA: PROMOTING GENDER EQUALITY

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## FOREWORD

This work on existing laws and practices in Kenya concerning land and property rights was undertaken by Federation of Women Lawyers, FIDA Kenya, in partnership with the International Women's Human Rights Clinic at Georgetown University Law Center, in Washington, D.C. We extend our thanks to Norwegian Embassy for making funds available for printing this report.

FIDA Kenya, established in 1985, is a non-profit, non-partisan, and non-governmental, membership organization committed to the creation of a society that is free from all forms of discrimination against women through the provision of legal aid, women's rights monitoring, law reform advocacy, education and referral services. FIDA has been working for over two decades toward the repeal of laws and elimination of practices that are discriminatory against women. Such discriminatory laws and practices create often insurmountable obstacles against women in the economic, social, political, and other spheres of life. They deprive Kenya of utilizing the full potential of half of its population: women, and thus impede the country's development as well as the creation of a just and inclusive society. To this end, FIDA has contributed to numerous law reform initiatives targeting discriminatory laws in the areas of marriage and divorce, inheritance and the like. As in many other African countries, women in Kenya have been facing discrimination not only throughout history but even presently. Sex-discriminatory laws limit women's ability to participate fully in the economic, political, social, and cultural spheres and lead women to perpetual poverty.

The International Women's Human Rights Clinic (IWHRC), a legal clinic at Georgetown University Law Center in Washington DC, in the United States, utilizes law students and faculty to support and advance women's human rights globally, through partnerships with local women's human rights organizations and attorneys. The Clinic provides national, comparative, and international legal analysis to support

constitutional challenges, impact litigation, legislative reform, and submissions to international human rights monitoring bodies on sex discriminatory laws, policies, and practices. During 2008, the IWHRC collaborated with FIDA Kenya to research and investigate legislative solutions and develop test case litigation to address women's unequal property and inheritance rights in Kenya. Based on that work, a joint report was also submitted to the UN Committee overseeing the International Covenant on Economic, Social, and Cultural Rights, for its November 2008 review of Kenya's compliance with that treaty.

Women's lack of access to and control over property makes them vulnerable to domestic violence and HIV transmission, among other violations. Gender balance in laws and practices that govern land and property ownership, use, and possession will empower women and benefit the nation as a whole. This research outlines the challenges faced by the country in relation to women's land and property rights. It provides in-depth analysis based on extensive national, comparative, and international legal law and testimonials by a range of stakeholders, from women affected by discriminatory laws, to legal professionals, local and national officials, and specific recommendations tackling challenges around women's access and control of property and land. This is the latest and most comprehensive work undertaken in this area and can serve as a basis for advocacy toward gender-sensitive land and property rights in Kenya. This work is particularly of great value to governmental officials, as well as to legal professionals, human rights activists, non-governmental organizations, and development agencies.

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## EXECUTIVE SUMMARY

The Kenyan government has demonstrated its laudable commitment to gender equality by ratifying international human rights conventions, such as CEDAW, and promulgating a National Gender and Development Policy. Yet, women in Kenya still suffer the degrading and even life-threatening consequences of their lack of property rights and the resulting absence of economic security. The denial of equal property rights puts Kenyan women at greater risk of poverty, disease, violence, and homelessness.

This situation is a direct consequence of discriminatory laws and practices concerning women's access to and control of land and matrimonial property. Kenya's land laws were developed against a customary law system in which women had no rights to own land and only limited rights to access or use land. Then, the process of land adjudication, consolidation, and registration crystallized men's absolute ownership and control of land. Today, women rarely own land titles either individually or jointly with their husbands.

Because women face daunting obstacles to land ownership and thus to housing and loans based on their lack of land ownership, they are denied the rights that Kenya is obligated to provide under international law, including the rights to property, housing, and equal access to credit. Once married, Kenyan women are at the mercy of a legal system that does not provide clear and equal access to the use, management, and control of matrimonial property. The Married Women's Property Act of 1882, an antiquated British law, contains the sole technical clause available for courts to regulate property distribution between spouses, often depriving wives of any share, much less equal share to matrimonial property. Moreover, discrimination against women flourishes where no law exists to define and address the control and management of matrimonial property. Furthermore, polygamy forces women to share hard-earned matrimonial property with multiple co-wives and children, all bound to receive an ever smaller share of resources. Some husbands use property earned by the first wife to acquire additional wives.

While Kenyan women face numerous obstacles during marriage, the burden becomes insurmountable if they divorce. The lack of equal property rights upon divorce and the fact that many women become the sole caretakers of their children often drives them into poverty. The precarious economic position of women renders them more vulnerable to be target of domestic violence, and undermines their ability to leave abusive relationships or to negotiate safe sex. As a result, women and their children face serious physical and psychological health harms, including increased risk of contracting HIV/AIDS.



Finally, women are unable to effectively assert their rights to property because of gender bias in customary law and the lack of procedural safeguards for land disputes. Women are excluded from the decision-making process as men hold the vast majority of seats in institutions that adjudicate land rights. The decisions emanating from those bodies are often based on discriminatory and degrading notions about women's inability to manage or own land, some of which are enshrined in customary law. As a result, women are subjugated to the status of second-class citizens who must rely on men as the sources of their rights.

To ensure Kenya fulfils its international and domestic commitments to guarantee women's equal rights to land, property, housing, and credit, the legislature should:

- ▶ Pass laws that require spouses to register land and property jointly;
- ▶ Enact incentives, such as tax credits and subsidies, for joint registration;
- ▶ Ensure the availability of alternative forms of collateral to land and as a corrective action, lengthen payment periods for loans extended to women; and
- ▶ Enshrine in law and titles women's occupancy and secondary (or derivative) rights to land.

In the context of marriage and divorce, Kenya should:

- ▶ Enact a requirement for mutual spousal consent to transactions involving matrimonial property; and
- ▶ Pass laws ensuring a presumption of equal division of matrimonial property upon divorce, accounting for indirect and non-financial contribution.

To ensure that women's voices are heard in the land-related decision-making process, Kenya should:

- ▶ Provide for female representation in institutions that adjudicate land disputes; and
- ▶ Amend procedures for land disputes to guarantee the right to an advocate and the right to appeal decisions based on customary law.

Only through a thoughtful overhaul of its statutes can Kenya achieve the non-discriminatory ideals of its constitution and international human rights treaty obligations. By ensuring women's equal rights to property without discrimination, the government will also be contributing to the country's economic development. Stronger rights for women translate into a stronger, more stable, and unified Kenya.

## RESEARCH METHODOLOGY

The International Women's Human Rights Clinic (IWHRC) at Georgetown University Law Center in partnership with FIDA-Kenya prepared this report, with accompanying annotated draft legislation, aimed to advance women's property rights in Kenya. To better understand Kenya's property laws and their impact on women, the IWHRC undertook intensive study of Kenyan land, property, marriage, and divorce laws. Through bi-weekly telephone conferences with FIDA-Kenya supervising attorneys, the IWHRC faculty and law students engaged in substantive discussions about the application and impact of existing legislation, case law, and practices on women's to access and control of property and land. The IWHRC also engaged in a study of international and regional human rights law and comparative law from various regions to inform the legislative recommendations for this project. Ideas and proposals for both this report and the draft legislation have been debated and analyzed based on international, regional, comparative, and national legal research, as well as findings from in-country interviews.

During March 29 - April 8, 2008, IWHRC faculty and law students, along with FIDA Kenya lawyers, conducted an intensive seven-day fact-finding investigation, in which 85 in-depth interviews were conducted with key stakeholders in Kenya. Interviews ranged from local and national officials, including officials from the Ministry of Land, Department of the Registrar, Gender Ministry; chiefs and county council members; community and religious leaders; judges (Magistrates, High Court, and Court of Appeal); local and international non-governmental organizations (NGOs); United Nations (UN) agencies and development partners; media representatives; and men and women - single, cohabitating, married, "abandoned", divorced or widowed - who have been impacted by existing laws on property, land, and inheritance. Interviews were conducted in Nairobi and around the Mt. Kenya area, including in Meru and Nanyuki. The IWHRC and FIDA-Kenya produced a separate report and proposed amendments on inheritance rights.



**I. MOVING FORWARD TOGETHER:  
AN OPPORTUNITY FOR  
GENDER-SENSITIVE LAND REFORM**

The clashes following the December 27, 2007 elections exposed long-standing grievances concerning land in Kenya.<sup>1</sup> In the wake of more than 1,000 deaths and the displacement of approximately 304,000 people,<sup>2</sup> Kenya is at a critical stage of reconciliation in the political system and the society at large. As part of this reconciliation process, long-delayed land reforms are urgently needed to address the simmering resentments regarding land allocation and control. The protection of women's rights to land and property is an indispensable aspect of this reform and reconciliation process.

The majority of displaced people in the aftermath of the post-election violence are women and children,<sup>3</sup> and their property rights will be crucial to resettlement efforts. Women who have lost husbands and sons to the violence are at risk of losing land that was never registered in their names due to discriminatory property statutes and customary law. Based on a study of multiple countries across the globe, the Internal Displacement Monitoring Centre stressed that women who lack control over property stand to lose out even more when conflict leads to internal population displacement:

**Given inequitable laws and practices denying wives joint ownership of family land, women often lose out in [land titling]. In cases where land titling contributed to violations of rights and was one of the causes of displacement, a return to the status quo ante will not necessarily lead to a fair outcome. Restitution in such situations should be replaced by some form of land redistribution.<sup>4</sup>**

The protection of women's land rights in the context of resettlement and land reform is especially critical given women's overwhelming contribution to agriculture and the contrasting gender disparity in land ownership in Kenya. Kenyan women are the "main agricultural producers and

food providers."<sup>5</sup> Women constitute 80 percent of the agricultural labour and provide about 60 percent of farm-derived income<sup>6</sup>. Yet only 5 percent of land in Kenya is registered jointly with women and only 1 percent is registered by women alone.<sup>7</sup> Women are the driving force behind subsistence farming and food security, playing an integral role in the family and the economy as a whole. Elijah Odhiambo, of the Hakijamii Trust in Nairobi, works extensively with women living in dire need and reaffirmed the popular notion that, "[t]he future of the family lies with the mothers . . . If a man dies and leaves the family behind, the family is without [land] . . . . [T]he post election violence is giving us a lot of good opportunity to learn from<sup>8</sup>." As the country moves forward with political reconciliation and economic renewal, it is imperative that half of the population's rights are recognized and protected.

5 UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS OF WOMEN AND GIRLS IN KENYA IN THE ERA OF HIV AND AIDS 12 (2006) [hereinafter UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS].

6 HUMAN RIGHTS WATCH, DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA 10 (2003), available at <http://hrw.org/reports/2003/kenya0303/kenya0303.pdf> [hereinafter HRW, DOUBLE STANDARDS].

7 Republic of Kenya, Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women (39th Sess., 2007), para. 134; U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya) [hereinafter Kenya's Report to CEDAW Committee]; KENYA LAND ALLIANCE & FIDA KENYA, POLICY BRIEF: WOMEN, LAND AND PROPERTY RIGHTS AND THE LAND REFORMS IN KENYA 1 (2006), available at <http://www.kenyalandalliance.or.ke/women%20policy%20brief.pdf> [hereinafter KLA, WOMEN, LAND AND PROPERTY RIGHTS].

8 Interview with Elijah Odhiambo, Program Coordinator, Economic & Social Rights Centre, Hakijamii Trust, in Nairobi, Kenya (Apr. 1, 2008).

1 See HUMAN RIGHTS WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 2 (2008), available at <http://www.hrw.org/reports/2008/kenya0308/kenya0308webwcover.pdf>.

2 Kenya Red Cross Says More Than 1,000 Die in Crisis, REUTERS, Feb. 5, 2008, available at <http://www.reuters.com/article/africaCrisis/idUSL05411310>.

3 KENYAN WOMEN'S CONSULTATION GROUP ON THE CURRENT CRISIS IN KENYA, WOMEN'S MEMORANDUM TO THE MEDIATION TEAM (Jan. 29, 2008), available at <http://allafrica.com/stories/200801310664.html>.

4 Internal Displacement Monitoring Centre, Land, Housing, and Property Issues (2006), available at <http://www.internal-displacement.org> (select "Thematic" hyperlink; click on "Land, Housing, and Property Issues").



**II. SEX-DISCRIMINATORY LAWS  
DOOM WOMEN TO PERPETUAL  
POVERTY AND MINIMAL, IF ANY,  
ACCESS AND CONTROL OVER  
PROPERTY AND LAND**

## A. Land Laws Perpetuate Discrimination Against Women

Kenya's myriad land statutes discriminate against women by: (1) invoking customary law which generally confers exclusive control of land on men, to govern land rights; (2) vesting in men absolute sole ownership rights to registered land; and (3) adopting procedures that insulate customary laws from appeal and judicial scrutiny. Kenya has over 75 land laws, which create a confusing and anachronistic legal framework that fails to recognize women's land rights.<sup>9</sup> In the draft National Land Policy, the government has acknowledged the injustices this framework has caused, particularly for women.<sup>10</sup>

Under existing law, there are three categories of land in Kenya: government land (or public land),<sup>11</sup> which is owned by the government but may be allocated to individuals;<sup>12</sup> trust land (or communal land),<sup>13</sup> which is vested in the county councils<sup>14</sup> in trust for the community;<sup>15</sup> and registered land (or private land),<sup>16</sup> which is owned by individuals.<sup>17</sup> Agricultural land, or land that can be put into productive use for agriculture,<sup>18</sup> straddles all land categories.<sup>19</sup>

Type of Land	Applicable Law	Responsible Land Body	Applies Customary Law?
Government Land	Government Land Act	National government	No
Trust Land	Constitution, Chapter IX Trust Land Act Trust Land Rules	County council	Yes
Trust Land That Becomes Registered Land	Land Adjudication Act Land Consolidation Act	Adjudication Committee Arbitration Board	Yes
Registered Land	Registered Land Act Registration of Titles Act Other acts concerning private land	None, except for agricultural land	No, except for agricultural land
Agricultural Land	Land Disputes Tribunals Act Land Control Act	Land Disputes Tribunals (drawn from a panel of elders) Land Control Board	Yes

### (1) Land Laws Invoke Discriminatory Customary Law to Govern Land Rights

Numerous land laws, including Chapter IX: Trust Land of the Constitution, the Trust Land Act, the Land Adjudication Act, the Land Consolidation Act, and the Land Disputes Tribunals Act, rely on customary law, under which men control the land,<sup>20</sup> to determine and govern land rights. According to Assistant Chief Jackson Kirigia from the Meru area, local government officials also apply customary law when they are unfamiliar with

<sup>9</sup> KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 1.

<sup>10</sup> See MINISTRY OF LANDS, NATIONAL LAND POLICY §§ 3.6.2, 3.6.6, 3.6.10.3 (2007) [hereinafter NATIONAL LAND POLICY].

<sup>11</sup> Id. § 3.3.1, paras. 56–57 (2007).

<sup>12</sup> See The Government Lands Act, (2004) Cap. 280.

<sup>13</sup> NATIONAL LAND POLICY, supra note 10, § 3.3.1, paras. 56–57.

<sup>14</sup> CONSTITUTION, § 115(1)–(2) (rev. ed. 2001) (1998).

<sup>15</sup> Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

<sup>16</sup> NATIONAL LAND POLICY, supra note 10, § 3.3.1, para. 56–57 (2007).

<sup>17</sup> See The Registered Land Act, (2006) Cap. 300 § 27(a); KENYA LAND ALLIANCE, THE CASE FOR WOMEN'S LAND RIGHTS IN THE PROPOSED NEW CONSTITUTION 9 (2006), available at [www.kenyalandalliance.or.ke/Women%20land%20rights%20bk.pdf](http://www.kenyalandalliance.or.ke/Women%20land%20rights%20bk.pdf) [hereinafter KLA, THE CASE FOR WOMEN'S LAND RIGHTS].

<sup>18</sup> Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008); see also The Agriculture Act, (2004) Cap. 318 § 2(1) ("agricultural land" means all land which is used for the purpose of agriculture . . .).

<sup>19</sup> See Land Disputes Tribunal Act, (2004) Cap. 287 § 2.

<sup>20</sup> Telephone Interview with Evelyn Opondo, Senior Counsel, FIDA-Kenya, (Jan. 30, 2008); Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).



the written laws: “[b]ecause [we] do not have the statutes or written laws, we usually invoke custom because that is what we know.”<sup>21</sup>

Under the customary law invoked in land statutes, women cannot own or control land.<sup>22</sup> According to Lily Murei, Monitoring and Evaluation Officer for the Kenya Land Alliance (KLA), “we have different cultural systems [that] believe women cannot even be acknowledged to own land. . . . [Y]ou talk of land and cows and all that property that men have, they also put women as part of their property.”<sup>23</sup> Women only have customary rights to access and cultivate land, and even those rights are dependent on men.<sup>24</sup> In the majority of the communities in Kenya, women have to ask a male for permission to cultivate the land,<sup>25</sup> although some males traditionally reserve fields for the wife or wives.<sup>26</sup> According to a Kenya National Commission on Human Rights report, for example, under Luo customary law a man usually parceled out his tract of land to his wife or wives, and each wife cultivated her tract and could amass a larger tract based on her labour.<sup>27</sup>

Customary land law constitutes a serious barrier to realizing women's rights, explained Frederick Ochieng of the United Nations Development Fund for Women (UNIFEM) in Kenya. The custom stipulates that “a woman is not supposed to own land. Traditionally, a woman doesn't own land. The land is owned by the man, and in other cultures land is owned by the community . . . . [In some] cases . . . a woman has to ask for permission to go and till the land . . . . so that even when the government says everybody is free to own land . . . the woman in the family is prevented by the traditional dynamics within

those cultures from owning land and even from using it and having any say about the use of clan land.”<sup>28</sup>

Because such customary law governs trust land,<sup>29</sup> on which a majority of the Kenyan population lives,<sup>30</sup> women are excluded from accessing rights to trust land. Section 115(2) of the Constitution<sup>31</sup> and section 69 of the Trust Land Act<sup>32</sup> explicitly state that trust land is governed by customary law. Customary law also determines who should be compensated when trust land is set apart for public use.<sup>33</sup> According to Evelyn Opondo, senior counsel with FIDA-Kenya, only men effectively control trust land: “the challenge is that trust land belongs to the community, but the fact that Kenya is patriarchal means that the male holds the land on behalf of others.”<sup>34</sup> Some of the Trust Land Rules, which require residents of the trust land areas to obtain licences to occupy or farm the land,<sup>35</sup> reinforce women's exclusion from trust land by using gender-specific words like “son of” on the license application form.<sup>36</sup>

The customary rights of men to control Trust land form the basis of rights to registered land<sup>37</sup> when land undergoes the adjudication and consolidation process under the Land Adjudication Act or the Land Consolidation Act.<sup>38</sup> The Land Adjudication Act<sup>39</sup>

28 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

29 See CONSTITUTION, § 115(2) (rev. ed. 2001) (1998) (Kenya); The Trust Land Act, (2004) Cap. 288 § 69.

30 KENYA LAND ALLIANCE, POLICY BRIEF: COMMUNITY LAND TENURE AND THE MANAGEMENT OF COMMUNITY LAND IN KENYA 1 (2007), available at [http://www.kenyalandalliance.or.ke/Community percent20Land percent20Policy percent20Brief.pdf](http://www.kenyalandalliance.or.ke/Community%20Land%20Policy%20Brief.pdf).

31 CONSTITUTION, § 115(2) (rev. ed. 2001) (1998) (“Each county council . . . shall give effect to such rights, interests or other benefits in respect of the land as may, under . . . African customary law . . . , be vested in any tribe, group, family or individual . . .”).

32 The Trust Land Act, (2004) Cap. 288 § 69 (“In respect of the occupation, use, control, . . . and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law . . . , in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made thereunder, or to the provisions of any other law . . .”).

33 See CONSTITUTION, § 117(4)(a) (rev. ed. 2001) (1998); Trust Land Act, (2004) Cap. 288 § 8(1)(a).

34 Telephone Interview with Evelyn Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008).

35 See Trust Land (Athi-Tiva) (Land Utilization) Rules, (2004) Cap. 288 § 3(1); Trust Land (Lambwe Valley) Rules, (2004) Cap. 288 § 5(1), 6(2); Trust Land (Meru Concessional Area) Rules, (2004) Cap. 288 § 3; Trust Land (Irrigation Areas) Rules, (2004) Cap. 288 § 4; Trust Land (North Yalta, Yatta Plateau and Ithanga) Rules, (2004) Cap. 288 § 4; Trust Land (Isiolo) Rules, (2004) Cap. 288 § 3; Trust Land (Olengurone) Rules, (2004) Cap. 288 § 4; Trust Land (Shimba Hills) Rules, (2004) Cap. 288 § 4.

36 See Trust Land (Meru Concessional Area) Rules, (2004) Cap. 288 sched. 2; Trust Land (Irrigation Areas) Rules, (2004) Cap. 288 sched. 1; Trust Land (North Yalta, Yatta Plateau and Ithanga) Rules, (2004) Cap. 288 sched. 1; Trust Land (Isiolo) Rules, (2004) Cap. 288 sched. 1; Trust Land (Olengurone) Rules, (2004) Cap. 288 sched. 1; Trust Land (Shimba Hills) Rules, (2004) Cap. 288 scheds. 1, 2. No provision of the Trust Land Rules, the Trust Land Act, or any general definitional statute renders these terms gender-neutral.

37 Under section 116(1) of the Constitution, when trust land is registered, it ceases to be trust land. CONSTITUTION, § 116(1) (rev. ed. 2001) (1998).

38 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9.

39 The Land Adjudication Act, (2004) Cap. 284. Under the Land Adjudication Act, the Minister may designate an area of Trust land to undergo the adjudication process. The Land Adjudication Act, (2004) Cap. 284 § 3. The recording officer and the adjudication committee determine the claims to the land under customary law. The Land Adjudication Act, (2004) Cap. 284 §§ 19, 20. The recording officer designates any person who “has, under recognized customary law, exercised rights in or over land which should be recognized as ownership” as the owner of that land. The Land Adjudication Act, (2004) Cap. 284 § 23(2)(a). The land is then registered accordingly. The Land Adjudication Act, (2004) Cap. 284 § 28.

21 Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008).

22 See Kenya's Report to CEDAW, supra note 7, at para. 10; Interview with county clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008); Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

23 Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

24 See Akinyi Nzioki, The Effects of Land Tenure on Women's Access and Control of Land in Kenya, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 218, 228 (Abdullahi A. An-Na'im ed., 2002).

25 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

26 Nzioki, supra note 24, at 218, 228.

27 KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, FROM DESPAIR TO HOPE: WOMEN'S RIGHT TO OWN AND INHERIT PROPERTY 3 (2005) [hereinafter KNCHR].

and the Land Consolidation Act<sup>40</sup> were enacted to determine the existing customary rights to land, consolidate fragmented, non-contiguous holdings, and convert them to single, registered, freehold parcels of land.<sup>41</sup> Because customary law prescribes that men control land and property but women cannot, the bodies that determine these land rights have not recognized women's claims: as explained by the KLA, the Acts were "bound to exclude most women from acquiring titles to land since they only had rights of use while men retain those of allocation"<sup>42</sup> under customary law.

## (2) Registered Land Statutes Vest Absolute Sole Ownership Rights in Men

The registered land statutes, particularly the Registered Land Act,<sup>43</sup> insulate the rights men gained through the adjudication and consolidation process by vesting them with absolute ownership of the land and failing to acknowledge even the derivative rights of women to land.<sup>44</sup> The Registered Land Act in section 27 provides that "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."<sup>45</sup> The proprietor's rights "shall be held by the proprietor . . . free from all other interests and claims whatsoever."<sup>46</sup> According to the Kenya Land Alliance, men were the first to register land under the Registered Land Act, so men gained absolute ownership rights, to the exclusion of women.<sup>47</sup> The Registered Land Act allows for registration of land

"made in favour of two or more persons,"<sup>48</sup> but it also permits the Minister of Lands to limit joint registration to one proprietor.<sup>49</sup> Joint registration is rarely realized in practice, with only about 5 percent of titled held jointly.<sup>50</sup> The customary rights of women to access and use land are neither registrable nor protected as overriding interests under the Registered Land Act.<sup>51</sup>

Currently, women hold a miniscule number of title deeds (about 5 percent of titles).<sup>52</sup> Women provide the vast majority of agricultural labour, including 89 percent of the subsistence farming labour force<sup>53</sup> and over 70 percent of labour in cash crop production.<sup>54</sup> Women head about 32 percent of Kenyan households.<sup>55</sup> Nevertheless, women only hold 1 percent of registered land titles in their own names and only about 5–6 percent of land titles jointly.<sup>56</sup>

## (3) The Land Bodies' Procedures Fail to Protect Women's Rights to Land

The bodies that govern land lack adequate procedural safeguards to protect the rights of women because (1) women are nearly absent from land bodies; (2) the land disputes procedures are biased against women; and (3) husbands may sell matrimonial land without their wives' consent. First, the Kenyan government has acknowledged that women are underrepresented in land bodies in both the National Gender and Development Policy<sup>57</sup> and the National Land Policy.<sup>58</sup> The National Gender Policy notes that "[d]espite the fact that women account for slightly more than half of the

40 The Land Consolidation Act, (2004) Cap. 283. Under the Land Consolidation Act, the Minister may designate an area of Trust land to undergo the consolidation process. The Land Consolidation Act, (2004) Cap. 283 § 2. An Adjudication Committee consisting of "persons resident in" that area is then appointed. The Land Consolidation Act, (2004) Cap. 283 § 9(1). The Committee adjudicates and determines "in accordance with African customary law the claim of any individual person to any right or interest in any land" within the area. The Land Consolidation Act, (2004) Cap. 283 § 11(1). If the Committee cannot reach a decision, it refers the matter to an Arbitration Board. The Land Consolidation Act, (2004) Cap. 283 § 11(2). The findings of the Committee or Arbitration Board are reflected in a Record of Existing Rights. The Land Consolidation Act, (2004) Cap. 283 § 15. The Committee then allocates land based on the customary law rights reflected in the Record of Existing Rights and compensates those who have rights to land under customary law but are required to relinquish the land after consolidation. The Land Consolidation Act, (2004) Cap. 283 §§ 21(2), 22(1).

41 LORENZO COTULA, FOOD AND AGRICULTURE ORGANIZATION (FAO) LEGISLATIVE STUDY NO. 76, GENDER AND LAW: WOMEN'S RIGHTS IN AGRICULTURE 34–35 (2002), available at <http://ftp.fao.org/docrep/fao/005/y4311E/y4311E00.pdf>.

42 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9.

43 The Registered Land Act, (2006) Cap. 300. Although some land titles are governed by the Land Titles Act, Cap. 282, and the Registration of Titles Act, Cap. 281, most new land titles are created under the Registered Land Act. See TUDOR JACKSON, THE LAW OF KENYA 240, 243 (3rd. ed., 1988).

44 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9.

45 The Registered Land Act, (2006) Cap. 300 § 27(a).

46 Id. § 28.

47 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9; see also Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008) ("[I]n the majority of communities the system is so patriarchal or patrilineal that . . . the men are the ones that have the land in their names, the titles are in their names.").

48 The Registered Land Act, (2006) Cap. 300 § 101(1).

49 Id. § 101(3)(a) (permitting a discretionary limit on "the maximum number (whether one or a greater number) of persons who are allowed to be registered in the same register as proprietors").

50 See Kenya's Report to CEDAW Committee, supra note 7, para. 134; KENYA LAND ALLIANCE, THE NATIONAL LAND POLICY IN KENYA: CRITICAL GENDER ISSUES AND POLICY STATEMENTS 4 (2004), available at <http://www.kenyalandalliance.or.ke/issues%20Paper%20gender%20.pdf> [hereinafter KLA, CRITICAL GENDER ISSUES].

51 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9–10.

52 See Kenya's Report to CEDAW Committee, supra note 7, para. 134; KLA, CRITICAL GENDER ISSUES, supra note 52, at 4.

53 KNCHR, supra note 27.

54 KLA, CRITICAL GENDER ISSUES, supra note 50, at 6.

55 Gender in the Kenya 2003 Demographic and Health Survey, available at <http://www.measuredhs.com/topics/gender/profiles/kenya2003.cfm> (last visited May 9, 2008); Kenya's Report to CEDAW, supra note 7, para. 194.

56 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 1.

57 MINISTRY OF GENDER, SPORTS, CULTURE AND SOCIAL SERVICES, NATIONAL GENDER AND DEVELOPMENT POLICY 20 (2000), available at <http://www.culture.go.ke/images/stories/pdf/genderpolicy.pdf> [hereinafter NATIONAL GENDER AND DEVELOPMENT POLICY].

58 NATIONAL LAND POLICY, supra note 10, § 3.6.10.3, para. 223 (2007).



total population and comprise a large voting population, they are still inadequately represented in ...grassroots-based institutions such as Land Boards.<sup>59</sup> On county councils, which oversee land transactions dealing with Trust Land on which most women reside, women made up only 8.2 percent of county councils in 1997, a gradual increase from 1.7 percent in 1986.<sup>60</sup> As of 2008, the Meru County Council included only 5 women out of 43 council members,<sup>61</sup> and the Laikipia County Council included only 5 women out of a total of 36 council members.<sup>62</sup>

Under the Land Disputes Tribunals Act, disputes regarding agricultural land are adjudicated before a panel of elders<sup>63</sup> who apply customary law.<sup>64</sup> According to an interview with an Assistant Chief, women are not elders because customary law “has not allowed that, is not open to that.”<sup>65</sup>

Second, the procedures of the Lands Disputes Tribunals discriminate against women by denying them the opportunity to appeal decisions based on customary law and denying them representation by advocates. The Land Disputes Tribunals have exclusive jurisdiction<sup>66</sup> over civil cases involving “(a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land . . . .”<sup>67</sup> Because they apply customary law, they are predisposed to rule against women.<sup>68</sup> Although any party may challenge a Tribunal’s decision

to the Appeals Committee,<sup>69</sup> no party may appeal a customary law decision to any Kenyan court.<sup>70</sup> Therefore, the customary law decisions of the Land Disputes Tribunals and Appeals Committees are insulated from judicial review, and women cannot ask the courts to safeguard their rights. The procedures also prohibit advocate representation before a Tribunal or Appeals Committee,<sup>71</sup> exacerbating the discriminatory effect on women.

Third, although Land Control Boards must approve transactions affecting agricultural land, they do not require spousal consent for such transactions.<sup>72</sup> Thus, one spouse may sell the matrimonial home without the other’s knowledge, much less consent.<sup>73</sup> In *Kamau v. Kamau*, for example, the Court of Appeal in 2006 upheld a husband’s sale of matrimonial land without his wife’s consent.<sup>74</sup> A non-binding presidential decree from the 1980s directs land control boards to take all adult family members’ interests into account, but Boards may disregard the decree, and some husbands present “fake” wives to give their consent to the Boards.<sup>75</sup>

## B. Existing Marriage and Divorce Laws Rob Women of Their Matrimonial Property

Gaps in Kenyan law on matrimonial property and land during marriage and at divorce have resulted in judicial decisions that undervalue and dismiss the immense contribution of women to their families and the household. Regardless of whether the marriage is formalized under statute or custom, women often have no more than mere use rights to the matrimonial land, revocable at the will of the husband. Married women rarely enjoy equal rights to control, alienate, or

59 NATIONAL GENDER AND DEVELOPMENT POLICY, *supra* note 57, at 18.

60 *Id.* at 20.

61 Interview with Charles Murithi Marangi, Chairman, Meru Central County Council, in Meru, Kenya (Mar. 31, 2008) (Only 1 woman was elected and 4 women were nominated).

62 Interview with County Clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008).

63 See The Land Disputes Tribunal Act, (2004) Cap. 287 §§ 4(2), 5(1).

64 *Id.* § 3(7) (“The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law.”)

65 Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008).

66 See The Land Disputes Tribunal Act, (2004) Cap. 287 § 3(9) (“Notwithstanding any other written law no magistrate’s court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of subsection (1).”).

67 The Land Disputes Tribunal Act, (2004) Cap. 287 § 3(1).

68 See generally Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

69 The Land Disputes Tribunal Act, (2004) Cap. 287 § 8(1).

70 See *id.* §§ 8(8), 8(10). Section 8(8) of the Land Disputes Tribunal Act states that “[t]he decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.” *Id.* § 8(8). Under Section 8(10), “[a] question of customary law shall . . . be deemed to be a question of fact” and is therefore not appealable. *Id.* § 8(10).

71 See Land Disputes Tribunals (Forms and Procedure) Rules, 1993, (2004) Cap. 287 § 19 (“No party to or other person interested therein shall be entitled to appear by or to be represented by an advocate in any proceedings unless a Tribunal or an Appeals Committee directs otherwise.”).

72 See Land Control Act, (2004) Cap. 302 § 6.

73 KLA, THE CASE FOR WOMEN’S LAND RIGHTS, *supra* note 17, at 9–10; Interview with Victoria Ochanda, Kenyan Attorney and Law and Advocacy for Women in Africa Fellow, Georgetown University, in Wash., D.C., USA (Feb. 21, 2008).

74 Jacinta Wanjiku Kamau v. Isaac Kamau Mungai, (2006) 59 K.L.R. 9 (C.A.K.) (Kenya).

75 See, e.g., KLA, THE CASE FOR WOMEN’S LAND RIGHTS, *supra* note 17, at 9–10; Interview with former chief in Meru, Kenya (Mar. 31, 2008); Interview with Hellen Kwamboka Ombati, advocate of the High Court of Kenya and member of FIDA-Kenya, in Nairobi, Kenya (Apr. 1, 2008). For further discussion of the lack of spousal consent, see *infra* Part IV.B.

transfer matrimonial property.<sup>76</sup> At separation or divorce, women are often unable to take away an adequate share of their matrimonial property, and are often forced to leave the matrimonial home with little more than personal effects.

The multitude of laws governing issues of marriage and divorce leads to confusion and an inability to effectively ensure adequate protection of women's property rights. Kenyan law recognizes five marital legal regimes: civil, Christian, Islamic, Hindu, and customary. Statutes regulate various aspects of these marital regimes, including the Marriage Act,<sup>77</sup> the African Christian Marriage and Divorce Act,<sup>78</sup> the Hindu Marriage and Divorce Act,<sup>79</sup> the Mohammedan Marriage, Divorce and Succession Act,<sup>80</sup> the Married Women's Property Act,<sup>81</sup> and the Matrimonial Causes Act.<sup>82</sup> The customary laws of the respective 42 tribes that reside in Kenya govern customary marriages. Of these statutory regimes, no single statute comprehensively addresses the rights and property interests of spouses during marriage or at its dissolution. Following its review in 2007 of Kenya's compliance with Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the CEDAW Committee highlighted the problem of overlapping and parallel laws and urged Kenya to: "harmonize civil, religious and customary law with article 16 of the Convention and to complete law reform in the area of marriage and family relations . . . ."<sup>83</sup>

### (1) Gaps in Current Marriage Law Leads to Unequal Control Over Matrimonial Property

Current statutory marriage law does not protect married women's interest in matrimonial property. Women are particularly vulnerable to discrimination regarding matrimonial property because they are at the mercy of historically discriminatory laws and practices, and gender roles that consider women inferior to men: "The property

belonged to the husband – even yourself. Women were included as a part of the property men could own under customary law."<sup>84</sup>

While both polygamous and monogamous marriages are recognized in Kenya, only women in monogamous marriages are entitled to minimal protection of their rights at marriage and at divorce. The African Christian Marriage and Divorce Act,<sup>85</sup> the Hindu Marriage and Divorce Act,<sup>86</sup> and the Marriage Act<sup>87</sup> all govern monogamous unions. Marriages contracted under these regimes offer women at least some form of protection in that the marriages are registered, thus providing tangible evidence of the union and the first basis for establishing a wife's claim to matrimonial property. Lacking from each of these, however, is a framework delineating how matrimonial property will be acquired, registered, controlled, managed, or divided between spouses throughout the course of the marriage.<sup>88</sup>

All marriages contracted under Customary or Muslim law are potentially polygamous. Neither law is codified in statute or provides an explicit framework to protect the equal rights of women during marriage or at divorce. The Mohammedan Marriage, Divorce and Succession Act<sup>89</sup> and customary laws govern polygamous unions. Per statute, a Muslim man may marry up to four wives, while under custom there is no limit to the number of wives a man can marry. Unions contracted as polygamous leave women particularly vulnerable to deprivation of their matrimonial property. The Mohammedan Act makes no explicit mention of a matrimonial property regime, however, practice dictates that Islamic personal law governs married women's property rights.<sup>90</sup> Disputes arising under the Mohammedan Marriage Act may be brought before the Kadhi court,

<sup>76</sup> See generally, KLA, CRITICAL GENDER ISSUES, *supra* note 50.

<sup>77</sup> The Marriage Act, (1902) Cap. 150 (Kenya).

<sup>78</sup> The African Christian Marriage and Divorce Act, (1931) Cap. 151 (Kenya) [hereinafter Christian Act].

<sup>79</sup> The Hindu Marriage and Divorce Act, (1960) Cap. 157 (Kenya) [hereinafter Hindu Act].

<sup>80</sup> The Mohammedan Marriage, Divorce and Succession Act, (1806) Cap. 156 (Kenya) [hereinafter Mohammedan Act].

<sup>81</sup> The Married Women's Property Act, (1882) (hereinafter MWPA).

<sup>82</sup> The Matrimonial Causes Act, (1941) Cap. 152 (Kenya).

<sup>83</sup> Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Comments: Kenya, para. 44, U.N. Doc. CEDAW/C/KEN/CO/6 (2007), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under "Kenya," then "Concluding Comments") [hereinafter CEDAW Committee, Concluding Comments: Kenya].

<sup>84</sup> Interview with Frederick Oundo, Member, CLARION, in Nairobi, Kenya (Apr. 3, 2008).

<sup>85</sup> Christian Act, *supra* note 78.

<sup>86</sup> Hindu Act, *supra* note 79.

<sup>87</sup> Marriage Act, *supra* note 77.

<sup>88</sup> See *id.*

<sup>89</sup> Mohammedan Act, *supra* note 80.

<sup>90</sup> Hulton & Williams, Customary and Islamic Law & Its Development in Kenya, LEGALBRIEF AFRICA, Oct. 11, 2004, available at <http://www.legalbrief.co.za/article.php?story=20041010212108281>.

which has jurisdiction to deal with matters arising out of Islamic law.<sup>91</sup> Unlike customary marriages, Muslim marriages are formally registered.

The Married Women's Property Act of 1882 (MWPA), a woefully inadequate remnant of British colonial rule, remains the only statute to govern married women's right to property acquired during a marriage. The MWPA applies to all Kenyan marriages regardless of the type of marriage or regime governing the marriage, including marriages contracted under Customary or Muslim law.<sup>92</sup> The MWPA allows a wife to hold property separate from her husband without the husband acting as a guardian over her affairs.<sup>93</sup> Under the MWPA, married women have express claim to separate property (presumably registered in their name) acquired before or during the marriage.<sup>94</sup> Married women's claim to matrimonial property, however, is all but completely left out of the statute. The one mention of disputes concerning matrimonial property occurs in section 17:

**In any question between husband and wife as to the title to or possession of property, either party,...may apply by summons or otherwise in a summary way to any judge of the High Court...and the judge of the High Court of Justice...may make such order with respect to the property in dispute....<sup>95</sup>**

The women of Kenya continue to be governed by an antiquated Act, ill-equipped to deal with the realities of their lives or to protect their human rights. The British parliament has since 1882 amended, repealed, and supplemented the various provisions of the

MWPA.<sup>96</sup> Further, the MWPA has been unevenly applied; some judges only use it for disputes that arise during the course of a marriage, other judges only apply the MWPA at the dissolution of marriage while others insist that the party applying for division of matrimonial property must first show an intention to dissolve the marriage, for example, by filing a petition for divorce.<sup>97</sup> In assessing the extent to which a married woman retains rights in matrimonial property, judges have developed a system of monetary contribution determination, a test whose criteria remains the prerogative of the presiding judge and which tends to dismiss indirect, non-financial contribution.<sup>98</sup> Justice Omolo, in reasoning an equal division of property between spouses in the now partly overruled 1991 decision, *Kivuitu v. Kivuitu*, explained that:

**Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to court under [section] 17 of the [MWPA of] 1882, so that the court can determine her interest in the property and in that case, the court would have to assess the value to be put on the wife's non-monetary contribution.<sup>99</sup>**

Yet, in the absence of an explicit law to govern matrimonial property, both during marriage and at divorce, married women are left with no legal framework by which to exercise their right to equal ownership, control, and management of matrimonial property. In fact, the very purpose of the MWPA was to ensure that married women could acquire separate property without the guardianship of their husbands. The Act neither defines matrimonial property nor provides guidance about the equitable

91 CONSTITUTION, § 66 (rev. ed. 2001) (1998) (Kenya).

92 Telephone Interview with Evelynne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008). For example, the MWPA has been applied in customary marriages in *Karanja v. Karanja*, (1976) 1 KLR 389 and in Muslim marriages in *Fathiya Essa v. Mohamed Alibhai Essa*, (1995) Civil Appeal 101 of 1995 (H.C. Nairbi) (unreported), and *Amina O. Abdulkadir v. Ravindra N. Shah*, (2006) eKLR 1, 3 (H.C. Mombasa) (Kenya).

93 MWPA, supra note 81, at § 1 ("A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.").

94 MWPA, supra note 81, at § 1.

95 MWPA, supra note 81, at §17.

96 See, e.g., Married Women's Property Act 1964, c. 19 (Eng.), available at <http://www.statutelaw.gov.uk/> (under "Quick Search," enter "Married Women's Property Act" in the title field; in search results, click on "Married Women's Property Act 1964").

97 Telephone Interview with Evelynne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008). See also, He Zhuo Ying v. Qiuwen Ren (1994) (H.C. Mombasa) held that notwithstanding the cases of *I v. I* (1971), *Karanja v. Karanja* (1976) and *Essa v. Essa* (1996), all of which involved divorced spouses, the Married Women's Property Act did not apply to couples who have divorced. Cited in *Amina O. Abdulkadir v. Ravindra N. Shah*, (2006) eKLR 1, 3 (H.C. Mombasa) (Kenya).

98 See e.g., *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya); *Kivuitu v. Kivuitu*, Civil Appeal 26 of 1985, (1991) eKLR (C.A.) (Kenya).

99 *Kivuitu v. Kivuitu*, (1991) eKLR 248, 259 (C.A.) (Kenya).

division of such property.<sup>100</sup> To address these legal gaps, new legislation should include:

- ▶ presumption of spousal co-ownership of matrimonial property, regardless of type of contribution;
- ▶ a framework for requiring spousal consent in certain transactions involving matrimonial property; and
- ▶ clear rules for equal division of matrimonial property at separation or divorce.<sup>101</sup>

## (2) **Gaps in Divorce Law Limit Women From Equally Sharing Matrimonial Property at the Dissolution of Marriage**

At separation or divorce, Kenyan women rarely take away their equal share of matrimonial property. Often, they are violently chased away and are only able to take with them the clothes on their backs. The tradition of registering property, including matrimonial property, solely in the name of the husband becomes a serious obstacle when women seek to stake a claim in matrimonial property. Kenyan law lacks any guidance on the division of matrimonial property. Instead, various cases have focused on a painstaking analysis of the contribution of a wife in order to determine her right to any proportion of the matrimonial property.<sup>102</sup> Although The Matrimonial Causes Act enumerates grounds for divorce, it provides no legislative guidance as to the rights each spouse holds in the matrimonial property to be divided.<sup>103</sup>

Because of the gap in divorce laws, women have had to rely on wide judicial discretion, often resulting in adverse determinations of the percentage of contribution by women to the matrimonial property. Under the MWPA, Kenyan courts began to advance

the theory that a wife's contribution to matrimonial property is a strong indication of whether or not she has any rights in the property.<sup>104</sup> In 1991, in *Kivuitu v. Kivuitu*, the Court of Appeals provided a favourable understanding of the idea of contribution, concluding that non-financial contributions must be accounted for in determining share of ownership between spouses.<sup>105</sup> Justice Omolo echoed the sentiment of the other two justices on the bench who believed that the indirect contribution of women to the household is as valuable as direct financial contribution by a salaried spouse:

**I can find nothing...which would force me to the conclusion that only monetary contributions must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by.**<sup>106</sup>

This progressive standard was rejected by the Court of Appeal in *Echaria v. Echaria*, a 2007 decision which effectively negated the ground Kenyan women gained under the *Kivuitu* decision.<sup>107</sup> The Court of Appeal refused to acknowledge non-financial contributions, therefore removing the interests of non-salaried or stay-at-home spouses to the matrimonial property, absent a showing of actual, financial contribution, if the property is held solely in the name of the other spouse. This narrow interpretation of what constitutes "contribution" severely limits Kenyan women's access to matrimonial property. Yet, even within that decision itself, the justices noted the unfairness of its holding in the Kenyan context and urged Parliament to take measures to rectify the law so that the division of matrimonial property is no longer at the whims of judicial panels. In referring to the MWPA, the sole Act governing matrimonial property, the court lamented that "there is no sign, so far, that Parliament has any intention of enacting the

100 See MWPA, supra note 81, at § 1.

101 Unlike other nations, Kenya's current laws fail to adequately and fairly address these issues. See MWPA, supra note 81; see also, South African Matrimonial Property Act, (88 of 1984) (S. Afr.), Married Person's Equality Act (1996) (Namib.).

102 See *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya); But see *Makunda v. Makunda* (2006), Civil Suit 5 of 2002, eKLR (H.C) (Kenya) (court found wife made direct and indirect contribution to the acquisition and development to properties and had equal share in them).

103 See The Matrimonial Causes Act, supra note 82.

104 See *Kivuitu v. Kivuitu*, Civil Appeal 26 of 1985, (1991) eKLR (C.A.) (Kenya); see also *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya).

105 *Kivuitu v. Kivuitu*, Civil Appeal 26 of 1985, (1991) eKLR (C.A.) (Kenya).

106 *Id.* at 259, 558.

107 *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya).

necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago!"<sup>108</sup>

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<sup>108</sup> *Id.* at 522.





### **III. ABSOLUTE SOLE OWNERSHIP BY MEN DENIES WOMEN'S RIGHTS TO LAND AND MATRIMONIAL PROPERTY**



Kenyan women are effectively foreclosed from owning land because men own as “absolute proprietors” the overwhelming majority of registered land in Kenya. This absolute sole ownership violates women’s rights to property, housing, and access to credit. Under the Registered Land Act, the first person to register title to a portion of land retains “absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto,”<sup>109</sup> free from any other interest or claim.<sup>110</sup> Married women face particular hardships in violation of the right to equality in marriage because they effectively cannot own matrimonial property or exercise any control over its transfer, sale, or subdivision. To remedy these violations, Kenya should enact legislation requiring spousal consent for land transactions, requiring spouses to register land jointly, providing incentives for joint registration, and recognizing and protecting women’s rights to land that are less than ownership, such as occupancy, use, and access rights.

### **A. Men’s Exclusive Control over Land Violates Women’s Rights to Property, Housing, and Credit**

Because the Registered Land Act vests absolute ownership of land in the registered proprietors, who are overwhelmingly men,<sup>111</sup> women effectively have been denied rights to land and, as a result, the rights to property, housing, and credit. Although women may register titles, men were generally the first ones to register titles under the Act.<sup>112</sup> Because the Act only allows for the first person’s registered absolute ownership rights, and men have already registered such land, women are generally excluded from registering land titles in their names.<sup>113</sup> The law of absolute rights for the “first registrant” reinforces the traditional view of man as the only entitled holder of land and property rights. Lily Murei of the Kenya Land Alliance, which has conducted country wide research into titling, found that “in the majority of communities the system is so patriarchal or patrilineal that . . . the men are the ones that have the land in their names, the titles are in their names.”<sup>114</sup> In response to a question about why land acquired during the marriage is

registered only in the name of the husband, a married rural man in the Mount Kenya area replied: “I wouldn’t say there is a reason. But it’s kind of tradition.”<sup>115</sup>

When women only own 1 percent of registered land titles in their own names and only about 5–6 percent of land titles jointly,<sup>116</sup> most women cannot exercise the right to property over land, contrary to both the Kenyan Constitution and international law. According to Nancy Abisai of the Shelter Forum, an NGO working on land and housing issues in Kenya, “[m]ost women work on land and they are responsible for productivity of land but unfortunately the majority of them do not have a say on the proceeds of the land, they cannot own it, and at the end of the day it’s the male counterparts who hold the title deed . . . .”<sup>117</sup>

Both national and international human rights laws mandate equal rights for men and women in access and control of property, as well as the equality of spouses during marriage. According to the Kenyan Government, section 75 of the Constitution guarantees that all Kenyans have the right to own property.<sup>118</sup> International conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples’ Rights (African Charter), which Kenya has ratified without reservation, also provide for the right to property.<sup>119</sup> Article 15 of CEDAW requires Kenya to “give women equal rights . . . to administer property.” In reviewing Kenya’s compliance with CEDAW, the CEDAW Committee expressed concern about the “disadvantaged

115 Interview with Joshua Kirinya, in Meru, Kenya (March 30, 2008).

116 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 1.

117 Interview with Nancy Abisai, Project Officer, Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

118 See Kenya’s Report to CEDAW Committee, supra note 7, para. 154. Although section 75 on its face only addresses government takings, the Government stated that “[t]he Constitution guarantees the rights of ownership, acquisition, administration, management and disposal of property.” *Id.* at para. 183.

119 See Convention on the Elimination of All Forms of Discrimination Against Women, GA res. 34/180, art. 15, 34 UN GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981, ratified by Kenya Mar. 9, 1984, available at <http://www2.ohchr.org/english/law/cedaw.htm> [hereinafter CEDAW], ratification status available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), art. 16, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by Kenya May 1, 1972, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR], ratification status available at <http://www2.ohchr.org/english/bodies/ratification/4.htm>; International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), art. 3, 11, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, ratified by Kenya May 1, 1972, available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR], ratification status available at <http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications>; African Charter on Human and Peoples’ Rights, art. 14, OAU Doc. CAB/LEG/67/3 rev. 5 (1981), 1520 U.N.T.S. 217, entered into force Oct. 21, 1986, ratified by Kenya Jan. 23, 1992, available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) [hereinafter African Charter], ratification status available at [http://www.achpr.org/english/ratifications/ratification\\_african\\_percent20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african_percent20charter.pdf). The Universal Declaration of Human Rights, a non-binding but important international instrument, proclaims that “[e]veryone has the right to property.” Universal Declaration of Human Rights, G.A. res. 217A (III), art. 17(1), U.N. Doc. A/810 at 71 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

109 The Registered Land Act, (2006) Cap. 300 § 27(a).

110 See *Id.* § 28.

111 See KNCHR, supra note 27, at 1; KLA, CRITICAL GENDER ISSUES, supra note 50, at 4.

112 KLA, THE CASE FOR WOMEN’S LAND RIGHTS, supra note 17, at 9.

113 See *Id.*

114 Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).



position of rural women, in particular with regard to the ownership of land, as reflected in the low percentage of women who own . . . land,"<sup>120</sup> and urged Kenya to "eliminate all forms of discrimination against women with respect to ownership . . . of land."<sup>121</sup>

The "right of recognition everywhere as a person before the law" under article 16 of the ICCPR includes the equal capacity of women to own property.<sup>122</sup> Article 3 of the ICESCR, which provides for the equal right of men and women to enjoy rights under the Covenant, in conjunction with Article 11, which provides for the right to an adequate standard of living and adequate housing, "requires that women have a right to own, use or otherwise control . . . land and property on an equal basis with men . . ."<sup>123</sup> Article 14 of the African Charter states that "[t]he right to property shall be guaranteed."<sup>124</sup>

Because the Registered Land Act removes all other claims to the land that might exist, it further extinguishes women's rights to access or use land under customary law.<sup>125</sup> Land bodies did not recognize such rights while determining the rights to the land under customary law during the land adjudication and consolidation process, so those rights for women were not protected in the land register.<sup>126</sup> Only the primary rights of men to control the land were recognized.<sup>127</sup> Because the land statutes do not recognize even the customary rights of women to access land, women's rights are largely ignored in land allocation, compensation, and other transactions. Although women's rights to access and use land are de facto recognized in some instances,<sup>128</sup> women cannot seek legal redress if men encroach upon their customary rights because such rights are neither registrable nor protected as overriding interests under the Registered Land Act.<sup>129</sup> Under customary land tenure, for example, land was allocated to a wife for life and could

not be reallocated.<sup>130</sup> Under registered land tenure, however, the registered owners reallocate land for sale, gift, or lease; cash crop production; or allocation to a co-wife.<sup>131</sup>

Because men generally control access and ownership to land and can decide to chase away and evict women residing on or using the land, women are denied housing rights, and women's access to housing is dependent on men.<sup>132</sup> Under existing laws, Kenyan women who may have tilled, farmed, or lived on a plot of land their entire lives but do not own or have any other legal right to land, lack any legal security of tenure. The ICESCR,<sup>133</sup> CEDAW,<sup>134</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)<sup>135</sup> guarantee the right to housing. The ICESCR provides that "[t]he States Parties to the present Covenant recognize the right of everyone to . . . adequate . . . housing . . ."<sup>136</sup> This provision "requires that women have a right to own, use or otherwise control . . . housing on an equal basis with men . . ."<sup>137</sup> That right includes legal security of tenure, and Kenya, as a party to the ICESCR should "take immediate measures aimed at conferring legal security of tenure upon those persons . . . currently lacking such protection . . ."<sup>138</sup> Although signed but not yet ratified by Kenya,<sup>139</sup> the Maputo Protocol requires States Parties to at a minimum "grant to women, whatever their marital status, access to adequate housing."<sup>140</sup> Following a country visit to Kenya in 2004, the U.N. Special Rapporteur on Housing has concluded that discrimination against women in land ownership, access, and control in Kenya has "a direct and negative impact on their right to adequate housing."<sup>141</sup>

120 CEDAW Committee, Concluding Comments: Kenya, supra note 83, para. 41.

121 *Id.* para. 42.

122 Human Rights Committee, General Comment No. 28, Equality of rights between men and women (68th Sess., 2000), para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC, General Comment No. 28].

123 Committee on Economic, Social and Cultural Rights, General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (34th Sess., 2005), para. 28, U.N. Doc. E/C.12/2005/4 (2005), available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter CESCR, General Comment 16].

124 African Charter, supra note 119, art. 14.

125 KLA, THE CASES FOR WOMEN'S LAND RIGHTS, supra note 17, at 9-10; KLA, CRITICAL GENDER ISSUES, supra note 50, at 5.

126 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9-10.

127 *Id.*; FAO, supra note 41, at 35.

128 FAO, supra note 41, at 36.

129 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9-10.

130 Nzioki, supra note 24, at 218, 247.

131 *Id.* at 218, 247.

132 U.N. Special Rapporteur on Adequate Housing, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Kenya, para. 39, delivered to the Committee on Economic, Social and Cultural Rights and the Commission on Human Rights, U.N. Doc. E/CN.4/2005/48/Add.2 (Dec. 17, 2004) [hereinafter Report of the Special Rapporteur on Adequate Housing 2004].

133 See ICESCR, supra note 119, art. 11(1).

134 See CEDAW, supra note 119, art. 14(2)(h).

135 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 16, CAB/LEG/66.6 (Sept. 13, 2000), entered into force Nov. 25, 2005, available at [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) [hereinafter Maputo Protocol].

136 ICESCR, supra note 119, art. 11(1).

137 CESCR, General Comment 16, note 123, at para. 28.

138 Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (6th Sess., 1991), para. 8(a), U.N. Doc. E/1992/23 (Dec. 13, 1991), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument).

139 See Ratifications, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at [http://www.achpr.org/english/ratifications/ratification\\_women\\_percent20protocol.pdf](http://www.achpr.org/english/ratifications/ratification_women_percent20protocol.pdf) (scroll down to "Kenya") (last updated May 26, 2007). As a signatory to the Protocol, Kenya has an obligation not to defeat the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, art. 18, UN Doc. A/Conf.39/27 (1969), 1155 U.N.T.S. 331, entered into force Jan. 27, 1980, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

140 Maputo Protocol, supra note 135, art. 16.

141 Report of the Special Rapporteur on Adequate Housing 2004, supra note 132, para. 38.

Because women often do not have land titles,<sup>142</sup> which constitutes a common collateral for loans,<sup>143</sup> they cannot access credit and loans. This de facto exclusion violates women's right to equal access to credit, which is both necessary for their economic empowerment and development, and is enshrined in international human rights law, including under CEDAW.<sup>144</sup> According to the Rev. Dr. Mrs. Judy Mbugua, the head of the Pan African Christian Women Alliance (PACWA) and Team Leader for Kenya of the Association of Evangelicals in Africa, "Land is used as collateral in many, many instances when you can get a bank loan, and when you don't have it, then you can't even access a bank loan."<sup>145</sup> A rural male farmer stated that "[b]ecause the land is registered in man's name, a woman can't get the loan."<sup>146</sup> Although women may sometimes use their husbands' titles to access credit, that is not common.<sup>147</sup> Thus, men, who have land titles for collateral, may access credit, but women, who were historically excluded from land titles, may not.<sup>148</sup>

In the National Gender and Development Policy, the Government of Kenya has acknowledged that "[i]n most cases, access to credit . . . is linked to access to land ownership. Women cannot therefore qualify for any credit that is tied up with collateral requirements, which are often based on a land title deed."<sup>149</sup> In reports to the CEDAW Committee, the Government of Kenya has acknowledged women's inability to access bank loans because they do not hold land titles: "[W]omen are faced with greater challenges than men due to the fact that not many of them hold titles to land which is the major collateral to bank loans."<sup>150</sup> For example, the Agricultural Finance Corporation, a major source of loans to farmers,<sup>151</sup> usually requires a land title as security for such loans, so very few women received loans from the Corporation.<sup>152</sup> The Housing Act requires a first

mortgage or charge as security for every loan by the National Housing Corporation.<sup>153</sup> Standard Bank, Barclays Bank, and Commercial Bank, Kenya's three major commercial banks, also usually require a land title as collateral.<sup>154</sup>

In contrast to the practice in Kenya, article 13 of CEDAW requires states to guarantee equality in financial credit: "States Parties shall take all appropriate measures . . . to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (b) The right to bank loans, mortgages and other forms of financial credit." CEDAW article 14(2)(g) further mandates that women in rural areas enjoy "access to agricultural credit and loans." Article 19 of the Maputo Protocol, yet to be ratified by Kenya, likewise seeks to "promote women's access to credit."<sup>155</sup>

## B. Married Women Lack Control Over Their Matrimonial Home and their Indirect Contributions Are Dismissed in Violation of the Right to Equality in Marriage

*"Marriage here is like slavery, like enslavement. Once you are married, you cease to have any rights of your own, and if you divorce then you have no property independent [by] -- you cannot go back to where you came from."*<sup>156</sup>

-Member of the Kenyan Parliament, April 2008

Married women are nothing more than silent marriage partners in issues of matrimonial property. Due to the lack of laws that protect married women's interest in matrimonial property during the subsistence of the marriage, women remain at the mercy of the Registered Land Act and customary law, which do not protect the matrimonial property interests of wives.<sup>157</sup>

142 See KNCHR, supra note 27, at 1; KLA CRITICAL GENDER ISSUES, supra note 50, at 4.

143 NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 7.

144 Article 13 of CEDAW guarantees equality in financial credit: "States Parties shall take all appropriate measures . . . to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (b) The right to bank loans, mortgages and other forms of financial credit . . . ." CEDAW article 14(2)(g) further guarantees women in rural areas "access to agricultural credit and loans . . . ." CEDAW, supra note 119, art. 13, 14. Article 19 of the Maputo Protocol on the Rights of Women in Africa also seeks to "promote women's access to credit . . . ." Maputo Protocol, supra note 135, art. 19(d).

145 Interview with Judy Mbugua, head of PACWA and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).

146 Interview with rural male farmer in Male, Kenya (Mar. 29, 2008).

147 Nzioki, supra note 24, at 218, 246.

148 Nzioki, supra note 24, at 218, 246.

149 See NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 7.

150 Kenya's Report to the CEDAW Committee, supra note 7, para. 134; Kenya, Responses to the list of issues and questions to the Committee on the Elimination of Discrimination Against Women, para. 23, U.N. Doc. CEDAW/C/KEN/Q/6/Add.1 (2007), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya) (same) [hereinafter Kenya, Responses to CEDAW].

151 See The Agricultural Finance Corporation Act, (2004) Cap. 323 § 19(1) (permitting the Corporation to "make a loan to a farmer to enable him to engage more effectively in agriculture . . ."); FAO, supra note 41, at 121.

152 FAO, supra note 41, at 120-121.

153 The Housing Act, (2004) Cap. 117 § 17(1) (providing that every loan by the National Housing Corporation "shall be secured by a first mortgage or charge over the land . . .").

154 Nzioki, supra note 24 at 218, 246.

155 Maputo Protocol, supra note 135, art. 19(d).

156 Interview with Gitobu Imanyara, Member of Parliament, Nairobi, Kenya (Apr. 3, 2008).

157 The Registered Land Act, (2006) Cap. 300.

Married women are denied equal status with their husbands in regards to matrimonial property. The husband maintains the stereotypical role of “manager of property,” while the wife is viewed as subordinate in her role as “caretaker.” The Kenyan government in its report to the CEDAW Committee has acknowledged the problem, especially when customary law is involved: “Under the customary law of most ethnic groups in Kenya, a woman ... must live on the land as a guest of male relatives by blood or marriage.”<sup>158</sup>

The right to equality within marriage and family relations is protected under key international human rights treaties to which Kenya is a party. Both CEDAW in article 16(1) and the ICCPR in Article 23(4) require equality of rights and responsibilities of spouses during marriage and at its dissolution.<sup>159</sup> The African Charter in article 18(3) incorporates the equality-in-marriage standard requiring states to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman ... as stipulated in international declarations and conventions.”<sup>160</sup>

The UN Human Rights Committee, which enforces the ICCPR, clarified in its General Comment 28 on the equality of rights between men and women that married women must have equal rights to the matrimonial property:

**State parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to . . . ownership or administration of property, whether common property or property in sole ownership of either spouse . . . state parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property.**<sup>161</sup>

The CEDAW Committee further highlights as violations of CEDAW when states fail to “acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.” Another violation is when “there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman’s ability to control disposition of the property or the income derived from it.”<sup>162</sup>

The established absolute ownership land regime, validated by the Registered Land Act (RLA), destroys a married woman’s ability to claim and protect her interests or rights to matrimonial property.<sup>163</sup> According to the Kenya Land Alliance, “since women’s interests are largely not recorded on title deeds, the land on which they have customary user rights and on which they may depend for livelihoods can be disposed off [sic] without their knowledge or consent . . .”<sup>164</sup> Thus, married women are unable to exercise any control over the transfer, sale, or subdivision of matrimonial property. The large majority of women in Kenya leave their father’s land to go reside with their husband on property that he may have previously purchased or inherited.<sup>165</sup> The inability to establish an interest in this land that has subsequently become matrimonial property leaves women landless and dependent on their husbands for stability. According to Evelyne Opondo, Senior Counsel for FIDA-Kenya, “Property is usually registered in the husband’s name. Many women contribute to the property . . . but because their names are not registered they have no claim to it.” Nancy Abisai, of Shelter Forum, an NGO working to increase access to decent and affordable shelter for Kenyans, affirmed that “most women work on land and they are responsible for productivity of land but unfortunately the majority of them do not have a say on the proceeds of the land, they cannot own it, and at the end of the day it’s the male counterparts who hold the title deed and they can sell or mortgage the property and there’s nothing you can do.”<sup>166</sup>

158 Kenya’s Report to the CEDAW Committee, supra note 7, para. 10.

159 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 16(h), U.N. GAOR, 106th plen. mtg., U.N. Doc A/RES/34/180 (Dec. 17, 1979); ICCPR, supra note 119, art. 23(4).

160 African Charter, supra note 119, art. 18(3).

161 HRC, General Comment No. 28, supra note 122, at para. 25.

162 Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 21: Equality in Marriage and Family Relations (13th Sess., 1994), paras. 30-31, U.N. Doc. A49/38 at 1 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter CEDAW, General Recommendation 21].

163 The Registered Land Act, Cap. 300. (Kenya).

164 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 2.

165 See generally, Telephone Conference with Evelyne Opondo, Senior Counsel, FIDA-Kenya, (Jan. 30, 2008).

166 Id.; Interview with Nancy Abisai, Project Officer, Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

In *Kamau v. Kamau*, a 2006 Kenya Court of Appeal case, the country's highest court held that a husband was under no obligation to obtain his wife's consent before selling land used as matrimonial property when it is registered solely in his name.<sup>167</sup> Prior to the sale and subdivision of the land, the wife and her children had depended "solely on the income of cash and subsistence crops grown on the suit premises."<sup>168</sup> Though the land was registered solely in the name of the husband, the wife worked to maintain that land for the benefit of her family. Further, she asserted that she had financially contributed to the purchase of the plot of land. The decision of the court left the wife with 0.25 acre of land on which to support herself and her eight children.<sup>169</sup>

Similarly, a year later the same court in *Kagiri v. Kagiri* eliminated a wife's interest in matrimonial property: "[I]f the appellant's claim was based on the fact that she was the wife of the 1st respondent, that claim was bound to fail . . . ."<sup>170</sup> In *Kagiri* a wife filed a complaint against the fraudulent subdivision of matrimonial property, which she lived on continuously during the marriage with their children.<sup>171</sup> The property was registered solely in the name of her estranged husband, however, she wished to have 37 acres of the land considered joint property between her and her husband and had received a confirmation letter from the Kieni East Divisional Land Control Board.<sup>172</sup> The court refused to find standing for her to bring a complaint reversing the fraudulent subdivision of the matrimonial property despite her established interest because her husband was deemed to be the sole proprietor of the property.<sup>173</sup>

The lack of value attached to a wife's indirect contribution to matrimonial property devalues her as an equal in marriage. Kenyan law has used the idea of a wife's direct contribution to matrimonial property in determining property interests, a significant factor when determining property division upon dissolution of marriage.<sup>174</sup> However, judges have held that only direct, financial contribution will be accepted as an indicator of established property interest, excluding the valuable labour that the wife puts forth in the home. In Kenya's 2006 report to CEDAW, the

government acknowledged that women "contribute to domestic services including childcare, housework, firewood and water collection and food preparation for which no monetary gains are received."<sup>175</sup> A wife that has dedicated her time, energy, and resources to maintaining her family must have her property interests respected. A retired rural school teacher underlined a woman's tireless yet thankless contribution to the marriage:

**She is cooking, caring for the cows and animals, caring for children, caring for everything at home. That work is too much: children, working in the shamba [home farm or garden]. [Women] do the work with their hands, harvest and planting is work of a woman. The man is not there. African women are too much like laborers. That is African custom. Women are taken like slaves.**<sup>176</sup>

To conform to both the current realities of women's lives in Kenya, as well as international legal standards, Kenya must enact laws that recognize the indirect and non-financial contribution of spouses to a marriage. A countrywide consultation in Kenya carried out by the Kenya Law Reform Commission and Muigai Associates showed that an overwhelming majority of respondents opposed the requirement that contribution to matrimonial property should be "direct and financial" (540 opposed versus 156 in support).<sup>177</sup> Likewise, the CEDAW Committee has emphasized that "[f]inancial and non-financial contributions should be accorded the same weight," especially when "on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished."<sup>178</sup> In addition, "[S]uch contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets."<sup>179</sup> Moreover, the CEDAW Committee cautioned that "women who have traditionally performed their roles in the private or domestic sphere have long

167. *Jacinta Wanjiku Kamau v. Isaac Kamau Mungai*, Civil Appeal 59 of 2001 (2006) 59 K.L.R. 9 (C.A.K.) (Kenya).

168. *Id.* at 2.

169. *Id.* at 6.

170. *Margaret Mumbi Kagiri v. Kagiri Wamairwe & 3 others*, (2007) 181 K.L.R. 8 (C.A.K.) (Kenya).

171. *Id.* at 2-3.

172. *Id.*

173. *Id.*

174. See *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.K.) (Kenya).

175. Kenya's Report to CEDAW Committee, *supra* note 7, para. 140.

176. Interview with Retired Schoolteacher in Meru, Kenya (Mar. 30, 2008).

177. Kenya Law Reform Commission (KLRC) & Mohammed Muigai Advocates, *The Proceedings of the Provincial Public Consultative Meetings on the Review and Analysis of the Marriage Bill 1993, The Married Women Property Bill, The Gender Equality Bill 2002, and the Family Protection (Domestic Violence) Bill 2002*, at 55 (June 2007).

178. CEDAW, General Recommendation No. 21, *supra* note 162, para. 32.

179. *Id.*

had those activities treated as inferior," though "... such activities are invaluable for the survival of society, [and] there can be no justification for applying different or discriminatory laws or customs to them [women]."<sup>180</sup>

Land bodies, which approve land transactions, have inadequately protected the rights of married women in matrimonial property, often overlooking and failing to require wives to consent to transactions by their husbands involving their matrimonial land. Currently, spousal consent to land transactions involving the family land or home is merely recommended by an administrative decree, and lacking force of law it may be ignored.<sup>181</sup> Members of land boards are encouraged to follow this decree before the sale of family land;<sup>182</sup> however that requirement is not always followed. Johnson Okoth Okello, a senior state counsel at the Kenyan Law Reform Commission, explained the adverse impact of this situation on women:

**It's a big problem because women give money to husbands and then he registers land in his name and sells it without telling the woman and she has no say . . . We tried to do this in cases of transfer so that before family land is transferred you would have to get consent of the wife or children but [the] system has been abused. People have . . . bribed their way or in the alternative, they say, "Look here I'm the registered owner. I'm free to do what I like."<sup>183</sup>**

Further, the decisions of land control boards fail to fully account for the interests of women because "[m]en have reportedly bribed land control boards, fraudulently brought imposter 'wives' to the boards to consent to land transfers, and threatened their wives with violence or eviction if they withhold consent."<sup>184</sup> The Human Rights Committee mandates state parties to review their legislation to ensure that married women have equal rights in ownership and administration of

property.<sup>185</sup> Further, state parties should take appropriate steps to ensure equality of rights for spouses in marriage.<sup>186</sup>

### **C. To Rectify Historic Disadvantages Imposed on Women, New Laws Must Require Joint Spousal Registration and Consent for Acts Involving Matrimonial Property**

To rectify the discriminatory effects of absolute ownership for first registration of land and to fulfill its international law commitments to guarantee women the rights to property, housing, credit, and equality in marriage, Kenya should: (1) require spousal consent for land transactions; (2) require spouses to register matrimonial land jointly; (3) provide incentives for joint registration; and (4) recognize and protect existing women's rights to access, use, and occupancy of land. Such legislation would help ensure women's rights to land, property, housing, and credit and would be consistent with current rights under Kenyan law.

Filling the gaps left by current Kenyan marriage law regarding matrimonial property with positive, gender-specific legislation is a first step to ensuring the property rights of married women. A spousal consent requirement mandating the mutual consent of both husband and wife or wives before the alienation of the matrimonial home, jointly acquired property or other property falling under the definition of matrimonial property, will better protect the interests and rights of married women. Thirty-seven of the 61 respondents interviewed by the International Women's Human Rights Clinic believed that a spousal consent requirement in relation to matrimonial property would be a good idea.<sup>187</sup>

Recognizing the importance of spousal consent to transactions affecting family property, countries across the globe and the African continent require mutual spousal consent by men and women married under both statutory and customary law. The Law of Marriage Act of Tanzania mandates that the matrimonial home cannot be sold, gifted, leased, or mortgaged without the

180 Id. at paras. 11-12.

181 Interview with Reuben Mwenda Murugu, Land Policy Coordinator in Nairobi, Kenya (Apr. 2, 2008) ("If it [were] a legal provision then it is going to assist because then [wives] must consent").

182 Interview with male farmer, in Nanyuki, Kenya (Mar. 29, 2008).

183 Interview with Johnson Okoth Okello, Senior State Counsel, Kenya Law Reform Commission, in Nairobi, Kenya (Apr. 2, 2008).

184 HRW, DOUBLE STANDARDS, supra note 6, at 33. See also Interview with John Kinyua, Land Control Board Member at Meru, Kenya (March 30, 2008); Interview with Hellen Kwamboka Ombati, Advocate of the High Court of Kenya and FIDA member, in Nairobi, Kenya, (Apr. 1, 2008).

185 HRC, General Comment No. 28, supra note 122, at para. 5.

186 Human Rights Committee, General Comment No. 18, Non-discrimination (937th Sess., 1989), para. 5, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

187 IWHRC & FIDA-Kenya, Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya (Mar.-Apr. 2008) (on file with author).

consent of the spouse through the subsistence of the marriage.<sup>188</sup> The South African Matrimonial Property Act provides for the equal powers of spouses in regards to the joint estate and outlines those transactions that require spousal consent.<sup>189</sup> Namibia and Ethiopia have also promulgated matrimonial property provisions that encourage the equality of women in marriage and the equal exercise of ownership, use, and control rights in matrimonial property.<sup>190</sup> In combination with a presumption of joint ownership of matrimonial property, spousal consent works to adequately protect the property interests that married women acquire in land by virtue of contribution and support.

A law requiring mandatory, mutual spousal consent will also bring Kenya in line with international human rights standards articulated in CEDAW, the ICCPR, and the ICESCR that protect women's equal rights in marriage and in property acquired during marriage. CEDAW article 16(1)(h) requires that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." The ICESCR in its General Comment 16, states that "[W]omen have a right to own, use or control housing, land and property on an equal basis. . . ."<sup>191</sup> The Human Rights Committee in General Comments 28 likewise requires that "State parties should review their legislation to ensure that married women have equal rights in . . . ownership and administration of . . . property . . . ."<sup>192</sup>

Requiring spouses to register land jointly would increase the prevalence and acceptance of joint registration and promote equal rights to land during marriage and at divorce. Such a requirement would effectuate the Kenyan Government's commitment in the Draft National Land Policy to "[p]ut in place appropriate legislation to ensure effective protection of women's rights to land."<sup>193</sup>

Joint ownership ensures men and women equal rights to the land during marriage and at divorce and ensures a spouse full rights to the land upon the death of the other spouse, preventing problems of disinheritance of women,<sup>194</sup> in line with the right to equality during marriage and at its dissolution under article 16(1)(h) of CEDAW<sup>195</sup> and article 23(4) of the ICCPR.<sup>196</sup> When women have joint rights to land, they have equal rights to make housing determinations, and they can use their titles to access credit.

Of twenty-nine Kenyans stakeholders, including government officials, lawyers, professors, civil society members, and rural men and women, asked whether joint registration should be required, twenty-eight supported such a requirement.<sup>197</sup> Respondents favoured the requirement because it would ensure women a share of property at divorce and would preclude husbands from selling matrimonial land without their consent.<sup>198</sup> Many also favoured the requirement because it would reduce instances of dispossessing wives of their property and of disinheritance and widow eviction.

According to an interview with a Kenyan advocate, joint registration "would even lessen a lot of problems later. There would be no matrimonial issues or succession problems."<sup>199</sup> Cecilia Mbaka, Assistant Commissioner in the Ministry of Gender, Sports, Culture and Social Services, would likewise support a joint registration requirement because "it would avoid too much fighting for property when one spouse dies," particularly because when "a spouse dies or if a husband dies, the in-laws want to chase the woman out of the matrimonial home . . . . I think if it's owned jointly, then . . . that would be more difficult."<sup>200</sup>

194 See Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008); Interview with Leah Kiguatha, Kenyan Attorney and Law and Advocacy for Women in Africa Fellow, Georgetown University, in Wash., D.C. (Feb. 22, 2008).

195 See CEDAW, supra note 119, art. 16(1)(h) (requiring states parties to ensure equal "rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property").

196 See ICCPR, supra note 119, ("States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.")

197 IWHRC & FIDA-Kenya, Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya (Mar.–Apr. 2008) (on file with author).

198 See, e.g., Interview with Joyce Wangui, divorced woman, in Nanyuki, Kenya (Mar. 30, 2008) (via interpretation).

199 Interview with Gilbert O. Ombachi, advocate, in Nanyuki, Kenya (Mar. 29, 2008).

200 Interview with Cecilia Mbaka, Assistant Commissioner, the Ministry of Gender, Sports, Culture and Social Services, in Nairobi, Kenya (Apr. 4, 2008); see also Interview with Hellen Kwamboka Ombati, Advocate of the High Court of Kenya and Member of FIDA-Kenya, in Nairobi, Kenya (Apr. 1, 2008) ("[B]ecause if you register it jointly, and maybe you die (the man), then the wife can have absolute ownership, but in a scenario where he has registered it in his name, the wife only has a life interest, and that is subject to probate and administration issues, which means that even parents can lay claim to that particular land."); Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008) ("[I]f it is in joint, then it will help and reduce the cases of disinheritance.").

188 The Law of Marriage Act, (1970). (Tanz.).

189 South African Matrimonial Property Act (88 of 1984). (S. Afr.).

190 See, e.g., Revised Family Code, art. 63 (2000) (Eth.) ("All property shall be deemed . . . common property even if registered in the name of one . . . spouse); ETHIOPIA [CONSTITUTION] art. 35; The Married Persons Equality Act, s. 5-7 (Act I of 1996). (Namib.). (Mandates equal powers of spouses in community of property. Outlines spousal consent regime.).

191 CESCR, General Comment 16, supra note 123, para. 28.

192 HRC, General Comment No. 28, supra note 122, at para. 25.

193 DRAFT NATIONAL LAND POLICY, supra note 10, § 3.6.10.3, para. 225(a).

Countries across the globe with comparable circumstances, including neighbouring Tanzania, have successfully established such a joint registration requirement. For example, Article 29 of Nicaragua's Law 278 (1997) requires joint titles for couples, whether married or unmarried, and a title issued in the name of the head of the household is deemed issued to both members of the couple.<sup>201</sup> Similarly, under administrative guidelines in the Philippines,<sup>202</sup> land titles must be issued in the names of both spouses, whether or not they are legally married, for land they jointly work and cultivate.<sup>203</sup> Both legal reforms increased women's land ownership.<sup>204</sup> Tanzania's Land Act establishes a presumption of co-occupancy of land used by all spouses.<sup>205</sup> If the presumption is not rebutted, the spouses are registered as joint occupiers.<sup>206</sup>

Third, certain incentives would encourage joint registration and reverse the negative social attitudes of men toward joint registration.<sup>207</sup> Eliminating fees and taxes upon land registration like the stamp duty<sup>208</sup> and conveyancing fees could promote joint registration. Of twenty-five Kenyans asked whether Kenya should provide incentives for joint registration, twenty-three supported at least some form of incentives for joint registration.<sup>209</sup> No one rejected the proposal.<sup>210</sup> Supporters included six national government officials, in addition to professors, lawyers, civil society members, and rural men and women.<sup>211</sup> One national government official, Cecilia Mbaka, asserted that the benefits of such incentives to Kenyan society would probably outweigh the cost to Kenya's government revenues:

**Of course it will not be good for Kenya's government revenues . . . ,  
but I think in the long run, . . . the people themselves stand to benefit  
because I think you will not see all these cases going to court . . . .**

201 FAO, *supra* note 41, at 21.

202 These guidelines include Memorandum Circular 18 of 1996 and Administrative Order 1 of 2001, pursuant to the Comprehensive Agrarian Reform Law.

203 FAO, *supra* note 41, at 59–60.

204 *Id.* at 21, 60.

205 See Land Act, (2002) Cap. 113 § 161(1). (Tanz.). Because all Tanzanian land is vested in the state, Land Act, (2002) Cap. 113 § 4(1), the right of occupancy is the right that comes closest to ownership of land under Tanzanian law. See Land Act, (2002) Cap. 113 § 19. (Tanz.).

206 Land Act, (2002) Cap. 113 § 161(1). (Tanz.).

207 See *infra* Part IV.A; see also Telephone Interview with Dr. Ogada Penina Amolo, Professor (Social Sciences Research), Univ. of Nairobi (Feb. 26, 2008).

208 See The Stamp Duty Act, (2004) Cap. 480. (Kenya).

209 IWHRC & FIDA-Kenya, Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya (Mar.–Apr. 2008) (on file with author). The other two respondents expressed ambivalence about the proposal but did not reject it. *Id.*

210 *Id.*

211 *Id.*

**[I]t will also have its advantages that you might not be able to put a monetary value on.**<sup>212</sup>

Other countries have successfully implemented incentives for joint registration. For example, the Ireland Family Home Protection Act, 1976, encourages joint ownership of spouses by eliminating any “stamp duty, land registration fee, Registry of Deeds fee or court fee.”<sup>213</sup> Quebec, Canada has provided grants to increase land ownership among female farmers.<sup>214</sup> Although Kenya might not afford large grants, it might afford eliminating fees and taxes on land registration and small grants, especially if such grants are funded from fines paid by corrupt land officials or people who commit fraud before land boards.<sup>215</sup>

Incentives add legal benefits and do not encroach upon vested legal rights. Holders of vested legal rights may simply choose not to participate in the incentive programs. Ireland, Canada, and Paraguay have already implemented such incentives. Several countries have affirmative action provisions to promote women's equal access to land in practice. Brazil, for example, has an affirmative action to promote rural women's access to land under Ordinance 33 of 2001.<sup>216</sup> Section 44(1)(b) of Fiji's Constitution (Amendment) Act 1997 (as amended to 1998) requires the legislature to provide for programs to ensure that disadvantaged groups of people have “effective equality of access to . . . land and housing.” Similarly, Article 3(V) of Bolivia's National Service for Agrarian Reform Act of 1996 requires the application of “equity criteria” in land distribution and rights for women.<sup>217</sup>

Fourth, Kenya should enact legislation recognizing that women who do not have land registered in their names but who reside or depend upon that land, nevertheless have rights to the land and

212 Interview with Cecilia Mbaka, Assistant Commissioner, the Ministry of Gender, Sports, Culture and Social Services, in Nairobi, Kenya (Apr. 4, 2008).

213 Family Home Protection Act, 1976 § 14 (Act No. 27/1976) (Ir.), available at [http://www.bailii.org/ie/legis/num\\_act/1976/zza27y1976.1.html#za27y1976](http://www.bailii.org/ie/legis/num_act/1976/zza27y1976.1.html#za27y1976) (last visited February 27, 2008).

214 See Act to Promote the Development of Agricultural Operations, R.S.Q., ch. M-36 (1986) (Can.); Canada, Third Periodic Reports of States Parties to the Committee on Economic, Social and Cultural Rights (19th Sess., 1998), para. 1055–56, U.N. Doc. E/1994/104/Add.17 (Jan. 20, 1998), available at <http://documents.un.org>. (After clicking “welcome,” then click “simple search,” and insert the U.N. Doc. No. at “symbol.”) (citing the Programme d'accès à la propriété pour les conjoints de 40 ans et plus (an ownership programme for spouses over 40)).

215 For a more detailed discussion of incentives proposals, see section 12 of the IWHRC's Draft Land Equality Act.

216 FAO, *supra* note 41, at 28.

217 *Id.* at 21–22.



protecting those rights. Such rights include rights to access, use, cultivate, and live on the land; to control the profits from the crops or other property produced by their labour; and to consent to transactions involving the land. They are rights to property that are short of ownership but would ensure that women do not lose their rights to housing. They would preserve and expand upon women's rights to access land under customary law while also ensuring that women's rights to the land do not depend upon men. Uganda has already recognized similar rights in the Land (Amendment) Act, 2004, which provides that "[e]very spouse shall enjoy security of occupancy on family land," which means "a right to have access to and live on family land."<sup>218</sup>

Enacting these legislative changes would be consistent with the rights of men who own property under Kenya's Registered Land Act and with Article 75(1) of the Constitution's protections against deprivation of property because these changes are necessary to give effect to the rights women should have always had. Article 75(1) states that: "No property of any description shall be compulsorily taken possession of, and no interest in or right over property . . . shall be compulsorily acquired."<sup>219</sup> The bodies under the Land Consolidation Act and the Land Adjudication Act that applied customary law in determining and allocating rights to land should have recognized the customary law rights of women to land and limited the rights of male proprietors accordingly.<sup>220</sup> Thus, the absolute rights of male proprietors under the Registered Land Act should not completely exclude women's rights to the land.

Such legislation would reinforce findings communicated by the Kenyan Draft National Land Policy which has already recognized that the absolute sole ownership of men should be limited to protect the rights of female family members: "The policy seeks to repeal the principle of absolute sanctity of first registration under the Registered Land Act to . . . take into account all other legitimate rights held or claimed by other persons over the affected land including family rights."<sup>221</sup>

Even if these provisions would involve a deprivation of a proprietor's property rights, the deprivation would be reasonably justified under the conditions listed in section 75(1) of the Constitution. Under section 75(1)(b), a deprivation of property is permissible if "the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property."<sup>222</sup> The necessity for realizing women's rights to property, housing, and credit under international law affords a reasonable justification for the causing of hardship to the proprietor. As a party to CEDAW, Kenya may enact such "special measures aimed at accelerating de facto equality between men and women."<sup>223</sup>

218 The Land Act, (1998) Cap. 227 § 38A(1)–(2), as amended by The Land (Amendment) Act, 2004, § 19. (Uganda).

219 CONSTITUTION, § 75(1) (rev. ed. 2001) (1998). (Kenya).

220 KLA, THE CASE FOR WOMEN'S LAND RIGHTS, supra note 17, at 9-10.

221 Kenya, Responses to CEDAW, supra note 150, para. 22.

222 CONSTITUTION, § 75(1)(b) (rev. ed. 2001) (1998). (Kenya).

223 CEDAW, supra note 119, art. 4(1).





**IV. WOMEN IN POLYGAMOUS UNIONS  
FACE EXTRA BARRIERS TO KEEPING  
THEIR MATRIMONIAL PROPERTY  
AS THEY MUST OFTEN SHARE IT  
WITH MULTIPLE CO-WIVES**

## A. The Continued Practice of Polygamy Deprives Women of Their Rights to Equality in Marriage, Dignity, and Property

Polygamous unions are inherently unequal and further degrade women's rights to matrimonial property. A wife in such a union often sees her contribution to the homestead rewarded by the husband taking on additional wives with whom she must share that hard earned matrimonial property. Often such property is used by the husband to acquire an additional wife. Polygamy, condoned by law and in practice under Customary and Muslim law in Kenya, leads to severe conflict and harms women. Women in polygamous unions are often hard pressed to prove a valid marriage was concluded under customary law, without which women cannot claim any rights in the marriage or upon divorce. According to the most recent Demographics and Health Survey (DHS) of Kenya, "Women with no or low education and those who are poor are more likely to live in polygynous marriages."<sup>224</sup> Country-wide, on average "[s]ixteen percent of currently married women live in polygynous unions (having one or more co wives)."<sup>225</sup> In some regions of Kenya, such as the North Eastern Province, the proportion of women in polygynous marriages is as high as 34 percent.<sup>226</sup> According to University of Nairobi law professor, Dr. Patricia Kameri Mbote, "As long as women are dependent on men women are going to be left holding the short end of the stick, because it is either the first wife thinking she is the only wife and putting her all or the second wife coming in and putting something and then being thrown out when she would actually need care, protection and security."<sup>227</sup>

Polygamous unions further degrade women's rights in marriage and upon divorce. The rights to equality and dignity violated by polygamous marriages are fundamental rights that should not be abrogated by culture, custom, or religion. The CEDAW committee has consistently called for the prohibition of polygamy to preserve the right to equality between partners in marriage.<sup>228</sup> Further, ICCPR article 18(3) specifically requires the manifestation of religion or beliefs to be subject

to laws necessary to protect the fundamental rights and freedom of others.<sup>229</sup> After reviewing Kenya's compliance with the ICCPR in 2005, the Human Rights Committee concluded that "... the continued application of some customary laws, including the permissibility of polygamous marriages, undermines the scope of the non-discrimination provisions in the Constitution and other legislative texts."<sup>230</sup>

In response to the connection of polygamy and culture, the CEDAW committee has specifically urged Kenya to:

**view its cultures as dynamic aspects of the country's life and social fabric and as subject, therefore, to change. It urges the State party to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women....[and urged Kenya] to address harmful cultural and traditional customs and practices, such as ... polygamy, more vigorously.**<sup>231</sup>

The CEDAW committee has condemned the practice of polygamy in General Recommendation 21: "Polygamous marriages contravene a women's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited."<sup>232</sup>

Women in polygamous and potentially polygamous unions have no voice with which to denounce the wrongful use of their share of matrimonial property or to withhold consent to their husbands' marriage to another woman. Men, who wish to marry additional wives, have tapped into existing matrimonial property acquired with the existing wife to acquire and support additional wives and their children. Women in customary marriages are also at increased risk of losing their matrimonial

224 CENTRAL BUREAU OF STATISTICS, KENYA DEMOGRAPHIC AND HEALTH SURVEY 2003, at 90 (2004), available at <http://www.measuredhs.com/pubs/pdf/FR151/FR151-KE03.pdf> [hereinafter DHS SURVEY].

225 Id.

226 Other regions in Kenya exhibit lower rates of polygamous marriages: of 20-23 percent in Nyanza, Rift Valley, Western, and Coast provinces, and the lowest rate of 3 percent in the Central Province. Id.

227 Interview with Dr. Patricia Kameri Mbote, Law Professor, University of Nairobi Law School in Nairobi, Kenya (Apr. 3, 2008).

228 CEDAW, General Recommendation 21, supra note 162, para. 14, 39. See also Human Rights Committee, Concluding Observations: Kenya, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005), available at <http://www.ohchr.org/english/bodies/hrc/hrcs80.htm> (under Kenya). ("...the continued application of some customary laws, including the permissibility of polygamous marriages, undermines the scope of the non-discrimination provisions in the Constitution and other legislative texts.")

229 ICCPR, supra note 119, art. 18(3).

230 See HRC, Concluding Observations: Kenya, supra note 228.

231 CEDAW Committee, Concluding Comments: Kenya, supra note 83, para. 22.

232 CEDAW, General Recommendation No. 21, supra note 162, para. 14; See also ICCPR, supra note 119, art. 23 ("mandates that state parties work to ensure equality of rights and responsibilities of spouses as to and during marriage.")

property as their husbands seek out other wives. Through intimidation, coercion, and physical violence, women have been silenced and their rights violated as matrimonial property is used to advance the interests of a polygamous husband.<sup>233</sup> Margaret Muriuki, a woman in a polygamous marriage described how her husband acquired his second wife: "He took the food that we were farming, he sold it and spent the money on the second dowry... I felt bad because now he was using the family property to acquire a wife. But I didn't have any say – there's nothing I could have done."<sup>234</sup>

Since the husband retains control over matrimonial property and even in some cases the wives' own separate property, the wife is powerless to ensure that her contributions will not be used to benefit the other wives and their families.<sup>235</sup> Revenues from agricultural work performed by the wife may also be lost to a husband seeking another wife, as he uses the profits to make dowry payments. Further, women are limited from bettering themselves because they are forced to support an extended family that they did not consent to: "I have not been able to invest, especially after my husband got the other two wives. It used to be we would do farming and discuss what to save, and I would be able to invest money for myself. Now that it is polygamous, I haven't been able to get any produce for the farming activity. Now what I have in the house is taken for the children of the other wives so even if I could invest I don't have the ability to do so."<sup>236</sup> A married woman's dignity cannot survive under conditions that explicitly discriminate against her very being. The CEDAW committee urges Kenya to "address harmful cultural and traditional customs and practices, such as ... polygamy, more vigorously."<sup>237</sup> Kenya must acknowledge the harms posed by polygamy and either impose a complete ban or legislate to protect women and children from the inevitable economic pitfalls of the practice.

Despite the added vulnerability to discrimination and inequality, women in polygamous marriages enjoy little to no legal protection or recourse.<sup>238</sup> No law mandates the consent of existing wives

to a husband taking another wife.<sup>239</sup> Yet women in polygamous marriages, who tend to live in rural areas and are poor, have little choice but to acquiesce. If they leave, they leave with nothing. According to a widowed polygamous woman: "The wives in polygamous relationships face so many problems but because they've got no choice, they choose to remain in the relationships."<sup>240</sup> Inevitably, as Dr. Ogada Penina Amolo explains, "[R]egardless of how good an administrator a husband in a polygamous home may be, there will always be a favoured person and a favoured wife and a favoured household and favoured children."<sup>241</sup>

Women in polygamous marriages are thus not only denied their right to equality during a marriage and at its dissolution, they are denied the basic right to enter marriage with the "full and free consent" of the parties involved. This right is enshrined in CEDAW, article 16 (1): "States Parties shall ... ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent;" ICCPR, article 23(3): "No marriage shall be entered into without the free and full consent of the intending spouses;" and ICESCR, article 10 (1): "The States Parties to the present Covenant recognize that ... Marriage must be entered into with the free consent of the intending spouses."

## **B. Kenya Must Regulate Polygamy to Protect Co-Wives and Children From Its Harms**

If legal polygamy continues, Kenya's legislature must enact laws to mitigate the harms of polygamy by enforcing an equitable arrangement for all wives involved. In reviewing its own stance on customary marriages and polygamy, the South African Law Commission stated: "Although customary marriages should be recognized on the basis of the constitutional right to culture, it is necessary to distinguish areas where human rights prevail."<sup>242</sup> Kenya must be committed to

233 Interview with rural Kenyan woman, in Meru, Kenya (Mar. 30, 2008).

234 Interview with Margaret Muthoni Muriuki, TIST client, in Meru, Kenya (Mar. 31, 2008).

235 Id.

236 Id.

237 CEDAW, Concluding Comments: Kenya, supra note 83, para. 22; see also Maputo Protocol, supra note 135, art. 3 ("Every woman shall have the right to dignity inherent in a human being...").

238 See, e.g., The Marriage Act, supra note 77; The Mohammedan Act, supra note 80; MWPA, supra note 81.

239 See, e.g., The Marriage Act, supra note 77; The Mohammedan Act, supra note 80; MWPA, supra note 81.

240 Interview with Beatrice Nyokabi, Nanyuki Kenya, (March 30, 2008).

241 Telephone Interview with Dr. Ogada Penina Amolo, Professor, University of Nairobi (Feb. 26, 2008).

242 South African Law Commission, Harmonisation of the Common Law and the Indigenous Law, Issue Paper 3, (Customary Marriages) 31 October 1996.

advocating a view of women that transcends stereotypical gender roles and advocates for equal rights.

The registration of all polygamous unions is necessary to protect the wife's or wives' rights in marriage and in matrimonial property. The registration process should be one that allows for some serious examination on the part of the Chief as to whether the husband as meet sufficient requirements, such as written consent of each prior wife and the future wife, and a property distribution agreement which outlines the matrimonial property interest that each existing and prospective wife can expect to enjoy during the course of the marriage and upon its dissolution. Upon satisfactory review by the Chief, the consent and property distribution agreement must be sent to a magistrate court in order to receive judicial approval. The parties will only be called to court if there is an issue that the court deems inequitable to the parties involved in the matter.

The written spousal consent requirement is imperative to providing at least an equitable status in marriage between a wife and her husband. During country-wide consultation meetings held in 2007 by the Kenyan Law Reform Commission and Mohammed Muigai Advocates, the majority of Kenyans interviewed felt that the a husband should be required to obtain the consent of the first wife before taking on a second wife.<sup>243</sup> The written spousal consent also correlates with protecting the dignity of all wives as respected persons in the union, whose presence and property cannot be alternatively ignored and misused for the benefit of her husband.

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243 Kenya Law Reform Commission & Mohammed Muigai Advocates, The Proceedings of the Provincial Public Consultative Meetings on the Review and Analysis of the Marriage Bill 1993, The Married Women Property Bill, The Gender Equality Bill 2002, and the Family Protection (Domestic Violence) Bill 2002, at 58 (June 2007).



**V. A UNIFORM DIVORCE LAW  
WILL CURB BIASED  
JUDICIAL DISCRETION THAT  
HAS LEFT WOMEN BEREFT OF THEIR  
HOME AND POSSESSIONS AT DIVORCE**



**When Nzilani, divorced her husband, the land which belonged to him and that she was using for subsistence farming was immediately sold by him. She now lives as a single parent, back in her place of birth and using her father's land. Her brothers eventually grabbed the portion of land she was using, claiming their wives needed more land to cultivate. Nzilani feels bitter about her ex-husband who does not take any responsibility for their children's survival. She is very poor and she and her children live from hand to mouth and they do not go to school.**<sup>244</sup>

While married women may be able to count on their husband for a plot of land to cultivate and a roof over their heads, once divorced, those assurances are erased, leaving women with little but the clothes on their backs. A woman whose marriage is governed by customary law receives no share of family property, regardless of her contribution to its purchase or development. She is entitled only to her "personal effects and gifts given to her during the marriage."<sup>245</sup> Some communities do not allow a woman to take anything with her, including her personal belongings.<sup>246</sup> Even when spouses resort to the courts, under the current system governed by the 1882 Married Women's Property Act, women lose their homes, leave with very little, and must take care of their children, often without any contribution from the father.<sup>247</sup> The dispossession of women at divorce undermines women's rights to equality upon the dissolution of marriage, to an adequate standard of living, housing, and most fundamentally, to their dignity.<sup>248</sup>

For Kenya to comply with its constitutional, regional, and international obligations, it needs to enact a clear law on the division of matrimonial property and streamline that law so that related proceedings may be joined and remedies are within the reach of every Kenyan. While the Kenyan Constitution guarantees the right to own property regardless of sex,<sup>249</sup> under current caselaw on division of assets at divorce, wives lack legal claims to property if their names do not appear on

the title to the matrimonial home or land.<sup>250</sup> Even when wives contribute to or pay in full for the matrimonial land or home, social stereotypes and cultural pressure prevented them from jointly registering that property, rendering them vulnerable to loss of their homes at divorce.<sup>251</sup> This insecurity is perpetuated by court decisions that have restricted the scope of contribution to financial contribution that can be substantiated by receipts.<sup>252</sup> By providing a comprehensive divorce law which provides clear guidelines for the division of matrimonial property, and by applying it in a streamlined manner in all related matrimonial causes Kenya would allay the concerns of women and human rights bodies alike.

#### **A. Gaps in Divorce Laws and Wide Judicial Discretion Leave Women with Nothing at Divorce, Violating their Rights to Equality, Housing, and an Adequate Standard of Living**

In the absence of clear legislation on division of property at separation or divorce, Kenyan women rarely take away any share, much less, their equal share of matrimonial property. More often, they are violently chased away and are only able to take with them the clothes on their backs. The tradition of registering property, including matrimonial property in the sole name of the husband becomes a serious obstacle when women seek to stake a claim in matrimonial property. Caselaw governs the distribution of property at divorce and women often face biased judges who refuse to recognize wives' immense indirect contribution to the marital household, including their nearly sole performance of domestic chores, subsistence agriculture, and childrearing.<sup>253</sup> Driven from their matrimonial homes with no compensation, divorced and separated women lose their housing and suffer a severe drop in the standards of living for themselves and their children, for whom they retain primary caretaking responsibilities.

244 See Nzioki, *supra* note 24.

245 Janet Kabeberi-Macharia, *Family Law and Gender in Kenya*, in *Int'l Rev. Comp. Pub. Pol'y* 193, 204 (1992).

246 *Id.* ("In the Luhya and Kisii communities divorced women may take nothing with them. However, under Digo customary law a divorced woman is entitled to an equal share of the property acquired during the marriage").

247 See Nzioki, *supra* note 24.

248 See *infra* notes 266-272 and accompanying text.

249 CONSTITUTION, § 75(1) (rev. ed. 2001) (1998) (Kenya).

250 HRW, *DOUBLE STANDARDS*, *supra* note 6, at 1.

251 INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, *TO HAVE AND TO HOLD: WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN THE CONTEXT OF HIV/AIDS IN SUB-SAHARAN AFRICA* 18 (2004).

252 See *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.K.) (Kenya).

253 See *e.g.*, *Echaria v. Echaria*, Civil Appeal 75 of 2001, [2007] eKLR.

**(1) Women Must Often Leave Their Marriages With Nothing But The Clothes On Their Backs**

Many women are chased away from the home upon divorce and cannot take anything with them or do not want to take anything for fear of reprisal. When asked if women tended to go back to get property, Charity Mithega, a retired schoolteacher in Meru, said, "If you go back, it is a beating. It is better to go without beating. The woman is sent home without anything. Sometimes the husband burns the woman's things because he is mad and does not want to see them anymore"<sup>254</sup> Of the divorcees interviewed, most had left the matrimonial home with little to nothing, rendering them essentially homeless or dependent on the charity of a relative.<sup>255</sup> Joyce Wangui - a mother of two who was chased from her home by her husband when she was unable to conceive more children - had to leave everything.<sup>256</sup> Fearing that her in-laws or husband might harm her if she stayed in the home or tried to reclaim her possessions, she said, "I did not want to go with anything because I wanted to avoid conflict."

Jane Wanjiru Magenda's matrimonial home was sold, and after fifteen years of marriage and caring for five children, she got nothing. Currently staying with her elderly parents and struggling to care for her children while working as a househelp, she recalls that "even the house he had in the village, he sold it and disappeared. I got nothing from the sale; that was our matrimonial home."<sup>257</sup>

After being chased away by her husband, Margaret Domiciano from Meru became a squatter, living on a plot of land from which she can be evicted at any moment. She was the first wife of a polygamous man who squandered their property which included a shop they built together and a 3 acre land plot, to acquire additional wives and to drink. She was chased away after 21 years of marriage, and having cared for 4 of her children and 5 from her husband's other wives:

**He used to come home very late, very drunk. He would throw me out, I'd spend the night outside. I was thrown out with all my children. He brought children from another marriage, five to be taken cared by me . . . . He had a lot of wives. . . . I was the first wife. He never told me, no consent, [just] brought the wives from outside. [He used the property we acquired together to get other wives], he destroyed our things.**

Asked what she was able to take with her after the divorce, she replied "I was given my personal effects."<sup>258</sup>

While many customs state that children belong to the father's family, women are almost always the ones to assume responsibility for them after a divorce. In addition to being rendered homeless, women often have to provide for the livelihood of their children absent any contribution from the father. After being kicked out of the matrimonial home, Joyce Wangui, who now lives with her sister, was left to struggle to provide for her children. "He does not assist with the children and I have struggled to see my son through Standard 4 and my girl is in Form 1."<sup>259</sup> Back in her parents' home, Jane Wanjiru Magenda was not only deprived of any of the matrimonial property which she helped acquire and improve, but also receives no help from the father of the children as she labours to see to their education.<sup>260</sup> When asked what she would have wanted after her divorce, Margaret Domiciano expressed a commonly-heard sentiment by divorced women, many of whom are resigned to the fact that they have lost any access to matrimonial property, by answering "[t]he money for educating the children. For him to pay the fees for my daughter, nothing else."<sup>261</sup>

254 Interview with Charity Mithega, Retired Schoolteacher, in Meru, Kenya (Mar. 30, 2008).

255 IWHRC & FIDA-Kenya, Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya (Mar.-Apr. 2008) (on file with author).

256 Interview with Joyce Wangui, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).

257 Interview with Jane Wanjiru Magenda, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).

258 Interview with Margaret Domiciano, Divorced Squatter, in Meru, Kenya (Mar. 31, 2008).

259 Interview with Joyce Wangui, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).

260 Interview with Jane Wanjiru Magenda, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).

261 Interview with Margaret Domiciano, Divorcee Squatter, in Meru, Kenya (Mar. 31, 2008).

**(2) Dispossessing Divorced Women of Their Matrimonial Property Violates Their Rights to Equality, Housing, an Adequate Standard of Living, and Dignity**

Women's rights to equality at the dissolution of marriage, housing, an adequate standard of living, and dignity are violated when laws or their absence result in women receiving little if any property at divorce, often rendering them homeless and ultimately forcing them to relocate to "slums" or engage in survival or transactional sex to support themselves and their children.

International human rights law mandates that men and woman shall have "the same rights and responsibilities during marriage and at its dissolution," including "in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."<sup>262</sup> The CEDAW committee underscores that "any law or custom that grants men a right to a greater share of property at the end of a marriage . . . is discriminatory . . . ."<sup>263</sup> The Human Rights Committee, which oversees the implementation of the ICCPR, noted that "to fulfill their obligations . . . State parties must ensure that the matrimonial regime contains equal rights for both spouses with regard to . . . ownership and administration of property," and that "[s]tate parties must also ensure equality in regard to the dissolution of marriage."<sup>264</sup>

Women's rights to housing and an adequate standard of living are undermined at divorce, when they lose access to their homes and hard-earned property, often with nowhere to go for shelter. According to Elijah Odhiambo of Hakijami trust, which works in the human settlements around Nairobi, women-headed households make up the bulk of the "slum" dweller population:

**In most areas we're working, in terms of percentages, you find that a bigger percentage of heads of households are women, so we have that in mind now it's a real issue on the ground**

**– most of them are women-headed households – we have no official figures but looking at how population is distributed, men are few compared to women.**

He explained that women "if they divorce and don't have a stable source of income and don't have a place to go back to immediately they stay here [in the slum] and see if they can start life again."<sup>265</sup> As explained by the U.N. Special Rapporteur on Adequate Housing, the right to adequate housing is "the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."<sup>266</sup> The UN Rapporteur further stressed that "discriminatory cultural and social norms in family or personal laws - including civil law . . . have been identified as significant determinants of women's right to adequate housing, land and inheritance . . . ."<sup>267</sup> The right to housing is explicitly protected by the ICESCR, article 11 and the Maputo Protocol to the African Charter, yet to be ratified by Kenya.<sup>268</sup>

The right to human dignity and to be free from degrading treatment suffers when the law ignores women's contribution to a marriage during which they toiled to improve the home, performed domestic chores, worked in the field, and raised the children. Article 74(1) of the Constitution asserts the right to dignity by prohibiting any "degrading punishment or . . . treatment." Article 7 of the ICCPR echoes the language of Article 74(1) of the Constitution on freedom from "degrading treatment or punishment."<sup>269</sup> While both do not explicitly mention dignity, the Human Rights Committee, which oversees the implementation of the ICCPR, held that "[t]he aim of the provisions of article 7 . . . is to protect both the dignity and the physical and mental integrity of the individual."<sup>270</sup> Article 5 of the African Charter explains that "[e]very individual shall have

265 Elijah Odhiambo, Program Coordinator, Economic & Social Rights Centre, Hakijami Trust, in Nairobi, Kenya (Apr. 1, 2008).

266 Report of the Special Rapporteur on Adequate Housing 2004, *supra* note 131, para. 10.

267 *Id.* at para. 37.

268 ICESCR, *supra* note 119, art. 11(1) ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including . . . housing"); Maputo Protocol, *supra* note 135, art. 16 ("Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right . . .").

269 ICCPR, *supra* note 119, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

270 Human Rights Committee, General Comment No. 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) (44th Sess., 1992), para. 2, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

262 See CEDAW, *supra* note 119, arts. 16(1)(c), 16(1)(h); ICCPR, *supra* note 119, art. 23(4).

263 See CEDAW, General Recommendation No. 21, *supra* note 162, para. 28.

264 HRC, General Comment No. 28, *supra* note 122, at paras. 25, 26.



the right to the respect of the dignity inherent in a human being . . . .” The preamble to the Convention Against Torture provides that “the equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person . . . .”<sup>271</sup> CEDAW has also emphasized the importance of the basic right to dignity: “[A]ll human beings are born free and equal in dignity and rights . . . .”<sup>272</sup> Women’s dignity is at stake when the law fails to protect women from persistent, discriminatory practices that entrench their economic and social disempowerment.

## **B. New, Clear Laws on Equal Division of Matrimonial Property at Divorce Are Critical**

The Kenyan Government has acknowledged that “the law on matrimonial property currently in operation in Kenya is extremely antiquated as it is 19th Century British law resulting in several lacunae in this area,” but has yet to pass a new law that would account for the rights of women.<sup>273</sup> Following its review of Kenya, the CEDAW Committee expressed its concern over “discriminatory provisions that persist in laws governing marriage and family relations,” and urged the government “to complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with . . . the Convention . . . .”<sup>274</sup>

Because no law in Kenya explicitly addresses division of property at divorce, Kenya must craft specific laws to guide judges in making those determinations, eliminating decisions that disadvantage women and often render them homeless and penniless.

The law must:

- provide clear presumption of equal division of matrimonial property at divorce, regardless of any contribution calculation, i.e., granting each spouse half of the property or of proceeds from its sale; and
- combine all divorce-related proceedings for all marriages into the same lower-level court, ensuring equality under the law, and reducing duplicative concurrent proceedings and their related legal expenses,

271 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, acceded to by Kenya, Feb. 21, 1997, available at <http://www2.ohchr.org/english/law/cat.htm> [hereinafter CAT].

272 CEDAW, *supra* note 119, at Preamble.

273 See Kenya’s Report to the CEDAW Committee, *supra* note 7, para. 173.

274 CEDAW Committee, Concluding Comments: Kenya, *supra* note 83, at paras 43-44.

# (1) **Presumption Of Equality Of Spouses At Divorce Must Guide Law On Division Of Matrimonial Property**

By legislating on division of matrimonial property, Kenya will ensure women and children are not harmed at the breakdown of a marriage. The laws on divorce and matrimonial property must feature an equal division of property, regardless of whether contribution to the property or the marriage was direct or financial.

Nearly every lawyer and judge - from all levels of Kenyan courts - interviewed for this report, expressed their frustration concerning the lack of legislation on division of property at divorce and the harm to women from a 2007 Court of Appeal decision, *Echaria*, which rejected an equal division of matrimonial property, regardless of contribution.<sup>275</sup> The Honourable Lady Justice Joyce Aluoch was adamant in pointing out that “very few African women ... will make financial contributions, very few. We should always be talking about the woman in the rural area; where would she get the money to contribute to the property? Her money goes to feed the children. That is her contribution.”<sup>276</sup> The meaning of contribution as monetary is inconsistent with international legal instruments. Paul Ndungu, a prominent Kenyan lawyer who chaired the National Commission on Illegal and Irregular Allocation of Public Land, shares Lady Justice Aluoch’s sentiments. “In my view it is very difficult to start analyzing who contributed more and who didn’t. One party may not have produced a shilling, but the fact that that party was there with you and supported you all along and supported your decisions, that is worth a fair amount.”<sup>277</sup> Millie Odhiambo Mabona, a member of Parliament, echoed the comments of Justice Aluoch and Ndungu: “A lot of our women don’t work. They are not in formal employment, so we should take into account other non-monetary contributions that the women bring into marriage: taking care of the household, bearing children. That should be considered as non-monetary contribution.”<sup>278</sup>

Equal division of matrimonial property conforms to Kenya’s emerging legal and policy position. Prior to the problematic *Echaria* decision, Kenyan court decisions have held that property acquired during marriage was owned equally by the spouses and that domestic duties amount to contribution to the matrimonial property.<sup>279</sup> The government of Kenya boasted to the CEDAW committee in its report that predates the *Echaria* decision, that “All property acquired during the marriage period is considered matrimonial property and therefore each spouse has an equal share in the same.”<sup>280</sup> The government cited a 2005 High Court decision, in which “Lady Justice Mary Angawa, declared that: ‘A marriage is an institution of trust. The wife does not go about daily to record what she has done to contribute to the marriage.’”<sup>281</sup>

The equal division of property and the inclusion of indirect contribution are both firmly established in international human rights treaties, including those ratified by Kenya. Equal rights for men and women “during marriage and at its dissolution” are anchored in key human rights treaties, including in article 23(4) of ICCPR and article 16(1)(h) of CEDAW. The Human Rights Committee, which oversees the implementation of the ICCPR, noted that “to fulfill their obligations . . . States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to ... ownership and administration of property,” and that “[s]tate parties must also ensure equality in regard to the dissolution of marriage . . . .”<sup>282</sup> In its General Recommendation 21 on Equality in Marriage and Family Relations, the CEDAW committee emphasize that “any law or custom that grants men a right to a greater share of property at the end of a marriage . . . is discriminatory.”<sup>283</sup>

275 IWHR & FIDA-Kenya, Fact-finding on Women’s Property, Land, and Inheritance Rights in Kenya (Mar.–Apr. 2008) (on file with author).

276 Interview with The Honourable Lady Justice Joyce Aluoch, Court of Appeal, in Nairobi, Kenya (Apr. 4, 2008).

277 Interview with Paul Ndungu, Attorney, in Nairobi, Kenya (Apr. 3, 2008).

278 Interview with Millie Odhiambo Mabona, Member of Parliament, in Nairobi, Kenya (Apr. 1, 2008).

279 Kenya’s Report to the CEDAW Committee, supra note 7, at para 183.

280 *Id.* at para. 173.

281 *Id.* at para 183.

282 HRC, General Comment No. 28, supra note 122, at paras. 25, 26.

283 See CEDAW, General Recommendation No. 21, supra note 162, at 1.

In addition, countries in Africa and across the world, ranging from South Africa, Ethiopia, Canada, Scotland, to the United States,<sup>284</sup> mandate equal division of assets at divorce or separation, either by law or by having a default matrimonial property regime of in-community of property, under which spouses hold equal share to, at a minimum, property acquired during the marriage.<sup>285</sup> South Africa's Matrimonial Property Act of 1984 and the Recognition of Customary Marriages Act, both recognize that the default property regimes for all marriages is "in community of property and of profit and loss," which allocates spouses an equal share of the joint estate.<sup>286</sup> Ethiopia's revised Family Code states that "common property shall be divided equally between the spouses" and the "legal presumption" is that "all property shall be deemed to be common property even if registered in the name of one of the spouses . . . ."<sup>287</sup>

Moreover, a bright-line rule for 50-50 division would eliminate reliance of judges on sexist notions from seeping into judgments about property ownership and contribution. This also addresses the current judicial inefficiency of having to engage in facts-heavy determinations for each divorce of who contributed how much to the matrimonial property, including the very home in which the spouses lived and raised their children. As explained by one male farmer near Nayuki: "Even if I was paying money for the land, she was paying for my shoes . . . . Even if I was paying for the land, she was paying for the food I was eating."<sup>288</sup> A law requiring a 50-50 share would increase judicial efficiency and would fairly account for each party's contribution. Moreover, interviewees perceived such a division of property as a way to discourage high rates of

divorce, and marriage to multiple wives. One chief interviewed in the Meru area was concerned that the majority of divorces in his area were filed by men, leaving women with little choice. A rural male farmer in nearby Nanyuki advocated for the fairness of equal division of property by relating his own experience:

**Some time back, my own dad was about to separate from my mama. If my mom had separated from my dad and she was sent back to her own people and she went back with nothing, it would not be fair. Also, by having a law that stipulates that the property should be shared equally, this one will discourage the tendency of men thinking that they can go about marrying and divorcing.<sup>289</sup>**

The presumption of equal shares of property also provides a means to combat the deep-rooted notions of a wife as property of the husband, and therefore unable to hold property herself. Kenyan lawyers have noted that even when a woman works the land, the money from the harvest belongs to the husband primarily due to cultural notions of the wife as submissive and lacking ownership interest in property.<sup>290</sup> Law Professor Githu Muigai stressed that culture is the greatest impediment to women's rights because, despite existing statutes, judges might rule according to culture which traditionally views women as inferior to men.<sup>291</sup> This concern was echoed by FIDA Kenya lawyers who pointed out that most judges in Kenya are men and often their decisions bear the mark of their mentality.<sup>292</sup>

284 The Uniform Marital Property Act, a model law proposed by US family law experts and adopted by the National Conference of Commissioners of Uniform State Laws, likewise aims to "create a property system that would honor the contributions made by both marriage partners to the property acquired during their marriage." Unif. Marital Prop. Act Prefatory Note, 9A U.L.A. 97 (1987), reprinted in 21 Hous. L. Rev. 601, 603 (1984) cited in Kathy T. Graham, The Uniform Marital Property Act: A Solution For Common Law Property Systems? 48 S.D. L. REV. 455 (2003). The Act provides that "all property of spouses is marital property except that which is classified otherwise by this Act." Id. sec. 4(a). At least eight U.S. states, including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington follow a community property marital property law – a straight 50/50 division of property. Whereas other states balance a division based on indirect and direct contribution. See e.g., Alaskan courts pursuant to its statute on marital and domestic relations, follow a presumption favoring equal division of property ("In the absence of findings to warrant an unequal division, an equal division of the marital estate is presumptively the most equitable. Miles v. Miles, 816 P.2d 129 (Alaska 1991). An equal division of marital property is presumptively just. Berry v. Berry, 978 P.2d 93 (Alaska 1999).") Ala. Stat. sec. 25.24.160 (2008) (annotations).

285 See e.g., Marital Property Act of New Brunswick, R.S.N.B., ch. M1-1 (1980); Uganda Law Reform Commission, A Study report on the Reform of the Law of Domestic Relations 201 (2000); Legal Assistance Centre, Proposals for Divorce Law Reform in Namibia (2000).

286 South African Matrimonial Property Act, (88 of 1984) s. 2-10; The Recognition of Customary Marriages Act, (No. 120 of 1998) s. 7.

287 Revised Family Code, art. 90, 63 (2000). (Eth.)

288 Interview with Joshua Kirinya, in Meru, Kenya (Mar. 30, 2008).

289 Interview with Issac Nndumia, in Nanyuki, Kenya (March 29, 2008).

290 Interview with Victoria Ochanda, Kenyan Lawyer and Law and Advocacy for Women in Africa Fellow, Georgetown University, in Washington, DC, USA (Feb. 21, 2008).

291 Telephone interview with Githu Muigai, Attorney and Professor of Law, Washington, DC, USA (Feb. 25, 2008).

292 Interview with Maria Goretti, FIDA Advocate, in Nairobi, Kenya (Apr. 1, 2008).

## (2) **One Court Handling All Divorce Related Matters Will Increase Judicial Efficiency, Reduce Legal Costs And Ensure Equality Under The Law**

The current fragmented system of multiple proceedings related to divorce violate the rights of Kenyans to access legal services<sup>293</sup> and to an effective remedy.<sup>294</sup> Currently, proceedings for the division of matrimonial property must be filed in the High Court and are separate from the divorce proceeding which are filed with the Magistrate court. "Divorce cases are so . . . complicated," says advocate Gilbert O. Ombachi. "We have to file the divorce matter, we file a matrimonial causes matter, and the issue of children matter. There are three matters pending."<sup>295</sup> At each stage, the person must recall or relive the sad circumstances that brought her before the court in the first place, leading to needless re-traumatization. In addition, with multiple cases, a petitioner may be forced to travel great distances to the different courts and spend large sums on attorney and court fees. Evelyn Opondo, Senior Counsel at FIDA - Kenya, who along with her colleagues has provided legal services for countless women, explained that the current process "is time consuming, expensive, and complicated for women, and there is the emotional trauma."<sup>296</sup> A widower interviewed in rural Nanyuki pointed out that the fees for retaining a lawyer to access the justice system in Kenya were "exorbitantly high and beyond the reach of a common man,"<sup>297</sup> much less of a rural woman who would be unable to commute to the city court or to retain a lawyer. A UNAIDS Kenya study found that "court procedures for filing motions, summons and suits are expensive, time-consuming and confusing, even to advocates, resulting in cases being dismissed on technicalities . . . and long delays."<sup>298</sup>

Kenya needs to enact a law that will funnel all divorce and related proceedings, such as division of property, through the Magistrate courts. Combining all divorce related matters into one proceeding at the same court will reduce the number of proceedings

one has to attend and coincidently, the cost of legal and court fees. Unlike High Courts based in central towns, Magistrate courts are more numerous and geographically accessible. Kenya's neighbours - like many other countries - have combined divorce proceedings into one court. Tanzania's Marriage Act, in addition to governing divorce also provides for the division of matrimonial property and payment of maintenance.<sup>299</sup> In Zimbabwe, the courts that handle dissolution of marriage can also issue orders for maintenance.<sup>300</sup>

The same Magistrate courts should be empowered to hear cases brought by individuals married under any of the recognized forms of marriage in Kenya – those concluded under civil, customary, or religious law. Such access to legal protection at divorce conforms with the right to equality under the law<sup>301</sup> and the rights to equality at dissolution of marriage.<sup>302</sup> Following its review of Kenya's compliance with CEDAW in 2007, the CEDAW Committee urged the government "to harmonize civil, religious and customary law with article 16 of the Convention and to complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with articles 15 and 16 of the Convention, within a specific time frame."<sup>303</sup>

The harmonization of laws on marriage and divorce does not curtail the right to celebrate one's culture or religion. Kenya itself has laws that uniformly apply to all groups and are compliant for the most part with international law, like the 2001 Children's Act. The woefully inadequate Married Women's Property Act of 1882 is used routinely to resolve division of matrimonial property disputes in civil as well as customary marriages.<sup>304</sup>

299 The Marriage Act, supra note 77, § 107(3).

300 The Matrimonial Causes Act, supra note 82, CH. 5:13, § NO 2(1).

301 See CEDAW, supra note 119, Article 15; ICCPR, supra note 119, Article 3; ICESCR, supra note 119, Article 3; African Charter, supra note 119, Article 3; Maputo Protocol, supra note 135, Article 6. All guarantee that women and men are equal before the law, entitled to the equal enjoyment of all fundamental rights and freedoms.

302 See e.g., ICCPR, supra note 119, art 23(4); see also CEDAW, supra note 119, art. 16(1)(h).

303 CEDAW Committee, Concluding Comments: Kenya, supra note 83, para. 44.

304 See e.g., Beatrice Bonareri Nyabuto v. Eldad Kanyanya Wapenyi (2006) eKLR (H.C Kenya) (coupled married under Kisi customary law relied on the Married Women's Property Act to distribute in equal shares the proceeds from a sale of land acquired by the couple's joint efforts).

293 Maputo Protocol, supra note 135, art. 8.

294 See CEDAW, supra note 119, art. 2(c); see also ICCPR, supra note 119, art. 2(3).

295 Interview with Gilbert O. Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).

296 Telephone Conference with Evelyn Opondo, Senior Counsel, FIDA-Kenya, (Apr. 24, 2008).

297 Interview with Johnson Kimani Mwangi, Widower, in Nanyuki, Kenya (Mar. 29, 2008).

298 UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, supra note 5, at 23.

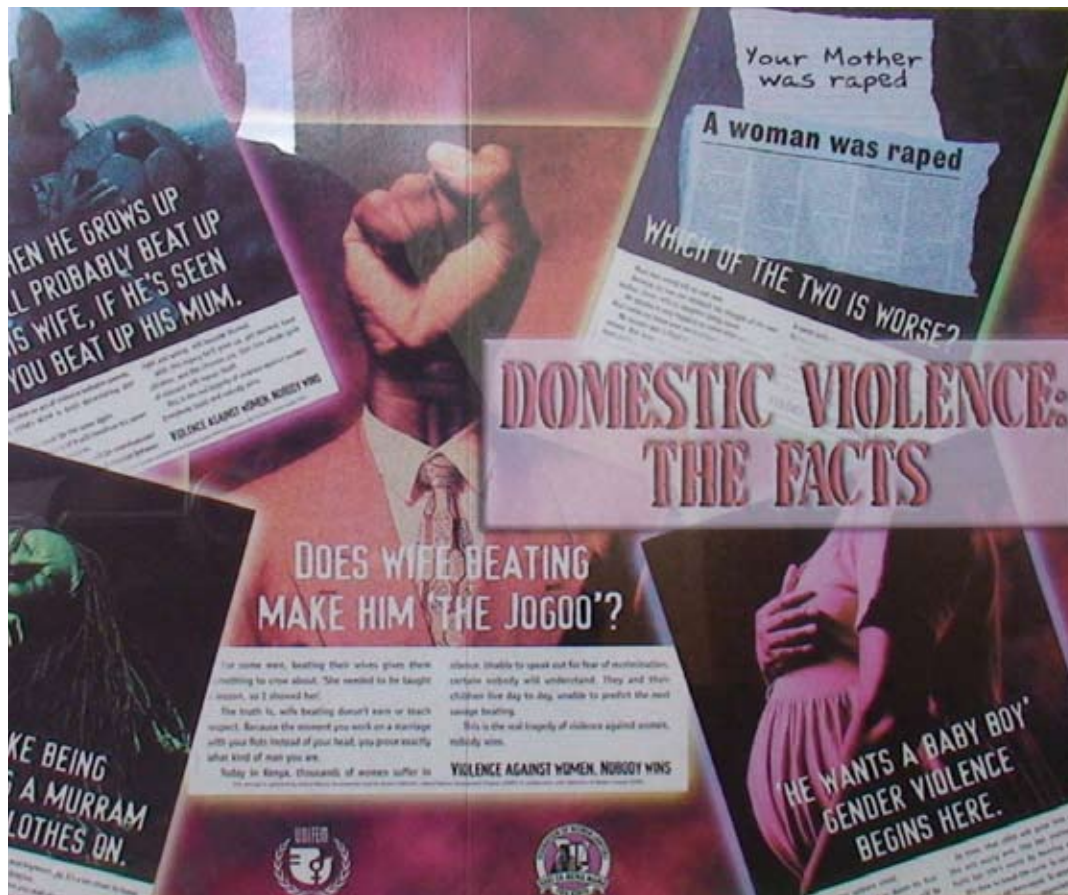
Countries throughout the world have applied uniform laws to their diverse religious and cultural constituents. For example, majority Muslim countries, like Turkey and Tunisia, and European countries with significant Muslim communities, like the United Kingdom and France, apply secular laws regardless of religious affiliation.<sup>305</sup> Ethiopia's laws regarding the dissolution of marriage are the same regardless of the type of marriage.<sup>306</sup> Thus, civil, customary and religious marriages go through the same process to be dissolved. In South Africa, the Divorce Act regulates all divorces.<sup>307</sup>

.....  
 305 See Joan Wallach Scott, Veiled Politics, 54 CHRONICLE OF HIGHER EDUC. B10 (2004), available at <http://chronicle.com/free/v54/i13/13b01001.htm> (discussing the French law banning any conspicuous religious signs).

306 ETHIOPIA CIV. CODE ART. 662.

307 Id. § 7(1).





## VI. LACK OF SECURE LAND AND PROPERTY RIGHTS INCREASES WOMEN'S VULNERABILITY TO DOMESTIC VIOLENCE AND HIV TRANSMISSION



Women's lack of access to, control, and ownership over property and land, or the harvest and crops they grow on family land, render them vulnerable to domestic violence and greater risk of contracting HIV. Husbands force wives to relinquish their property,<sup>308</sup> and wives feel that they must remain in abusive marriages because they will have no property and are thus dependent on their husbands.<sup>309</sup> Such dependence also prevents them from negotiating safe sex practices.<sup>310</sup> Women in polygamous marriages are particularly vulnerable and have no power in refusing the marriage of additional wives or having sexual relations with their husbands who have legally married multiple sexual partners.<sup>311</sup> Women may also engage in prostitution or be forced to move to the "slums" because they do not own property and may be dispossessed of or evicted from their homes by their husbands or relatives. These practices violate women's rights to health, life, dignity, and security of the person.

When men control matrimonial property, women face increased risk of domestic violence.<sup>312</sup> According to the Rev. Dr. Mrs. Judy Mbugua, the head of the Pan-African Christian Women Alliance (PACWA), many cases of domestic violence are tied to property, and women who do not surrender their salaries to their husbands are beaten.<sup>313</sup> For example, one woman working in a top position in the government refused to give her entire salary to her husband and even arranged with the bank to conceal her earnings;<sup>314</sup> when the husband learned of this, "the woman was beaten and divorced."<sup>315</sup> Frederick Ochieng of UNIFEM confirmed that violence and divorce will result "when a man realizes that a woman owns property elsewhere and he was not informed."<sup>316</sup> Gilbert O. Ombachi, an advocate who has handled several matrimonial property cases, stated that a woman may even "be shot dead" because of a property dispute.<sup>317</sup>

Often women stay in violent marriages because they do not own property; frequently because they are excluded from ownership by custom, or they depend on their husbands for housing and sustenance. If they leave they may take nothing and they and their children may have nowhere to go. Gitobu Imanyara, a Member of Parliament, explained that women are "enslave[d]" in marriages "because they have nowhere else to go to."<sup>318</sup> Hilda Nguyai, a FIDA client services officer, mentioned a woman who stayed with her husband, a former Member of Parliament, because she feared losing her property, even though their son is now in a mental institution as a result of seeing violence in the home.<sup>319</sup> Women in the Maasai community, for example, must remain in abusive marriages because they do not own any matrimonial property and cannot return to their parents' property.<sup>320</sup> According to Lanoi Parmuat, a Maasai community activist, "[W]ife battering is the order of the day." Elderly Maasai women tell brides on the night before they marry that they cannot leave if their spouses are abusive: "The very night before you go, . . . the elder women come in and tell you. They use a proverb: Whatever pain the situation will bring there is no going back. . . . There is no going back."<sup>321</sup> Ms. Parmuat recalled the experience of a 12-year-old girl in the Kajiado District forced to become the second wife of a 42-year-old man, who abused her so badly when she was pregnant that her fetus died, her uterus had to be removed, and she nearly died:

**Her husband beat her near death. This little girl was hospitalized for six months and lost conscious and everything. She had stayed with the husband for three months and had already conceived. The worst which happened was she miscarried and the placenta refused to come out, so it rotted inside her. The doctors didn't realize it for six months. When they realized . . . the placenta was rotted inside her, they had to remove the uterus. . . . The man is still at large. . . . To him it is a heroic act because the woman is not supposed to defeat you. And when we asked the father, "You let your child be beaten and you don't feel it?"**

308 See Interview with Judy Mbugua, head of the Pan-African Christian Women Alliance and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).

309 Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008).

310 Interview with Annie Mumi Muchiri, Kenya AIDS NGO Consortium (KANCO) in Nairobi, Kenya (Apr. 1, 2008).

311 See Kenya, Responses to CEDAW, supra note 150, para. 15.

312 See Interview with Judy Mbugua, head of PACWA and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).

313 Id.

314 Id.; see also Interview with Gilbert O. Ombachi, advocate, in Nanyuki, Kenya (Mar. 29, 2008) ("If there is a lot of property, the next thing may be a lot of violence.").

315 Interview with Judy Mbugua, head of PACWA and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008); see also Interview with Gilbert O. Ombachi, advocate, in Nanyuki, Kenya (Mar. 29, 2008) ("If there is a lot of property, the next thing may be a lot of violence.").

316 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

317 Interview with Gilbert O. Ombachi, advocate, in Nanyuki, Kenya (Mar. 29, 2008).

318 Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008).

319 Interview with Hilda Nguyai, FIDA client services officer, in Nairobi, Kenya (Apr. 1, 2008).

320 See Interview with Lanoi Parmuat, FGM Project Leader, Free Pentecostal Fellowship in Kenya, in Nairobi, Kenya (Apr. 3, 2008).

321 Id.

**He answered, “No, . . . . If the man decided she needs to be disciplined it is because she is notorious.” . . . [E]ven when you run to your parents they are the ones returning you back. . . . She is still feeling the pains and the beatings. The marks that she is bearing are bad because he used some corrosive [substances] on her.”<sup>322</sup>**

If the girl or her mother had any financial means or access to resources, the girl may have never been turned over to marry at such a tender age and have had to endure the abuse of her husband.

Women's lack of property rights and consequent dependence on men also prevent them from negotiating safe sex, increasing their chances of exposure to HIV/AIDS. In a study on violence against women and girls in Kenya, the UN Theme Group on HIV and AIDS found that women yield to demands “for unprotected sex, despite the danger, as they often have nowhere to go, limited financial options (a Kenyan woman's average earnings is less than half of that of man), limited land rights, and fear of losing their children.”<sup>323</sup> According to Annie Mumi Muchiri, of the Kenya AIDS NGO Consortium (KANCO), a network of over 850 organizations working on HIV/AIDS issues in Kenya,<sup>324</sup> women who do not have property rights are likely to remain in marriages that render them vulnerable to HIV/AIDS: “Women would continue staying in marriages when they were being abused because they had no way of leaving. They were vulnerable.”<sup>325</sup> Women in such economically disempowered conditions cannot negotiate for safe sex.<sup>326</sup>

Women who do not own their own property or who were evicted by family from their homes, often must engage in practices like transactional or survival sex that expose them to HIV/AIDS. According to Mr. Ochieng of UNIFEM, even women who regularly use matrimonial land but

cannot make any economic decisions about the produce from the land may have to engage in sex work for an income:

**In many cases where a woman has . . . used land, . . . you will find that she cannot make a decision on . . . the produce that are coming from that land. She cannot sell the maize. She cannot sell the milk that is coming from the cow being grazed there. So what options do they have? The only option they have is to go and engage in sexual practices which make them vulnerable to contracting HIV/AIDS. And this is common everywhere . . . . [I]f women can own property, and owning property means that they are economically stable, means that they have a source of livelihood, they wouldn't be vulnerable to HIV/AIDS.”<sup>327</sup>**

Women forced to engage in transactional, survival sex because they do not own property often must live in the slums (or human settlements), where HIV/AIDS is more prevalent.<sup>328</sup> Women who dwell there often have no other means of survival but to engage in sexual acts for food and basic necessities for themselves and their children. Ruben Mwenda Murugo, a Land Policy Coordinator in the Ministry of Lands, explained that many times, women who have divorced, are chased away, or otherwise displaced from their homes are forced into prostitution in the slums because they own nothing:

**[T]hey have to do something and most of the time you will find them in slums. Actually it is one of the contributing factors to the growth of slums. And when they are in these slums they have to make a livelihood and . . . they use all means possible . . . [including prostitution] so that they can take care of their families.”<sup>329</sup>**

322 Id.

323 UN Theme Group on HIV and AIDS, Violence Against Women and Girls in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya, at 12 (2006), available at [http://data.unaids.org/pub/Report/2006/20060630\\_GCWA\\_RE\\_Violence\\_Women\\_Girls\\_Kenya\\_en.pdf](http://data.unaids.org/pub/Report/2006/20060630_GCWA_RE_Violence_Women_Girls_Kenya_en.pdf) [hereinafter UN Theme Group on HIV and AIDS, Violence Against Women].

324 KANCO - Kenya AIDS NGOs Consortium, <http://www.kanco.org/about.php> (last visited May 3, 2008).

325 Interview with Annie Mumi Muchiri, Intern, KANCO in Nairobi, Kenya (Apr. 1, 2008).

326 Id.

327 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

328 Interview with Ruben Mwenda Murugo, Land Policy Coordinator, Ministry of Lands, in Nairobi, Kenya (Apr. 2, 2008).

329 Id.

Mr. Ochieng of UNIFEM recalled the experiences of two women who did not have property rights and were relegated to sex work in the slums during the recent post-election violence:

**[W]e have two cases where a woman went back home, . . . and the relatives there refused to let her back, and her and the daughters decided to go and start doing the sex business in . . . the next town center. And I'm very sure that their knowledge of HIV/AIDS might not have been so high that they would have understood what sort of impact that would be. But that is just to tell you that women who do not have property or whose access to land or whose usage of those lands are restricted become very vulnerable to HIV/AIDS.**<sup>330</sup>

Women in polygamous marriages face increased health risks and report higher rates of domestic violence than women in monogamous unions.<sup>331</sup> Polygamy also exacerbates the spread of HIV/AIDS because husbands have sexual relations with multiple partners who are all bound by custom to provide unprotected, conjugal encounters. Women in polygamous marriages have a higher rate of HIV infection (11.4 percent) compared to women in non-polygynous unions (7.2 percent), and to the overall rate of HIV-positive adults in Kenya (6.7 percent).<sup>332</sup>

Because many Kenyan women suffer both physical and psychological injuries, sometimes fatal, from domestic violence and HIV/AIDS, their rights to life and health are violated. The National Survey on Violence against Women found that 60.9 percent of adult women reported one or more episodes of physical abuse, and 40.6 percent reported sexual abuse.<sup>333</sup> Moreover, HIV/AIDS, which is also closely linked with domestic violence, has compromised and taken the lives of many more women. In 2005, a total of 140,000 Kenyans died from AIDS.<sup>334</sup> Women in Kenya, especially younger women, carry the brunt of the epidemic. According to 2003 statistics, "HIV prevalence

is nearly 9 percent in women age 15 to 49 and under 5 percent among men 15 to 54."<sup>335</sup> A 2006 UNAIDS study revealed even starker gender disparities: HIV prevalence in Kenya among women ages 15 to 49 is 8.7 percent, almost double the prevalence rate for men in the same age range (4.5 percent).<sup>336</sup> The HIV prevalence among women ages 20 to 24 is 9 percent, over four times the rate of men in the same age range (2 percent). Such disproportionately high prevalence rates indicate that Kenya is not protecting women's rights to health and life.

Multinational studies conducted by the United Nations and the World Health Organization have shown that HIV positive women are more likely to have experienced violence, including domestic violence and marital rape, and that women subject to violence, are at a higher risk for contracting the disease.<sup>337</sup> Sexual violence increases the risk of HIV transmission because of the "degree of trauma, vaginal lacerations, and abrasions that occur when force is used."<sup>338</sup> Violence within marriage can also spread the AIDS virus because a woman's fear of violence may keep her from being tested or disclosing her status, and may keep her from seeking treatment to reduce the chance of mother-to-child transmission if she is pregnant.<sup>339</sup>

When law and custom deprive women of economic resources, they are denied their basic rights to life, health, and the security of the person and are at greater risk of domestic violence and HIV/AIDS. These rights are guaranteed under the Kenyan Constitution and international human rights treaties to which Kenya is a party. Section 70(a) of the Constitution mandates that every person has a right to "life, liberty, security of the person and the protection of the law."<sup>340</sup> The right to life is universally upheld with no exception or derogation permitted.<sup>341</sup> It is enshrined under Article 6(1) of the ICCPR, and Article 4 of the African Charter.<sup>342</sup> The right to security of the

335 DHS SURVEY, supra note 224, at 221.

336 UN THEME GROUP ON HIV AND AIDS, supra note 5, at 6.

337 The Secretary General, In-depth study on all forms of violence against women, para. 160, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006), available at <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomenstudydoc.pdf> [hereinafter Secretary-General's study]; THE GLOBAL COALITION ON WOMEN AND AIDS, INTIMATE PARTNER VIOLENCE AND HIV/AIDS 1007 (2004) [hereinafter INTIMATE PARTNER VIOLENCE] (noting that "[s]tudies from Rwanda, Tanzania, and South Africa show up to three fold increases in risk of HIV among women who have experienced violence compared to those who have not.").

338 INTIMATE PARTNER VIOLENCE, supra note 337, at 1008.

339 Secretary-General's study, supra note 337, para. 160.

340 CONSTITUTION, § 70(a) (rev. ed. 1998) (2001) (Kenya).

341 See ICCPR, supra note 119, art. 4(2). ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.").

342 ICCPR, supra note 119, art. 6(1) ("Every human being has the inherent right to life"); African Charter, supra note 119, art. 4 ("Every human being shall be entitled to respect for his life"); Maputo Protocol, supra note 135, art. 4(1) ("Every woman shall be entitled to respect for her life").

330 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

331 Kenya, Responses to CEDAW, supra note 150, para. 15.

332 DHS SURVEY, supra note 224, at 224.

333 Kenya, Responses to CEDAW, supra note 150.

334 JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), 2006 REPORT ON THE GLOBAL AIDS EPIDEMIC 508 (2006), available at [http://data.unaids.org/pub/GlobalReport/2006/2006\\_GR\\_ANN2\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN2_en.pdf) [http://data.unaids.org/pub/GlobalReport/2006/2006\\_GR\\_ANN2\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN2_en.pdf) [hereinafter UNAIDS].

person is guaranteed under Article 6 of the African Charter and Article 9 of the ICCPR. The right to health is invoked under Article 16 of the African Charter, Article 12 of CEDAW, and Article 12 of the ICESCR, and the right to physical integrity under Article 4 of the African Charter.

To guarantee the basic rights of health and life under Kenya's international law commitments, and to prevent the harms to women from domestic violence and the spread of HIV/AIDS, Kenya must enact laws ensuring that women have equal rights to property and land, including during marriage and at divorce. Article 12 of the ICESCR provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and commits states to take the necessary steps to prevent and control epidemic diseases.<sup>343</sup> The African Charter includes a similar right to health, and the Maputo Protocol, yet to be ratified by Kenya, commits states to guarantee "the right of health of women, including sexual and reproductive health."<sup>344</sup> This includes the right "to be protected against sexually transmitted infections, including HIV/AIDS." The CEDAW committee considers violence against women, including domestic violence, a form of sex discrimination and a serious threat to the health and lives of women. The CEDAW Committee requires that States pay special attention to marital rape as a form of violence committed against a woman in her home: "[A]rticles 2, 5, 11, 12, and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family . . . ."<sup>345</sup>

343 ICESCR, supra note 119, art. 12(2) ("The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . . (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.");

344 African Charter, supra note 119, art. 16 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health."); Maputo Protocol, supra note 135, art. 14 ("States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.")

345 CEDAW, supra note 119, at 75.





**VII. TO STEM WOMEN'S POVERTY  
AND MARGINALIZATION,  
KENYA MUST LIMIT  
THE APPLICATION OF SEX-  
DISCRIMINATORY CUSTOMARY LAWS**

Customary law on property rights discriminates against women by denying them equal rights to own, access, and control land and other property. As a result, the application of customary law robs women of their dignity, often renders them homeless and destitute, and exposes them to greater vulnerability to domestic violence and HIV/AIDS. Customary law violates women's fundamental human rights to equality, dignity, and an adequate standard of living by failing to recognize their rights to land and property. To comply with international law and regional trends recognizing these rights, Kenya must pass legislation to limit the application of customary law when it discriminates against women.

### **A. Application of Discriminatory Customary Law Violates Women's Basic Human Rights**

While respect for customs and traditions can be a beneficial aspect of community life, it can also harm the interests of women when applied in a discriminatory manner. Specific aspects of customary law deny women's rights to land. As encapsulated by a Programme Officer for the Kenyan Centre for Law & Research International (CLARION), which oversees a gender rights program in over 24 districts,<sup>346</sup> "[C]ustomary law is strictly patrilineal. The idea is that land vests in men. The whole idea of customary law in Kenya favours men at the expense of women."<sup>347</sup> In most communities, "women have no right to own any property. They are owned by their husbands."<sup>348</sup> A magistrate in Nairobi described the harmful impact of customary law on Kenyan women: "When it comes to ownership of property, customary law really affects women negatively."<sup>349</sup>

The discrimination against women in customary law manifests itself in abuses that women suffer because they lack protections under statutory law. For example, women in customary marriages that allow polygamy are vulnerable to dispossession because the man maintains control over the land and can allocate part of it to additional wives.<sup>350</sup> In addition, the customs related to dowry

can deter women from seeking divorce in abusive marriages, since return of the dowry is often a condition for obtaining a divorce. According to Meru custom, women are not allowed to leave with their children unless they repay the dowry,<sup>351</sup> which can be an insurmountable financial hurdle for women. Furthermore, women married under customary law are sometimes chased away by their husbands with no guaranteed rights to the land:

**In the example of customary marriage and land, customarily a man will have the right to chase away his wife even if they have been married for 100 years. If you don't follow what he says, he will have the right to send you back to your parents' land without any recourse. In customary law you could never come back and claim any property. The property belonged to the husband . . . Women were included as a part of the property men could own under customary law.**<sup>352</sup>

Women are not adequately protected by the formal laws and they can be rendered homeless and destitute by discriminatory customs.

Kenya's reliance on customary law has been justified on the basis of the country's diverse population of 42 different tribes who have their own particular customs.<sup>353</sup> However, the use of custom to decide life-altering matters such as women's rights to live and work on the land can be harmful when such customs do not recognize the equality of the sexes. The Kenyan government noted this dilemma in its 2004 report to the Human Rights Committee, admitting that "[t]his recognition of customary law brings with it customary practices that are in some cases in practice, discriminatory in their very nature though the spirit of the law was to allow for differentiated treatment that does not amount to discrimination."<sup>354</sup> Furthermore, the government has noted to the Human Rights Committee that interpretation of customary law "quite often favours men

346 See Centre for Law & Research International (CLARION), Human Rights Programme, Gender Rights Project Phase III at <http://www.clarionkenya.org/project.asp?ID=18> (last visited July 27, 2008).

347 Interview with Frederick Oundo, Programme Officer, CLARION, in Nairobi, Kenya (Apr. 3, 2008).

348 Interview with County Clerk, Laikipia County Council, in Nanyuki, Kenya (Mar. 31, 2008).

349 Interview with a magistrate in Nairobi, Kenya (Mar. 31, 2008).

350 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 2.

351 Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008).

352 Interview with Frederick Oundo, Programme Officer, CLARION, in Nairobi, Kenya (Apr. 3, 2008).

353 Interview with Otieno Ogindo, Member of Parliament, in Nairobi, Kenya (April 3, 2008).

354 Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: 2nd Periodic Report: Kenya (2004), para. 29, U.N. Doc. CCPR/C/KEN/2004/2 (Sept. 27, 2004) [hereinafter HRC, Consideration of Reports].



over women.”<sup>355</sup> The government of Kenya also recognized the sex inequality in customary law on property in its report to the CEDAW Committee, explaining that “the area in which most customary laws disadvantage women is in respect of property rights and inheritance.”<sup>356</sup>

Women are not afforded the same rights as men under customary law simply based on their sex. Elijah Odhiambo, Program Coordinator at the Economic & Social Rights Centre, Hakijamii, explained that “The customary law is clear that [property] it is for men. If you go by customary law you are basically saying it is the man who owns the assets.”<sup>357</sup> Because customary law traditionally denies women equal rights to own and control property, it blatantly infringes on their right to equality before the law and their right to freedom from discrimination. Kenya has an obligation to respect women’s right to equality before the law according to several international and regional conventions. This includes sex equality provisions under ICCPR article 26,<sup>358</sup> CEDAW article 15(1),<sup>359</sup> and the African Charter on Human and Peoples’ Rights article 3 in conjunction with article 2.<sup>360</sup>

The right to sex equality is a fundamental right that supersedes the rights to culture and religion under international law. The Human Rights Committee has declared that states parties “should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”<sup>361</sup> In addition, the rights which minorities enjoy under article 27 of the ICCPR in respect of their language, culture and religion “do not authorize any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.”<sup>362</sup> According to these provisions of international law, the customs of particular communities cannot be invoked to justify discrimination against women.

Furthermore, Kenya must comply with its duty to eliminate all forms of discrimination against women pursuant to article 18(3) of the African Charter<sup>363</sup> and CEDAW article 2 (obligation to “adopt appropriate legislative and other measures . . . prohibiting all discrimination against women”) and article 5 (“achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”).<sup>364</sup> Kenya has ratified CEDAW without reservations, demonstrating its acceptance of the legal obligation to eliminate customary practices that discriminate against women.

Kenya also has an affirmative obligation under international law to eliminate harmful traditional practices. According to article 5 of CEDAW, which Kenya has signed and ratified without reservations, states parties shall take all appropriate measures to eliminate customary practices based on harmful sex stereotypes.<sup>365</sup> Customary laws related to property represent a clear example of such practices, since they restrict women’s rights to own and control property based on stereotypes that men are heads of households and women cannot be trusted with property.<sup>366</sup> The CEDAW Committee in its review of Kenya’s compliance with the treaty has warned that such customs and stereotypes perpetuate discrimination against women: “The Committee is concerned about the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men . . .”<sup>367</sup> The government has a duty under CEDAW to modify these practices by prohibiting discrimination against women in the application of customary law.<sup>368</sup> Kenya recognized this principle in passing the Children’s Act of 2001, which prohibits “customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development.”<sup>369</sup> The harmful effect of customs on the girl child

355 *Id.*

356 Kenya’s Report to the CEDAW Committee, *supra* note 7, para. 10.

357 Elijah Odhiambo, Program Coordinator, Economic & Social Rights Centre, Hakijamii Trust, in Nairobi, Kenya (Apr. 1, 2008).

358 See ICCPR, *supra* note 119, art. 26 (“[A]ll persons are equal before the law”).

359 See CEDAW, *supra* note 119, art. 15(1) (“States Parties shall accord to women equality with men before the law”).

360 See African Charter, *supra* note 119, art. 3 (“Every individual shall be equal before the law”) and art. 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as . . . sex”).

361 HRC, General Comment No. 28, *supra* note 122, para. 5.

362 *Id.*

363 See African Charter, *supra* note 119, art. 18, para. 3, (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”).

364 See CEDAW, *supra* note 119, art. 2, para. 6, and art. 5, para. 9.

365 See CEDAW, *supra* note 119, art. 5(a).

366 KLA, WOMEN, LAND AND PROPERTY RIGHTS, *supra* note 7, at 1.

367 CEDAW Committee, Concluding Comments: Kenya, *supra* note 83, para. 21.

368 See *id.* at para. 22 (The CEDAW Committee “urges the State party to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women . . .”).

369 The Children’s Act, (2001) Cap. 8 § 14 (Kenya).

applies equally to adult women, who are often treated as if they were children by denying them land rights equivalent to men.

Customary law lends recognition to many harmful practices that discriminate against women. The statutes that apply such customs rob women of their rights to dignity,<sup>370</sup> health,<sup>371</sup> and an adequate standard of living.<sup>372</sup> When women are not considered competent to own or control property, their right to dignity is violated. Similarly, customary laws that deny women's property rights in marriage and divorce infringe on their right to health by trapping women in abusive marriages and exposing them to the risk of HIV infection in polygamous marriages.<sup>373</sup> Furthermore, women who do not have rights to the fruits of their own labour on farms, to their contributions to a household, or are chased out of their homes are thereby denied an adequate standard of living. The UN Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living has highlighted the harms suffered by Kenyan women who do not have equal property rights under customary law: "[D]iscrimination in customary law with respect to women's property and inheritance rights negatively affects their right to adequate housing."<sup>374</sup> For example, "[e]ven if a woman builds or pays for a house herself, tradition often dictates that it belongs to her husband."<sup>375</sup> The discriminatory effects of customary law in these situations demonstrate the need for new laws to explicitly protect women's equal rights to property.

## B. To Beget Kenyan Women's Equal Footing with Men, Kenya Must Abolish Sex-Discriminatory Customary Laws

*We have moved on from customary law in other areas, so why should it keep haunting us in ownership of property?*

*We have moved on from customary law in many ways – wearing a business suit is not customary. This office is not customary. My people used to walk around half-naked according to custom. So we cannot go blaming customary law.*<sup>376</sup>

In accordance with international human rights law and regional developments in neighbouring states, Kenya should enact new legislation to negate the discriminatory effects of customary law and promote women's equal property rights. Kenya's application of discriminatory customary law to land and property violates the fundamental human rights of women guaranteed by the Kenyan Constitution and by regional and international treaties. The Draft National Land Policy recognizes that "[t]here is conflict between constitutional and international provisions on gender equality vis-à-vis customary practices that discriminate against women in relation to land ownership."<sup>377</sup> A statutory provision to prohibit the application of customary laws that discriminate against women in land rights would resolve the conflict between international law and customary law. Thus it would fulfill the Draft National Land Policy's commitment to "[r]epeal existing laws and outlaw . . . customs and practices that discriminate against women in relation to land."<sup>378</sup>

Neighboring African states have enacted progressive legislation to protect women's equal rights to property, thereby indicating that the lasting influence of African customary law is not a barrier to change. For example, Uganda's Land Act limits the application of customary law to ensure that it does not discriminate against women. The Act states that "[a]ny decision taken in respect of land held under customary tenure . . . shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women . . . access to ownership, occupation or use of any land . . . shall be null and void."<sup>379</sup> Similarly, Tanzania's Village Land Act declares that customary law shall be void "to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such

370 See African Charter, supra note 119, art. 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being").

371 See ICESCR, supra note 119, art. 12 (provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health") and see African Charter, supra note 119, art. 16, para. 1, ("Every individual shall have the right to enjoy the best attainable state of physical and mental health.")

372 See ICESCR, supra note 119, art. 11(1) ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.") and see CEDAW, supra note 119, art. 14(2)(h) (the right "to enjoy adequate living conditions, particularly in relation to housing").

373 See Interview with Anne Mumi Muchiri, Intern, KANCO, in Nairobi, Kenya (Apr. 1, 2008).

374 See Report of the Special Rapporteur on Adequate Housing 2004, supra note 132, para. 38.

375 Id. para. 39.

376 Interview with staff member, Kenya Law Reform Commission, in Nairobi, Kenya (Apr. 2, 2008).

377 NATIONAL LAND POLICY, supra note 10, § 3.6.10.3, para. 222.

378 Id. § 3.6.10.3, para.225(b).

379 The Land Act, (1998) Cap. 227 § 27. (Uganda).

land.<sup>380</sup> The South African Constitution protects women from discrimination by mandating every court, tribunal or forum to interpret customary law so that it conforms to the Bill of Rights.<sup>381</sup> Kenya should join the regional trend exemplified by Uganda, Tanzania, and South Africa and enact its own protections for women's equal right to property.

Domestic and international law already limit the use of customary law when it is harmful or unjust, and Kenya needs a statutory requirement to apply this principle to discrimination against women. The Constitution recognizes limits to the application of customary law in section 115(2), which states that "no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law."<sup>382</sup> The Judicature Act provides an example of such a law: it applies customary law only "so far as it is applicable and is not repugnant to justice and morality."<sup>383</sup> The Court of Appeal cited this limitation in *Otieno v. Ougo*; while it upheld the use of customary law as applied to the burial place of a Luo man, it recognized the restrictions placed on customary law in the Judicature Act.<sup>384</sup> The *Bhe* case from South Africa illustrates how customary law could be deemed unjust when it discriminates against women in terms of property rights. In *Bhe*, the Constitutional Court of South Africa ruled that denying equal inheritance rights to women under customary law violated women's rights to equality and dignity.<sup>385</sup> The court decried the harmful effects of customary law that discriminates against women: "Discrimination conveys to the person who is discriminated against that the person is not of equal worth. The discrimination against women conveys a message that women are not of equal worth as men."<sup>386</sup> To uphold the right to equality and to ensure that Kenyan women receive the same protection against discrimination, the National Assembly should prohibit the application of customary laws that discriminate against women.

The elimination of sex discrimination not only fulfils an obligation under international law; it also reflects the will of the Kenyan people. Kenyans have shown their support for such a provision

during public consultations carried out by the Kenya Law Reform Commission in 2007. In presentations on the proposed Gender Equality Bill, 91 percent of respondents said that women had been discriminated against and 96.6 percent of respondents agreed on the need for an anti-discrimination law.<sup>387</sup> The overwhelming popular support for sex equality further demonstrates that culture is not a legitimate excuse for discrimination against women.

380 The Village Land Act, (1999) Cap. 114 § 20. (Tanzania).

381 S. AFR. CONST. 1996 art. 211 (1996). See CENTRE ON HOUSING RIGHTS AND EVICTIONS, BRINGING EQUALITY HOME 112 (2004).

382 CONSTITUTION, Art. 115(2) (rev. ed. 2001) (1998).

383 The Judicature Act, (2004) Cap. 8 § 3(2). (Kenya).

384 *Otieno v. Ougo*, (1987) K.L.R. 371 (H.C.K.), *aff'd* by (1987) K.L.R. 407 (C.A.K.).

385 *Bhe & Others v. The Magistrate & Others*, (2004) 2 S.A. 1 (C.C.) at 110 (S. Afr.).

386 *Id.*

387 Kenya Law Reform Commission and Mohammed Muigai Advocates, The Proceedings Report of the Provincial Public Consultative Meetings on the Review and Analysis of the Marriage Bill 1993, the Married Women Property Bill, the Gender Equality Bill 2002 and the Family Protection (Domestic Violence) Bill 2002 Held Between 27th February 2007 and 10th April 2007 (June 2007) (on file with author).





**VIII. PROCEDURAL FAIRNESS  
IN LAND ADJUDICATION  
WILL BETTER PROTECT  
WOMEN'S RIGHTS**

The current land adjudication system frequently denies women's land and property rights because of the under-representation of women on land bodies, the lack of due process rights in disputes tribunals, and insufficient training of local officials who decide land disputes. These deficiencies in the land adjudication process violate women's right to equality, the right to participation in political life, and the right to due process, all of which are guaranteed under international conventions that Kenya has ratified. By instituting more procedural safeguards and gender-sensitive policies, the government can address these gaps and ensure that women's rights to land are protected.

## **A. Gender Balance in Land Bodies Will Better Reflect Community Needs.**

Kenyan women constitute the vast majority of agricultural workers and domestic tillers and farmers, yet they lack both a presence and a voice on land bodies. Greater representation of women on land adjudication bodies will better reflect the needs and realities of local communities.

### **(1) The Under-Representation of Women in Land Bodies Favours Men and Violates the Rights to Equality, Political Representation, and Participation in Social and Political Life**

Kenyan women are vastly under-represented in local institutions that adjudicate land disputes, and therefore their interests are not adequately protected by these bodies. The representation of women on institutions such as county councils and land control boards is especially important in light of the critical role that these bodies play in overseeing land where the majority of Kenyans live and farm.<sup>388</sup> Furthermore, women have a particularly crucial stake in the decisions by these bodies based on their greater contribution to the agricultural workforce in Kenya: "it is a pity that women ... do not even participate in making major decisions pertaining to allocation and use of such property."<sup>389</sup>

In both elected and appointed land bodies, women are either entirely missing or vastly outnumbered by men.<sup>390</sup> The government recognized this problem in its National Gender and Development Policy, in which it reported that women have traditionally been excluded from decision-making processes that concern land.<sup>391</sup> The policy notes that "[d]espite the fact that women account for slightly more than half of the total population and comprise a large voting population, they are still inadequately represented in strategic decision-making institutions such as ... grassroots-based institutions such as Land Boards."<sup>392</sup> For example, women made up only 8.2 percent of county councils in 1997, which represented a gradual increase from 1.7 percent in 1986.<sup>393</sup> As of 2008, the Meru County Council included only five women out of 43 council members,<sup>394</sup> and the Laikipia County Council included only five women out of a total of 36 council members.<sup>395</sup> The skewed gender ratio is not merely the result of women's difficulty in winning elected seats; appointed bodies such as land control boards exhibit the same imbalance. For example, the Land Control Board in Meru included only two women out of nine total members in 2008.<sup>396</sup> Whether in elected bodies such as county council or appointed bodies such as land control boards, women are still woefully under-represented.

Gender discrimination in the constitution of land bodies is widespread in practice despite the fact that the statutes governing these institutions do not exclude women from serving as members. So while the county councils that administer trust land according to the Trust Land Act allow women to run as candidates, there are few women serving as council members.<sup>397</sup> Paul Ndungu, the Chairperson of the Ndungu Commission on Land, explains that in trust land areas, "most of the communities ... are conservative in terms of allowing women in decision making - let alone getting to be

390 Nzioki, *supra* note 24, at 218, 237.

391 NATIONAL GENDER AND DEVELOPMENT POLICY, *supra*, note 57 at 20.

392 *Id.* at 18.

393 *Id.* at 20.

394 Interview with Charles Murithi Marangi, Chairman, Meru Central County Council, in Meru, Kenya (Mar. 31, 2008) (Only 1 woman was elected and 4 women were nominated).

395 Interview with County Clerk, Laikipia County Council, in Nanyuki, Kenya (Mar. 31, 2008).

396 Interview with John Kinyua, Land Control Board member, in Meru, Kenya (Mar. 30, 2008).

397 Interview with Paul Ndungu, Chairperson, Ndungu Commission on Land, in Nairobi, Kenya (Apr. 3, 2008).

388 Trust land is administered by county councils pursuant to the Trust Land Act, Cap 288, and agricultural land is administered by land control boards in accordance with the Land Control Act, Cap 302.

389 KLA, WOMEN, LAND AND PROPERTY RIGHTS, *supra* note 7, at 1.

elected to ... the county council. Their culture is such that women don't deal with land matters and governance issues. That is man's territory."<sup>398</sup>

Other land statutes perpetuate discrimination by relying on elders to adjudicate land matters in a context where elders are rarely, if ever, women.<sup>399</sup> Although the Land Adjudication Act sounds gender-neutral in setting up committees consisting of ten "persons" in the area under adjudication, in practice these "persons" are all male elders.<sup>400</sup> The Land Disputes Tribunal Act also calls for a panel of elders to decide land disputes.<sup>401</sup> Because elders are traditionally male, women are de facto excluded from these processes.<sup>402</sup> The Gender and Development Policy explains this trend by indicating that at the community level, "women were traditionally not represented in decision-making bodies at village or clan councils of elders where all political and judicial decisions were made."<sup>403</sup> It laments that, "[a]lthough women have made an immense contribution to the socio-economic and cultural development of the country, their peripheral position in political participation and decision-making is very much influenced by [the] patriarchal system, which assumed that men represent women."<sup>404</sup> The exclusion of women from these decision-making processes relegates them to the status of second-class citizens who cannot represent themselves in positions of power.

There is a stark disparity between women's contributions to society, especially in the context of agriculture, and their exclusion from the decision-making processes that affect those contributions. Women have a unique perspective in land disputes: they are most likely the ones who take care of the home and the crops.<sup>405</sup> According to

government estimates from 2000, women headed 38 percent of agricultural operations in Kenya.<sup>406</sup> Furthermore, women constitute over 80 percent of the agricultural labour force and provide approximately 60 percent of farm-derived income.<sup>407</sup> Because so many women have extensive expertise in agriculture, they possess the necessary qualifications to serve on land boards that approve transactions in agricultural land. Under the current system, important decisions affecting women's participation in agriculture and food production are made without their participation.<sup>408</sup> Once they are included in the process, they can utilize their expertise to contribute to local development and thereby benefit the society at large.

Under the current system of unfair allocation of seats on land bodies, predominantly male institutions often reinforce patriarchal ideas about women's lack of property rights.<sup>409</sup> Many men hold biased attitudes about women which influence their interpretation of the laws.<sup>410</sup> For example, a government-appointed senior chief in Kajiado district interviewed by Human Rights Watch stated that "[a] woman and the cows are a man's property." He laughed at the notion that a woman could take cattle if there was a divorce, saying that he would "never allow this."<sup>411</sup> A village elder from the Maasai community also expressed disagreement with the idea that women are entitled to a share of the family property, noting that "in Maasai culture, a woman is not supposed to own property."<sup>412</sup> The men who hold such attitudes are the same ones that make decisions in land disputes, leading to blatant discrimination against women. The effects of these biases are especially pronounced in bodies that enforce customary law. Because customary law is unwritten and malleable according to the situation, it is "prone to subjective interpretation."<sup>413</sup> Different people often have different ideas about what customary law is, which results in divergent outcomes depending

398 Interview with Paul Ndungu, Chairperson of the Ndungu Commission on Land, Nairobi, Kenya (Apr. 3, 2008).

399 See Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008) (stating that there are no women elders because custom does not allow it).

400 Nyamu-Musembi, Celestine, Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 132 (Abdullahi A. An-Na'im ed., 2002).

401 The African advisory committees under the Trust Land Rules and the land control boards under the Land Control Act also do not ensure that women are represented in the adjudicatory bodies dealing with land.

402 Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

403 NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 20.

404 See id., at 18.

405 Interview with Paul Ndungu, Chairperson, Ndungu Commission on Land, in Nairobi, Kenya (Apr. 3, 2008).

406 NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 7.

407 HRW, DOUBLE STANDARDS, supra note 6, at 10.

408 NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 7.

409 Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

410 HRW, DOUBLE STANDARDS, supra note 6, at 11.

411 Id. at 34.

412 Id.

413 Id. at 11.



on the particular decision-maker. If women's voices are included in the process, they will be more likely to take women's experiences into account instead of perpetuating patriarchal biases.

The lack of female representation in institutions that deal with land violates fundamental human rights protected in the Constitution and in international treaties that Kenya has ratified. The Constitution guarantees the right to be free from discrimination on the basis of sex in section 82(1), which declares that "no law shall make any provision that is discriminatory either of itself or in its effect."<sup>414</sup> The laws that set up adjudicatory bodies for land violate section 82(1) because they are discriminatory in effect. Since elders are traditionally male,<sup>415</sup> appointing them as the decision-makers in land disputes discriminates against women and thereby violates section 82(1). As a state party to the African Charter and the international human rights conventions, the government is obligated to not only respect women's right to be free from discrimination but to also eliminate all forms of discrimination and create equality for women.<sup>416</sup> By maintaining a discriminatory system of land adjudication in which women are underrepresented, Kenya is violating its obligation to promote equality under these treaties and its own Constitution.

The exclusion of women from decision-making bodies also infringes the right to political representation and the right to participate in social and political life. The ICCPR, CEDAW, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa all protect the rights to political participation and representation.<sup>417</sup> Kenya has an obligation under CEDAW article 7 to "ensure to women, on equal terms with men, the right ... [t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government." The CEDAW Committee raised this issue with the

Kenyan government in 2006, expressing its concern about "the under-representation of women in political and public life, in particular . . . in appointed decision-making bodies."<sup>418</sup> By failing to provide seats for women in institutions that concern land, the government is effectively excluding women from an important and fundamental area of social and political life in Kenya. As women play such an integral role in cultivation of agricultural land, this failure to provide for equal representation is a serious detriment to the country. The CEDAW Committee has stressed that "[w]omen's full participation is essential not only for their empowerment but also for the advancement of society as a whole."<sup>419</sup>

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418 CEDAW Committee, Concluding Comments: Kenya, *supra* note 83, at para. 27.

419 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23, Women in political and public life (16th Sess., 1997), U.N. Doc. A/52/38/Rev.1 at 61 (1997), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> [hereinafter CEDAW, General Recommendation 23].

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414 CONSTITUTION, § 82 (rev. ed. 2001) (1998). The clawback provisions in section 82(4) which allow discrimination in certain areas of law do not apply to political representation, so the right is unqualified in this context.

415 Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

416 See CEDAW, *supra* note 119, art. 2, 3, and 5; ICCPR, *supra* note 119, art. 2, 3, and 26; African Charter *supra* note 119, art. 18(3).

417 See CEDAW, *supra* note 119, art. 7 and 14(2)(f); ICCPR, *supra* note 119, art. 25; Maputo Protocol *supra* note 135, art. 9.

## (2) To Uphold Equal Rights, Kenya Should Require Representation of Women on Land Bodies

International law, regional trends, and Kenya's own government policies all recognize the need for representation of women in land bodies. An international and regional consensus has emerged that women should be included as equal participants in political life. To ensure that women's voices are heard in the decision-making process, the National Assembly must enact statutory requirements for female representatives in these institutions.

The Kenyan Constitution provides support for setting aside seats for women in decision-making bodies. Section 33(3) references the need for female representation in Parliament, stating that the persons filling the appointed seats shall be nominated by the political parties "taking into account the principle of gender equality."<sup>420</sup> A similar guideline could be applied to local land boards to ensure that women are adequately represented. Such a proposal would also find support from section 82(4) of the Constitution, which allows affirmative action measures that are "reasonably justifiable in a democratic society."<sup>421</sup> The government identified the need for implementing legislation for this provision in its report to CEDAW in 2006, noting that "[a]lthough section 82(4(d)) of the Constitution provides for ... affirmative measures for groups that have suffered a recognised form of discrimination such as sex based exclusion, there is no enabling legislation to ensure the enforcement of section 82(4(d))."<sup>422</sup> The Constitution also authorizes such measures in section 82(5), under which certain classifications may be applied to a person who is "appointed to an office in the public service, ... in the service of a local government authority or in a body corporate established by any law for public purposes."<sup>423</sup> According to these provisions, the government can enact sex-specific requirements for appointments to local government authorities such as land bodies.

International law also supports the use of affirmative measures to include women in government institutions. In accordance with ICCPR article 25, the Human Rights Committee has declared that states must take "effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate affirmative action."<sup>424</sup> In addition, CEDAW article 4 provides for temporary special measures "aimed at accelerating de facto equality between men and women,"<sup>425</sup> which applies to achieving women's equal participation in politics.<sup>426</sup> Furthermore, the government has announced its commitment to international norms in the Beijing Platform for Action,<sup>427</sup> which advocates for equal rights to political representation for women. The Beijing Platform calls on governments to set specific targets and implement measures to "substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions," and to encourage political parties to integrate women in elective and non-elective public positions "in the same proportion and at the same levels as men."<sup>428</sup> The international consensus reflected in the Beijing Platform should serve as a guiding principle for the Kenyan government to fulfil its commitments laid out in the national Gender and Development Policy.

Several of Kenya's neighbours and other sub-Saharan African countries have passed statutes to ensure female representation on land boards. Uganda's Land Act requires that "[a]t least one-third of the" at least five members of a district land board "shall be women,"<sup>429</sup> and "at least one of the" five members of a land committee "shall be a woman."<sup>430</sup> Similarly, Tanzania's Village Land Act requires that village land councils consisting of between five and seven members must include at least two women.<sup>431</sup> In

420 CONSTITUTION, § 33(3) (rev. ed. 2001) (1998).

421 CONSTITUTION, § 82(4(d)) (rev. ed. 2001) (1998).

422 CEDAW Committee, Concluding Comments: Kenya, supra note 83, para. 88.

423 CONSTITUTION, § 82(5) (rev. ed. 2001) (1998).

424 HRC, General Comment No. 28, supra note 122, para. 29.

425 CEDAW, supra note 119, art. 4(1).

426 CEDAW, General Recommendation 23, supra note 419, para. 15.

427 NATIONAL GENDER AND DEVELOPMENT POLICY, supra note 57, at 2.

428 The United Nations Fourth World Conference on Women, Sept. 4-15, 1995, Beijing Platform for Action, para. 190, U.N. Doc. A/Conf.177/20, available at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm>.

429 The Land Act, (1998) Cap. 227 § 57(3). (Uganda.)

430 The Land Act, (1998) Cap. 227 § 65(2). (Uganda.)

431 The Village Land Act, (1999) Cap. 114 § 60(2). (Tanzania).

addition, village adjudication committees consisting of between six and nine members must include at least three women.<sup>432</sup> Namibia has also enacted a requirement for four women to be appointed to communal land boards.<sup>433</sup> Provisions for female representation in the region demonstrate that African customs are not an impediment to ensuring women's equality.

The Kenyan government has made laudable efforts to promote the representation of women, but further action is needed to realize these aspirations in enforceable legal provisions. President Mwai Kibaki's announcement that women should constitute 30 percent of all government posts<sup>434</sup> was a progressive step in the right direction, but it has not been fully implemented.<sup>435</sup> The directive lacks the force of law and therefore must be enacted in a statute to ensure compliance. The Kenyan government has explicitly recognized the need for increased representation of women in its National Gender and Development Policy and the Draft National Land Policy. The National Gender and Development Policy declares that the government is "committed to promoting participation of women in leadership positions"<sup>436</sup> and that its policy objectives are to "strengthen and promote increased and equitable participation by Kenyan women in the electoral and decision-making process at all levels" and to "[d]evelop a monitoring framework to measure the level of participation of women in the political and decision making process."<sup>437</sup> Kenya's National Land Policy reflects the need for increased female representation in the specific context of land, declaring that "[w]omen are not sufficiently represented in institutions that deal with land."<sup>438</sup> To solve this problem, the policy provides that the Government shall "[e]nsure proportionate representation of women in institutions dealing with land at all levels."<sup>439</sup>

Both the Kenyan government and the population support the inclusion of women in decision-making bodies. During public consultations carried out by the Kenya Law Reform Commission in 2007, there was unanimous agreement on the need for broader legislation on affirmative action and 85 percent of respondents supported equal representation of women. In interviews conducted by the International Women's Human Rights Clinic and FIDA Kenya in March and April 2008, 92 percent of the 26 respondents questioned on the issue supported a requirement of women's representation on land bodies.<sup>440</sup> The National Gender and Development Policy also supports inclusion of women, stating that "the government fully recognises that women's increased participation in decision-making positions in the Government, NGOs, Private Sector and Legislative Bodies will help to re-define priorities regarding gender-specific concerns, values and experiences."<sup>441</sup> Member of Parliament, Gitobu Imanyara, notes that progressive reforms will be futile without increased female representation: "[U]ntil we change the membership of these boards to bring in equality in terms of composition between men and women, you may have the best provisions on the book, but when it comes to application they will be breached."<sup>442</sup>

A statutory requirement for female representation on land bodies would build on the government's work by integrating its Gender and Equality Principles into the land adjudication process. The inclusion of women in institutions that adjudicate land disputes will ameliorate the effects of traditional patriarchal biases by ensuring that women's voices are heard.<sup>443</sup> The CEDAW Committee has noted that if women's participation reaches 30 to 35 percent, research shows that "there is a real impact on political style and the content of decisions, and political life is revitalized."<sup>444</sup> By guaranteeing women a seat at the table when land decisions are made, Kenya can ensure that the interests of all citizens are represented in the political process.

432 The Village Land Act, (1999) Cap. 114 § 53(2). (Tanzania).

433 Communal Land Reform Act, (2002), § 4(1)(d). (Namibia).

434 Kibaki Orders Affirmative Action Campaign, Independent Online, Oct. 20, 2006, [http://www.iol.co.za/index.php?click\\_id=68&art\\_id=qw1161357484954B25&set\\_id=](http://www.iol.co.za/index.php?click_id=68&art_id=qw1161357484954B25&set_id=).

435 Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008).

436 NATIONAL GENDER AND DEVELOPMENT POLICY, *supra* note 57, at 18.

437 *Id.*, at 22.

438 NATIONAL LAND POLICY, *supra* note 10, § 3.6.10.3, para. 223.

439 *Id.* at § 3.6.10.3, para. 225(h).

440 IWHRC & FIDA-Kenya, Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya (Mar.-Apr. 2008) (on file with author).

441 NATIONAL GENDER AND DEVELOPMENT POLICY, *supra* note 57, at 21.

442 Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008).

443 See Interview with Nancy Abisai, Project Officer, Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

444 CEDAW, General Recommendation 23, *supra* note 419, para. 16.

## B. Land Disputes Bodies Prevent Women From Presenting Effective Claims

Existing laws governing dispute resolution of land disputes contain several provisions that, while gender neutral in their language, have adverse impact on women's rights. In particular, the land dispute laws prohibit the use of advocates in proceedings and preclude an appeal of decisions based on customary law.

### (1) Land Disputes Procedures Violate Women's Right to Due Process and Equality Before the Law

By prohibiting appeals of customary law decisions to the courts and by denying the right to legal representation, the Land Disputes Tribunals Act and the Land Disputes Tribunals (Forms and Procedure) Rules violate the rights under national and international law to be free from discrimination, the right to equality before courts and tribunals, and the right to an effective remedy.

First, the restrictions on appeal and on advocate representation violate the right to equality and the right to be free from discrimination based on sex guaranteed in the Kenyan Constitution and in international law. Section 70(a) of the Constitution guarantees that "[e]very person has the right to protection of the law," and section 82 of the Constitution protects Kenyans from "any provision that is discriminatory either of itself or in its effect [emphasis added]." Moreover, Kenya has a duty under international law to ensure equal protection of the law and to eliminate all forms of discrimination against women.

The restrictions on appeal and on legal representation in land disputes tribunals violate the equality provisions under national and international law because of their discriminatory effect. While the provisions are facially neutral in applying the same rules to men and women, the provisions disadvantage women because they insulate

customary law, which grants men more land rights,<sup>445</sup> from judicial review. In addition, women cannot present effective claims without advocate representation because they are usually unfamiliar with land laws.<sup>446</sup> Women have traditionally been excluded from decision-making processes regarding land; men hold the vast majority of the land titles and the vast majority of the seats on land boards. Women have often never heard of the property laws; as a result, they do not know their rights to land or the procedures by which they could protect their property.<sup>447</sup> Women's lack of awareness of their legal rights disadvantages them in relation to men, rendering the dearth of procedural safeguards even more harmful to them. Women, as generally less educated and less literate than men, may not understand the complex land laws or the Land Disputes Tribunal system<sup>448</sup> and may not be able to present their claims effectively without an advocate who understands the law. Furthermore, men already have a presumption in their favour when it comes to property disputes because they often hold the title to the land and are presumed to be the owners of matrimonial property. As a result, the lack of an advocate does not present the same challenges to men as it does to women who have greater difficulty proving that they have rights to the land. Thus, these provisions violate the right to equality in the Kenyan Constitution, the ICCPR, CEDAW, and the African Charter.<sup>449</sup> These rules also deny the equal protection of the law guaranteed in section 70(a) of the Kenyan Constitution and international human rights treaties because such rules perpetuate systemic biases against women in civil cases under the jurisdiction of the Land Disputes Tribunals.

The restrictions on appeal and on advocate representation also violate the right to equality before the courts. The ICCPR guarantees the right to equality before the

445 See HRW, DOUBLE STANDARDS, supra note 6, at 2.

446 See KLA, CRITICAL GENDER ISSUES, supra note 50, at 10-11.

447 See Interview with Anthony Kamaru, Advocate, in Nairobi, Kenya (Apr. 4, 2008); Interview with rural male farmer, in Nanyuki, Kenya (Mar. 29, 2008).

448 See KLA, CRITICAL GENDER ISSUES, supra note 50, at 10-11.

449 See ICCPR, supra note 119, art. 26 ("[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); CEDAW, supra note 119, art. 15(1) ("States Parties shall accord to women equality with men before the law") and art. 2(c) (States parties shall undertake to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination"); African Charter, supra note 119, art. 18(3) and 3(1) ("[e]very individual shall be equal before the law").

courts and tribunals.<sup>450</sup> CEDAW requires states parties to afford women the same opportunities to exercise their legal capacity, noting in particular that they shall treat women equally “in all stages of procedure in courts and tribunals.”<sup>451</sup> Women do not face equal treatment in the Land Disputes Tribunals because the tribunals insulate customary law, which grant men more land rights,<sup>452</sup> from judicial review. Furthermore, women cannot present effective claims without advocate representation because they tend to be less familiar with land laws.<sup>453</sup>

Second, the restrictions on appeal and on legal representation deny women the right to an effective remedy for violations of their property rights. A woman may be involved in a case before a Land Disputes Tribunal because her husband, ex-husband, relatives, or in-laws have deprived her of her fundamental right to property or to equality and freedom from sex-based discrimination. Yet if the woman cannot bring an advocate to represent her, she will be less likely to prevail on her claim and thus less likely to have an effective remedy for the violation of her fundamental right. The ability to appeal these decisions is especially important in the context of tribunals which are made up of mostly men and which often reflect biased attitudes about women.<sup>454</sup> Without an appeal, women have no recourse to challenge discriminatory decisions that deny their rights to the land. Furthermore, by deeming customary law a question of fact that cannot be appealed to the Kenyan courts, the Land Disputes Tribunals Act prevents a woman from having access to judicial remedies and exercising a right to appeal.

As a party to the ICCPR, Kenya must “ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy”<sup>455</sup> and “ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority

provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”<sup>456</sup> Furthermore, the African Charter on Human and Peoples’ Rights guarantees an individual “[t]he right to an appeal to competent national organs against acts of violating his fundamental rights.”<sup>457</sup> Under the ICCPR, CEDAW, and the African Charter, Kenya has an obligation to pass legislation that would guarantee due process rights and remove the discrimination against women in the Land Disputes Tribunals Act and the Land Disputes Tribunals (Forms and Procedure) Rules.

## **(2) Kenya Must Amend the Land Disputes Tribunals Procedures to Protect Women’s Rights**

Reform of laws governing land disputes would address the violations of domestic and international law caused by the current procedures. The Land Disputes Tribunal Act should provide that customary law is deemed to be a question of law and that all questions of law under the Land Disputes Tribunal Act may be appealed. In addition, the Land Disputes Tribunals Rules should entitle any party to appear or be represented by an advocate or another person of the party’s choice in any proceedings before a Land Disputes Tribunal or Appeals Committee. Ensuring judicial review of Tribunal decisions and the possibility of advocate representation would mitigate the discriminatory effect of the Land Disputes Tribunals procedures, promote equality before the courts and tribunals, and the right to an effective remedy.

Reforms of the current procedures will improve the adjudication of land disputes by making the proceedings more effective and efficient. Representation by advocates will help the parties understand the laws and ensure that their claims are relevant to the matter at hand. Moreover, the current procedures violate fundamental human rights, rendering any proffered rationalizations insufficient to justify their continued use. Administrative convenience is not an adequate justification for sex discrimination,

450 ICCPR, supra note 119, art. 14(1).

451 CEDAW, supra note 119, art. 15(2).

452 See HRW, DOUBLE STANDARDS, supra note 6, at 2.

453 See id. at 41.

454 See id. at 33-41.

455 ICCPR, supra note 119, art. 2(3)(a).

456 Id., art. 2(3)(b).

457 African Charter supra note 119, art. 7(1(a)).

as shown by the U.S. Supreme Court in its decision in *Reed v. Reed*.<sup>458</sup> The Court ruled that an automatic preference for males as administrators of estates was unconstitutional under the equal protection clause despite the justification of administrative convenience because it discriminated against women. In *Airey v. Ireland*, the European Court of Human Rights held that a woman was denied the rights to a hearing and to an effective remedy under the European Convention for the Protection of Human Rights and Fundamental Freedoms when she could not afford legal representation before a court to obtain a judicial separation.<sup>459</sup> Similarly, by prohibiting legal representation before the Land Disputes Tribunals and Appeals Committees, the Land Disputes Tribunals Act denies women the rights to a hearing and to an effective legal remedy in land disputes. Kenya's denial of procedural safeguards cannot be justified on administrative grounds when it violates due process rights and has a discriminatory impact on women.

The prohibition on advocate representation under the Land Disputes Tribunals (Forms and Procedure) Rules differs from provisions in other Kenyan statutes regarding other tribunals. For example, an appellant is entitled to an advocate before the Agricultural Appeals Tribunal.<sup>460</sup> An appellant is also entitled to an advocate before the Income Tax Tribunal.<sup>461</sup> According to a staff member of the Law Society of Kenya, it is standard for national tribunal to permit advocate representation: "Every national tribunal I know of permits representation."<sup>462</sup> Thus, adopting this amendment would render the Land Disputes Tribunals (Forms and Procedure) Rules consistent with other tribunal rules under Kenyan law.

The right to an effective remedy under international law would require that land decisions involving customary law should be subject to appeal.<sup>463</sup> Otherwise, customary law findings are insulated from judicial review and discriminatory decisions

made by biased tribunal members would not receive outside scrutiny. The Land Disputes Tribunals Act should reflect the fact that customary law is treated as law in the Kenyan legal system. Section 3(2) of the Judicature Act states that Kenyan courts:

**shall be guided by African customary law 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, and shall decide all such cases according to substantial justice.**<sup>464</sup>

Kenyan courts are competent to hear customary law cases and often do.<sup>465</sup> Kenya and other countries have already acknowledged the importance of addressing land disputes in the courts. Magistrate courts "have jurisdiction to settle disputes and make declarations" under the Land (Group Representatives) Act.<sup>466</sup> In the Draft National Land Policy, the Kenyan Government committed to "[e]stablish an independent, accountable and democratic system backed by law to adjudicate land disputes at all levels."<sup>467</sup> The Government also plans to establish a land court as a division of the High Court to deal exclusively with land issues in the country.<sup>468</sup> A Land Division has already been established within the Nairobi High Court, but such divisions are yet to be rolled out throughout the country. Ghana reformed its stool lands disputes settlement process to send such cases to the courts: "The High Court shall have original jurisdiction to hear and determine any dispute arising from, in respect of or related to a stool land boundary."<sup>469</sup>

Furthermore, because of the malleability of customary law and variations in interpretation, judicial review is especially important to ensure that decisions are fair.

458 See *Reed v. Reed*, 404 U.S. 71 (1971).

459 See 2 Eur. H.R. Rep. 305 para. 11, 19–28 (1979).

460 See The Agricultural Appeals Tribunal Rules, (2004) Cap. 318 § 3(1). (Kenya).

461 See The Income Tax (Tribunal) Rules, (2004) Cap. 470 § 2. (Kenya).

462 Interview with staff member, the Law Society of Kenya, in Nairobi, Kenya (Apr. 4, 2008).

463 See African Charter, supra note 119, art. 7; ICCPR, supra note 77, art. 2(3).

464 The Judicature Act, (2004) Cap. 8 § 3(2). (Kenya).

465 See, e.g., *Otieno v. Ougo*, (1987) K.L.R. 371 (H.C.K.), aff'd by (1987) K.L.R. 407 (C.A.K.) (holding that Luo customary law dictated that the head of the household determines where a family member is buried and that that customary law was not repugnant to justice or morality or inconsistent with any written law).

466 Land (Group Representatives) Act, (2004) Cap. 287 § 10(2). (Kenya).

467 NATIONAL LAND POLICY, supra note 10, § 3.5.9, para. 170(a).

468 Id. at § 4.3.5, para. 259 (2007).

469 Stool Lands Boundaries Settlement (Repeal) Act § 1, No. 587 (2000) (Ghana).

The evolving nature of customary law makes it impossible to consider customary law as a question of fact. When decisions based on customary law are not subject to appeal, there is no opportunity to determine whether the decision is repugnant to justice or morality under the Judicature Act. The government must uphold its own commitment to prevent the application of customary law where it is repugnant to justice or morality by guaranteeing that customary law is a question of law subject to appeal.

### **C. Implementation of Land Laws Require Mandatory Education and Training**

One of the stumbling blocks to the progress of women's land and property rights in Kenya is the lack of knowledge about the land statutes among local decision-makers and the general population. According to officials at USAID who carried out an assessment of land tenure in rural areas, close to 90 percent of the poor are not aware of formal laws.<sup>470</sup> Knowledge of the land laws is particularly important in rural areas, where the majority of people affected by those laws reside.<sup>471</sup> An advocate interviewed in Nanyuki noted the ineffectiveness of laws that remain unknown to large swaths of the population: "The law is there. People don't know it."<sup>472</sup> In situations where statutes provide more protections than customary law, this lack of knowledge deprives women of an opportunity to assert their rights. In addition, local officials who adjudicate land disputes often do not have knowledge of or access to the laws. According to an Assistant Chief in Meru, the inaccessibility of the land statutes leads to a reliance on custom instead.<sup>473</sup> Where customary law denies women equal rights to land, this represents a serious violation of their rights, albeit a preventable one: local leaders can be trained to implement the land statutes instead of falling back on custom.

To address the gap between written statutes and practical implementation of legal protections, the government should undertake a training initiative for local officials who adjudicate land matters and an awareness campaign for the general population. The Institute of Administration

is well-positioned to undertake such a training initiative based on its programs targeting civil service officers.<sup>474</sup> Beneficiaries of the training programs should include chiefs and elders in addition to members of bodies that deal with land such as county councils, land control boards, and land disputes tribunals. Once local leaders are aware of the land laws, they can hold trainings for the general public to educate them on the rights and obligations contained in the statutes.

Such a campaign should be carried out in conjunction with statutory reforms guaranteeing women's equal rights to land and property. Thus it would be a coordinated effort to enshrine protections in the formal law while educating local decision-makers and the population at large on the content and purpose of those legal protections. By providing for training of officials that deal with land rights and adjudication of disputes, chiefs and elders will be more knowledgeable about the legal protections afforded to women and thus will be less likely to make decisions that discriminate on the basis of sex. Such a provision would ensure that protections of women's rights are promulgated and implemented throughout the country, empowering women to assert their rights to land instead of being left homeless without any legal recourse.

470 Interview with Beatrice Wamalwa, Development Assistance Assistant, USAID, in Nairobi, Kenya (Apr. 2, 2008).

471 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 1.

472 Interview with Gilbert Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).

473 Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008).

474 Telephone interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (May 7, 2008).





**IX. STRONGER WOMEN'S  
PROPERTY RIGHTS WILL  
EMPOWER AND BENEFIT THE NATION  
AS A WHOLE**

Policymakers have both an obligation and an incentive to guarantee women's rights to property and land, because when those rights are curtailed, so are the opportunities for Kenya's economic growth. Strengthening women's legal rights to property is correlated with economic benefits for the nation. A 2005 International Monetary Fund (IMF) Assessment of Poverty Reduction in Kenya found that "women have unequal access to opportunities and assets" and stressed that "considerable microeconomic evidence, and growing macroeconomic evidence, suggests that gender inequality directly limits growth, output, and productivity in Kenya, notably in agriculture, where women provide about 70 percent of the labor requirements."<sup>475</sup> Country-wide research by the Kenya Land Alliance has concluded that "Gender discrimination is one of the factors that constrain sustainable use of land in Kenya."<sup>476</sup>

Ensuring the economic independence of women is an integral part of the fight against poverty in Kenya. A World Bank report concluded that "[g]ender inequality plays a significant role in accounting for Africa's poor growth and poverty reduction performance."<sup>477</sup> The IMF study stressed that "gender inequality directly limits growth, output and productivity in Kenya."<sup>478</sup>

The growing number of households headed by women, who are often dispossessed or denied secure access to land, traps families in inter-generational poverty. Already in 2000, the National Gender and Development Policy cautioned that

**Kenya has witnessed a rising trend in the number of female-headed households. Male migration, single motherhood, widowhood, divorce and separation all combine to make up a national average of 25 percent of female headed households. Female headed households in both rural**

**and urban areas have been identified as being among the poorest of the poor. If this category is not directly targeted by planners and policy makers in terms of distribution of national resources, it means that 25 percent of Kenya's households will continue to live below the poverty line.**<sup>479</sup>

Because women are often the primary caretakers of children and family members, their exclusion from property and land control affects entire households and future generations. For Frederick Ochieng of UNIFEM, the link between economic growth and women is clear: "If women were given the same opportunities like men in terms of productivity, I think the economy of this country would have doubled because we know [of so many] places where women are the producers."<sup>480</sup>

Although women in Kenya are the "main agricultural producers and food providers," comprising "80 to 90 percent of the labour force in subsistence production, and over 70 percent in cash production," they lack have access to land ownership.<sup>481</sup> Because women either lack ownership or control over the land or face the risk of losing it if their fathers, husbands, or their in-laws evict them, they may lack incentive to further develop or invest in greater agricultural productivity.<sup>482</sup> The Kenyan government has recognized that depriving half its population of equal rights to property and land has severely curtailed the nation's development. In its report to the CEDAW Committee, the government admits that "women are relegated to small-scale subsistence farming with little, if any, surplus for sale."<sup>483</sup> Its report to the Economic, Social, and Cultural Committee, laments that "[t]he growth of rural economy has been faced by a number of constraints among them land tenure and access to land by women in local communities."<sup>484</sup> Even when women have access to work the land, they seldom enjoy profits from the crops. The general counsel for

475 International Monetary Fund, Kenya: Joint Staff Assessment of the Poverty Reduction Strategy Paper, IMF Country Report No. 05/10, para. 35 (2005).

476 KLA, WOMEN, LAND AND PROPERTY RIGHTS, supra note 7, at 1.

477 World Economic Forum, The Africa Competitiveness Report 2007, at 70, available at <http://www.weforum.org/en/initiatives/gcp/Africa%20Competitiveness%20Report/2007/index.htm> (follow "Gender, Entrepreneurship and Competitiveness in Africa" hyperlink).

478 International Monetary Fund, Kenya: Joint Staff Assessment of the Poverty Reduction Strategy Paper, IMF Country Report No. 05/10 (2005).

479 National Gender and Development Policy, supra note 57.

480 Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

481 UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, supra note 5, at 12.

482 Women and Autonomy in Kenya: Policy and Legal Framework, Kivutha Kibwana ed. 35 (2006).

483 Kenya's Report to the CEDAW, supra note 7, at para. 148.

484 Kenya, Initial report submitted by states parties to the Committee on Economic, Social and Cultural Right (2006), para. 129, U.N.Doc/E/C.12/KEN/1 (Aug. 21, 2007) (emphasis added).

a bank in Nairobi noted this grim reality: "Women do all the backbreaking work, but it is the men who get the funds from the cash crops."<sup>485</sup>

The lack of access to and control of land also affects women's ability to get credit, because it is often conditioned upon a land title for collateral, which few women hold.<sup>486</sup> The general counsel of a Nairobi bank emphasized the connection between women's access to credit and Kenya's economy: "Since lending to men is more common, perhaps the more you increase lending to women, the more you see an improvement in the economy."<sup>487</sup> He also pointed out that where women had access to credit, there had been an extreme improvement in the lives of their children.

Strengthening women's property rights will strengthen Kenyan society and benefit the country economically. The World Bank, for example, estimated that protecting women's property rights would increase by 20 percent the overall agricultural output of Kenya.<sup>488</sup> A recent study by the International Finance Corporation and the World Bank concluded that "eliminating gender-based inequalities...in Kenya could result in a one-off increase in as much as 4.3 percentage points in GDP growth, and a sustained year-on-year increase of 2.0 to 3.5 percentage points of GDP growth."<sup>489</sup> Thus, apart from the critical importance of respect for human rights and the inevitable social good of protecting the rights of all Kenyans, equal land and property rights for women will benefit the human and economic development of Kenya.

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485 Interview with General Counsel for Bank, in Nairobi, Kenya (Apr. 2, 2008).

486 KENYA HUMAN RIGHT DEVELOPMENT REPORT 7 (1999) available at [http://www.ke.undp.org/Kenya\\_Human\\_Development\\_Report\\_1999.pdf](http://www.ke.undp.org/Kenya_Human_Development_Report_1999.pdf); see also *infra* Part IV.A.

487 Interview with General Counsel for Bank, in Nairobi, Kenya (Apr. 2, 2008).

488 The World Bank, *Engendering Development Through Gender Equality in Rights, Resources and Voice*, at 11 (2001) available at [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/03/01/---94946\\_01020805393496/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/03/01/---94946_01020805393496/Rendered/PDF/multi_page.pdf).

489 INTERNATIONAL FINANCE CORPORATION & THE WORLD BANK, *VOICES OF WOMEN ENTREPRENEURS IN KENYA 1* (2007), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/rep\\_GEMTools\\_VoicesKenya/\\$FILE/Voices+of+Women+Entrepreneurs+in+Kenya.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/rep_GEMTools_VoicesKenya/$FILE/Voices+of+Women+Entrepreneurs+in+Kenya.pdf).





**X. KENYA'S LEGISLATURE  
SHOULD TAKE IMMEDIATE ACTION**

In summary, in order to fulfill domestic and international obligations to promote women's rights to land, property, housing, and credit and to promote a brighter economic future for the country, the Kenyan legislature should undertake the following initiatives.

First, the government should:

- Pass laws that require spouses to register land and property jointly;
- Enact incentives, such as tax credits and subsidies, for joint registration;
- Ensure the availability of alternative forms of collateral to land and as a corrective action, lengthen payment periods for loans extended to women; and
- Enshrine in law and titles women's occupancy and secondary (or derivative) rights to land.

In the context of marriage and divorce, Kenya should:

- Enact a requirement for mutual spousal consent to transactions involving matrimonial property; and
- Pass laws ensuring a presumption of equal division of matrimonial property upon divorce, accounting for indirect and non-financial contribution.

To ensure that women's voices are heard in the decision-making process, Kenya should:

- Provide for female representation in institutions that adjudicate land disputes; and
- Amend procedures for land disputes to guarantee the right to an advocate and the right to appeal decisions based on customary law.

## LAND EQUITY ACT (ANNOTATED PROPOSAL)



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## Preamble

AN ACT of Parliament to make provision for the equal rights to land and property of women and men; to give effect to the principles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and People's Rights (African Charter) and for connected purposes

**Kenya's Parliament must enact provisions to ensure that women and men have equal rights to land and property to fulfil its obligations under international law, particularly under CEDAW, the ICESCR, and the African Charter, all of which Kenya has ratified without relevant reservations. See Convention on the Elimination of All Forms of Discrimination Against Women, art. 15, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981, ratified by Kenya Mar. 9, 1984, available at <http://www2.ohchr.org/english/law/cedaw.htm> [hereinafter CEDAW], ratification status available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>; International Covenant on Civil and Political Rights, art. 16, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by Kenya May 1, 1972, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR], ratification status available at <http://www2.ohchr.org/english/bodies/ratification/4.htm>; International Covenant on Economic, Social and Cultural Rights, art. 3, 11, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, ratified by Kenya May 1, 1972, available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR], ratification status**

**available at <http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications>; African Charter on Human and Peoples' Rights, art. 14, OAU Doc. CAB/LEG/67/3 rev. 5 (1981), 1520 U.N.T.S. 217, entered into force Oct. 21, 1986, ratified by Kenya Jan. 23, 1992, available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) [hereinafter African Charter], ratification status available at [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf).**

The government recognizes the need for domestication of such treaties: the Draft National Land Policy notes that "international conventions on women's rights relevant to women's land rights ratified by the Government of Kenya have not been translated into policies and laws." MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 3.6.10.3, para. 224 (2007). This preambulatory language mirrors the language of the Children Act domesticating international and regional conventions: "AN ACT of Parliament to make provision for . . . protection of children; . . . to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes." The Children Act, No. 8 (2001).

## WHEREAS

- (1) Kenyan women lack equal land and property rights because of discriminatory customs and stereotypes purporting that women cannot own or control land.

**In the customary law of many communities, women do not have the right to own and control land. Instead, women are treated as property owned by their husbands. Interview with County Clerk, Laikipia County Council, in Nanyuki, Kenya (Mar. 31, 2008). These customary**

**laws are enshrined in the land laws of Kenya for adjudication of land rights, thereby perpetuating discrimination against women.**

- (2) Despite the fact that women contribute 80% (eighty percent) of the agricultural labour in the country, they own only 6% (six percent) of the land;

**The Draft National Land Policy recognizes that “few women have land registered in their names. MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 3.6.10.3, para. 224 (2007). Women hold only 1% of registered land titles in their names and only 5-6% hold titles in joint names. KENYA LAND ALLIANCE POLICY BRIEF: WOMEN, LAND AND PROPERTY RIGHTS AND THE LAND REFORMS IN KENYA 1 (2006), <http://www.kenyalandalliance.or.ke/women%20policy%20brief.pdf> [hereinafter KLA, POLICY BRIEF].**

- (3) The land laws of Kenya fail to protect women's rights to land and property at all stages of their lives;

**Women lack security of land tenure throughout their lives: as daughters they have no legally protected right of occupancy on family land, as wives they have no legally protected right to refuse consent to land transactions, and as widows they have no legally protected absolute rights to inheritance. The Land Control Act fails to require spousal consent for transactions of agricultural land, rendering wives defenceless against unauthorized sale of their land. Furthermore, the only law applied to division of property in divorce is a 127-year-old British law that does not specify women's rights to matrimonial property.**

- (4) Women's economic dependence on men for their livelihoods and their housing renders them more susceptible to domestic violence and dispossession;

**Because of women's unequal access and control over resources such as farmland, they must rely on men for security of tenure. Often women stay in violent marriages because they do not own their own property, so they have nowhere to go and nothing to take with them if they leave. Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008). Many cases of domestic violence are tied to property, and women who do not surrender their salaries to their husbands are beaten. Interview with Judy Mbugua, head of PACWA and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).**

- (5) The deadly progression of the HIV/AIDS pandemic and its toll on individuals, families, and society make it ever more urgent for the Parliament to protect women's rights to property.

**According to the Draft National Land Policy, the HIV pandemic “underscores an urgent need to reform cultural and legal practices that discriminate against women and children with respect to access and ownership of land.” MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 3.6.10.1, para. 217 (2007). Women are at high risk of exposure to HIV when they are dispossessed by husbands' sale of their land and end up in slums where they are forced to resort to survival sex to support themselves. Interview with Ruben Mwenda Murugo, Land Policy Coordinator, Ministry of Lands, in Nairobi, Kenya (Apr. 2, 2008); UNAIDS, WOMEN AND AIDS: AN EXTRACT FROM THE AIDS EPIDEMIC UPDATE 94 (2004). In addition, women's access to HIV medications may be threatened when they are displaced from their residences. A steady supply of nutrition is essential for people living with HIV/AIDS, so dispossession from their homes and farms further threatens women's health.**

- (6) In the current period of reconciliation from the post-election violence, land reforms are urgently needed to address the long-standing resentments regarding land allocation in Kenya, and it is imperative that half of the population's rights are recognized and protected as part of this process;

**The majority of internally displaced persons are women and children, and their property rights will be crucial to resettlement efforts. See Women's Memorandum to the Mediation Team, KENYAN WOMEN'S CONSULTATION GROUP ON THE CURRENT CRISIS IN KENYA, Jan. 29, 2008, available at <http://allafrica.com/stories/200801310664.html>. In addition, women who have lost husbands and sons to the violence are at risk of losing land that was never registered in their names.**

- (7) Kenya has an obligation under the Constitution to uphold the fundamental rights and freedoms of all persons in Kenya without distinction based on sex;

**This provision is based on the unqualified guarantee of fundamental rights and freedoms regardless of sex in section 70 of the Constitution and the prohibition of discrimination on the basis of sex in Section 82. Section 70's protection of fundamental rights extends to the right to "life, liberty, security of the person, and the protection of the law" in addition to protection for the privacy of the home and other property and "protection from deprivation of property without compensation." Furthermore, Section 82 prohibits discrimination on the basis of sex. According to these provisions, Kenyan women are entitled to the same protections of the law as men.**

- (8) Kenya has an obligations under international treaties that it has ratified, including the ICESCR, ICCPR, the African Charter, and CEDAW, to guarantee the equality of women and to adopt legislation to eliminate discrimination against women;

**Article 26 of the ICCPR and article 3 of the African Charter ensure that every individual shall be "equal before the law" and that every**

**individual shall be entitled to "equal protection of the law." Kenya also has an obligation to "ensure the elimination of every discrimination against women" under article 18(3) of the African Charter. By ratifying CEDAW, Kenya has condemned "discrimination against women in all its forms" and agreed to pursue "by all appropriate means and without delay a policy of eliminating discrimination against women," including by adopting "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" (article 2).**

- (9) Kenya has an obligation under international law to ensure women's rights to property and to adequate housing;

**Kenya has a duty under article 14 of the African Charter to protect the right to property ("the right to property shall be guaranteed"). Kenya is also committed to ensure the right to adequate housing under article 11(1) of the ICESCR ("the right of everyone to an adequate standard of living ... including adequate food, clothing and housing"), and article 14(2)(h) of CEDAW (the right "to enjoy adequate living conditions, particularly in relation to housing").**

- (10) Kenya must reform land body processes that currently deny women's rights to due process and equality guaranteed by the ICCPR and the African Charter;

**Kenya must change the land adjudication procedures that disadvantage women to provide them with the right to an effective remedy under article 2(3) of the ICCPR ("any person whose rights or freedoms ... are violated shall have an effective remedy"), the right to appeal violations of their rights under article 7 of the African Charter, and the right to equality before the courts and tribunals under article**

14(1) of the ICCPR (“All persons shall be equal before the courts and tribunals”).

NOW THEREFORE BE IT ENACTED by the Parliament of Kenya as follows:

## PART I - PRELIMINARY

### 1. Short title

This Act may be cited as the Land Equality Act.

### 2. Interpretation

In this Act, unless context otherwise requires

**adjudication** means the process under the Land Adjudication Act, Cap. 284, by which a recording officer and adjudication committee determine customary rights to land and the recording officer registers those rights;

**agriculture** has the same meaning as under section 2(1) of the Agriculture Act, with the additional inclusion of subsistence farming;

**consolidation** means the process under the Land Consolidation Act, Cap. 283, by which an Adjudication Committee or of determining customary rights to land and registering those rights;

**discriminatory** has the same meaning as under section 82(3) of the Constitution;

**joint proprietor** has the same meaning as under section 102(1) of the Registered Land Act, Cap. 300;

**proprietor** means a proprietor under the Registration of Titles Act, Cap. 281, or the Registered Land Act, Cap. 300;

**Registrar** means a registrar under the Registration of Titles Act, Cap. 281, or the Registered Land Act, Cap. 300;

**These definitions conform to the definitions under Kenya’s various land acts. Under the adjudication process of the Land Adjudication Act, (2004) Cap. 284, a recording officer and the adjudication committee determine the claims to the land under customary law. §§ 19, 20. The recording officer designates any person who “has, under recognized customary law, exercised rights in or over land which**

should be recognized as ownership” as the owner of that land. Id. § 23(2)(a). The land is then registered accordingly. Id. § 28.

Under the consolidation process of the Land Consolidation Act, (2004) Cap. 283, an Adjudication Committee consisting of “persons resident in” the area is appointed and adjudicates and determines “in accordance with African customary law the claim of any individual person to any right or interest in any land” within the area. §§ 9(1), 11(1). If the Committee cannot reach a decision, it refers the matter to an Arbitration Board. Id. §11(2). The findings of the Committee or Arbitration Board are reflected in a Record of Existing Rights. Id. § 15. The Committee then allocates land based on the customary law rights reflected in the Record of Existing Rights. Id. § 21(2).

Section 102(1) of the Registered Land Act defines the rights of a joint proprietor to include the requirement that all joint proprietors consent to the disposition of property and the right of survivorship. The Registered Land Act, (2006) Cap. 300 § 102(1) (“Where the land, lease, or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently—(a) dispositions may be made only by all the joint proprietors; and (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.”) Section 2 of the Registration of Titles Act, (2004) Cap. 281, defines “proprietor” as “the person or corporation registered under this Act as the owner of land or as a lessee from the Government.” Section 3(a) of the Registered Land Act defines “proprietor” as “in relation to land or a lease, the person named in the register as the proprietor thereof.” Section 2 of the Registration of Titles Act defines “registrar” as “the principal

registrar of titles or a registrar of titles appointed under this Act and the words ‘the Registrar’ mean with reference to any particular piece of land . . . , the registrar of the registration district in which such land is situated.”

**Lending institution** means the Agricultural Finance Corporation and any bank or financial institution, as defined under the Banking Act, Cap. 488;

**Private lending institution** means any bank or financial institution, as defined under the Banking Act, Cap. 488, but does not include the Agricultural Finance Corporation;

The Banking Act defines “bank” as “a company which carries on, or proposes to carry on, banking business in Kenya and includes the Cooperative Bank of Kenya Limited but does not include the Central Bank” and “financial institution” as “a company, other than a bank, which carries on, or proposes to carry on, financial business and any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act.” (2004) Cap. 488 § 2(1).

**Dependant** means anyone who lives on the land with the holder of rights to that land and who relies on the holder of rights for support and may include, but is not limited to, children (including adult children), cohabitating partners of less than two years, parents, and other relatives.

**matrimonial land** means

- (a) land on which the matrimonial home or homes are located;
- (b) land owned by either spouse which provides the basic income for the sustenance of the family; and
- (c) any other land acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.



**spouse** means a person to whom a person is married or is presumed to be married under a system of law recognized in Kenya and includes a person with whom a person having capacity to marry has lived openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife.

**The definition of matrimonial land is borrows the language of the subsections relevant to land from section 7(1) of the Matrimonial Property Bill, 2007 (version as of April 2008), which defines “matrimonial property” to include: “(a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; (c) immovable property, owned by either spouse which provides the basic income for the sustenance of the family; (d) any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.”**

**The first part of the definition of “spouses” is taken from section 2 of the Matrimonial Property Bill, which defines “spouse” as “a person to whom a person is married or is presumed to be married under a system of law recognized in Kenya.” The definition of “spouses” includes cohabitants of at least two years, who are presumed to be married under section 7 of the Marriage Bill, 2007 (version as of April 2008). “Dependant” is meant to include any other person who may have an interest in the land but will not enjoy the requirement of joint ownership provided below.**

## PART II - EQUAL RIGHTS OF WOMEN AND MEN TO LAND

### 3. Equal rights to land

Regardless of marital status, the right of every woman to acquire, hold, use, and deal with land shall to the same extent and subject to the same restrictions be treated as a right of any man.

**This provision will guarantee women equal rights to land. It is based on Tanzania’s Land Act, 1999, as amended in 2004, which specifically sets out women’s equal right to property: “the right of every adult woman to acquire, hold, use, and deal with land shall to the same extent and subject to the same restrictions be treated as a right of any man.” Land Act, (2002) Cap. 113 § 3(2). (Tanz.). Gender equity is one of the principles of the Draft National Land Policy. MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 1.5.1, para. 7(c) (2007). International instruments binding on Kenya require Kenya to end discrimination and ensure the equal rights of women to property. For example, article 14 of the African Charter on Human and Peoples’ Rights guarantees the right to property, and article 2 requires the enjoyment of that treaty right regardless of sex. Article 15 of CEDAW requires Kenya to “give women equal rights . . . to administer property.” Similarly, the “right of recognition everywhere as a person before the law” under article 16 of the ICCPR implies the equal capacity of women to own property. Human Rights Committee, General Comment No. 28, Equality of rights between men and women (68th Sess., 2000), para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC, General Comment No.**

**28]. Article 3 of the International Covenant on Economic, Social and Cultural Rights, which provides for the equal right of men and women to enjoy rights under the Covenant, in conjunction with Article 11, which provides for the right to an adequate standard of living and adequate housing, “requires that women have a right to own, use or otherwise control . . . land and property on an equal basis with men. Committee on Economic, Social and Cultural Rights, General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (34th Sess., 2005), para. 28, U.N. Doc. E/C.12/2005/4 (2005), available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.**

This section prohibits discrimination based on marital status, consistent with CEDAW and with Kenya's Matrimonial Property Bill, 2007. Article 16(1)(h) of CEDAW requires Kenya to ensure equal “rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.” Article 23(4) of the ICCPR similarly requires Kenya to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” Section 3(a) of the Matrimonial Property Bill guarantees the equal right of married women and married men “to acquire, hold and dispose of property.”

#### **4. Prohibition of discrimination in application of customary law**

(1) No institution or official that deals with land, including local chiefs and elders, may:

- (a) discriminate on the basis of sex or marital status in applying customary law to land allocation or determination of land rights; or

- (b) apply any customary law that discriminates against women with respect to land rights, including rights of ownership, occupancy, use, access, control, and consent to transactions.
- (2) Any application of customary law which denies women equal rights of ownership, occupancy, use, access, control, and consent to transactions shall be null and void.
- (3) Adoption of affirmative measures to increase the representation of women on institutions that deal with land shall not be considered discrimination in contravention of subsections (1) or (2).

**This provision limits the application of customary law to correct the harmful effects of customary law provisions that deny women's rights to land. The prohibition of discrimination is designed to implement the principle of sex equality recognized in the Constitution's definition of discrimination in section 82(3). While the Constitution prohibits sex discrimination in section 82(1), it permits application of discriminatory customary law in section 82(4)(c). However, this constitutional provision does not mandate sex discrimination; the Parliament is free to prohibit sex discrimination as to land rights. Enacting this prohibition would fulfil the Draft National Land Policy's commitment to “[r]epeal existing laws and outlaw . . . customs and practices constituting discrimination against women in relation to land.” MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY, *supra*, § 3.6.10.3, para.225(b).**

**Discriminatory provisions of customary law often prevent women from owning or accessing land. Under customary law, men traditionally control land and property. See Interview with Frederick Oundo, Programme Officer, CLARION, in Nairobi, Kenya (Apr. 3, 2008); Interview with County Clerk, Laikipia County Council, *supra*. The Government of Kenya has recognized the sex inequality in property**

rights in its report to the CEDAW Committee: "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 or of their husbands." Republic of Kenya, Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women (39th Sess., 2007), U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), para. 10, available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya) [hereinafter Kenya's Report to CEDAW Committee]. Furthermore, interpretation of customary law "quite often favours men over women." Republic of Kenya, Second Periodic Report of States Parties to the Human Rights Committee (83rd Sess., 2005), U.N. Doc. CCPR/C/KEN/2004/2 (Sept. 27, 2004), para. 31, available at <http://documents.un.org>. (After clicking "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol.")

Customary law governs land rights pursuant to many Kenyan statutes, thereby entrenching discriminatory practices into the civil law. Section 115(2) of the Constitution of Kenya provides that customary law governs the "rights, interests or other benefits in respect of" trust land. The Trust Land Act reiterates that "[i]n respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law." The Trust Land Act, (2004) Cap. 288 § 69. (Kenya.) Under the Land Consolidation Act, customary law informs the rights and interests recognized in the Record of Existing Rights and thus are the basis for compensation and land allocation. The

Land Consolidation Act, (2004) Cap. 283 §§ 11(1), 15(2), 21(2), 22(1). Under the Land Disputes Tribunal Act, all civil cases involving "(a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land" shall be adjudicated "in accordance with recognized customary law." The Land Disputes Tribunal Act, (2004) Cap. 287 §§ 3(1), 3(7). As a result of these provisions, institutions that adjudicate land rights are currently free to apply customary laws that discriminate against women.

Kenya has an obligation under international law to eliminate sex discrimination and ensure the equality of women. According to CEDAW, which Kenya has signed and ratified without reservations, the state has a duty under article 2(b) to adopt "appropriate legislative and other measures ... prohibiting all discrimination against women" and a duty under article 2(f) to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." CEDAW, *supra*, art. 2(b) and 2(f). States parties also have a duty to "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle." CEDAW, *supra*, art. 2(a). The ICCPR declares that the law "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ...or other status." ICCPR, *supra*, art. 26. The African Charter also imposes a duty to prohibit discrimination: "The State shall ensure the elimination of every discrimination against women

and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra*, art. 18(3).

Kenya also has an affirmative obligation under international law to eliminate customs that discriminate against women. According to article 5 of CEDAW, which Kenya has signed and ratified without reservations, states parties shall take all appropriate measures to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” CEDAW, *supra*, art. 5. Customary laws related to property represent a clear example of such practices, since they restrict women’s rights to own and control property based on stereotypes that men are heads of households and women cannot be trusted with property. KLA, POLICY BRIEF, *supra*, at 1. The CEDAW Committee has warned that such customs and stereotypes perpetuate discrimination against women and has therefore urged the government of Kenya to “put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women...” CEDAW, Response to Fifth and Sixth Combined Report of the Government of Kenya, *supra*, para. 22. The government recognized this principle in passing the Children’s Act of 2001, which prohibits “customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development. The Children’s Act, (2001) Cap. 8 § 14. The harmful effect of customs on the girl child applies equally to adult women, who are often treated as if they were children under customary law by denying them land rights equivalent to men.

By prohibiting such discrimination, Kenya could resolve the conflict between international law and customary law and ensure that all members of society are protected against harmful customs. This provision reflects a regional trend by drawing from examples such as Uganda’s Land Act, which states that “[a]ny decision taken in respect of land held under customary tenure . . . shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women . . . access to ownership, occupation or use of any land . . . shall be null and void.” The Land Act, (1998) Cap. 227 § 27. (Uganda). Likewise, the Village Land Act of Tanzania declares that customary law shall be void “to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land.” The Village Land Act, (1999) Cap. 114 § 20. (Tanzania).

The prohibition of sex discrimination also reflects the will of the Kenyan people. Kenyans have shown their support for such a provision during public consultations carried out by the Kenya Law Reform Commission in 2007. In presentations on the proposed Gender Equality Bill, 91% of respondents said that women had been discriminated against and 96.6% of respondents agreed on the need for an anti-discrimination law. Kenya Law Reform Commission and Mohammed Muigai Advocates, *The Proceedings Report of the Provincial Public Consultative Meetings on the Review and Analysis of the Marriage Bill 1993, the Married Women Property Bill, the Gender Equality Bill 2002 and the Family Protection (Domestic Violence) Bill 2002 Held Between 27th February 2007 and 10th April 2007* (June 2007) (on file with author). The overwhelming popular support for

**sex equality further demonstrates that custom is not a legitimate excuse for discrimination against women.**

## **5. Types of land rights**

- (1) The three types of categories of land are:
  - (a) government land, which means land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964 and any land that may be designed as public land under the National Land Policy;
  - (b) Trust land, which means land that is vested in the county councils on behalf of a community under Chapter IX of the Constitution and any land that may be designated as community land under the National Land Policy; and
  - (c) registered land, which is land that is owned or held under freehold tenure under the Registered Land Act, the Registration of Titles, the Land Titles Act, or similar acts and any land that may be designated as private land under the National Land Policy.
- (2) Depending upon the category of land, the rights that may be exercised are divided into—
  - (a) a right of ownership;
  - (b) a right of leasehold; or
  - (c) a right of occupancy.

**Kenya has over 75 land laws, which create a confusing and anachronistic legal framework that fails to recognize women's land rights. KLA, POLICY BRIEF, supra, at 1. As a result, land bodies, confused about the nature of land rights, have ignored and marginalized women's rights to land. See KENYA LAND ALLIANCE, THE NATIONAL LAND POLICY IN KENYA: CRITICAL GENDER ISSUES AND POLICY STATEMENTS 5**

(2004), <http://www.kenyalandalliance.or.ke/Issues%20Paper%20gender%20.pdf> [hereinafter KLA, NATIONAL LAND POLICY]. This provision, in conjunction with the provisions that follow, clarifies the types of land rights and divides them into rights of ownership, rights of leasehold, and rights of occupancy. The structure of this section is borrowed from sections 19 and 21 of the Namibia Communal Land Reform Act, which list the type of rights to communal land, which is similar to Kenya's trust land, which is also communally controlled. See Communal Land Reform Act, No. 5, § 19 (2002) (Namib.) ("The rights that may be allocated in respect of communal land under this Act are divided into - (a) customary land rights; and (b) rights of leasehold."); Communal Land Reform Act, No. 5, § 21 ("The following customary land rights may be allocated in respect of communal land - (a) a right to a farming unit; (b) a right to a residential unit; (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of this Act.").

This provision identifies the three categories of land under existing Kenyan law—government land, Trust land, and registered land—but anticipates the enactment of the National Land Policy, which would rename those categories as public land, private land, and community land, respectively. See DRAFT NATIONAL LAND POLICY, supra, § 3.3.1, para. 56–57. The definition of government land is drawn from the definition under the Government Lands Act. (2004) Cap. 280 § 2 (defining "government land" as "land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council,

1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964"). The Draft National Land Policy defines public land to include "all land that is not private or community land and any other land declared to be public land by an Act of Parliament." DRAFT NATIONAL LAND POLICY, *supra*, § 3.3.1.1, para. 59. Section 114 of the Constitution enumerates various areas as Trust land, and section 115(1) vests Trust land in the county councils. The Draft National Land Policy defines community land as "land lawfully held, managed and used by a specific community as shall be defined in" a Land Act that will implement the policy. DRAFT NATIONAL LAND POLICY, *supra*, § 3.3.1.2, para. 63. Multiple statutes govern registered land, which confers the most land rights to individuals. See *id.* §§ 3.3.1.3, 3.3.3.1. The Draft National Land Policy defines private land as "land lawfully held, managed and used by an individual or other entity under statutory tenure." *Id.* §§ 3.3.1.3, para. 67.

## 6. Right of ownership

- (1) A right of ownership includes, but is not limited to: the rights to own, administer, alienate, mortgage, or control the land or use the land as collateral.
- (2) A right of ownership is available for registered land.

**This provision defines the right of ownership, which applies to registered land, which could include trust land (or community land) that has been duly registered. According to the Draft National Land Policy, the right of ownership include "the right to use, the right to dispose of, and the right to exclude others from the land owned." DRAFT NATIONAL LAND POLICY, *supra*, § 3.3.3, para. 70.**

## 7. Right of leasehold

- (1) A right of leasehold is a right to use land for a defined period of time in exchange for the performance of certain obligations and includes all rights specified in the lease.
- (2) Rights to Trust land that have been granted under a lease, licence, or occupation permit granted under Part VI of the Trust Land Act shall be deemed to be rights of leasehold.
- (3) A right of leasehold is available for all categories of land.

**This provision defines the right of leasehold, which applies to all types of land. It is defined to include rights to trust land that have been granted by lease, licence or occupation permitted under Part VI of the Trust Land Act. The definition of the right of leasehold is borrowed from section 3.3.3.2 of the Draft National Land Policy, which defines "leasehold tenure" as "the right to use land for a defined period of time in exchange for the performance of certain obligations such as the payment of rent." DRAFT NATIONAL LAND POLICY, *supra*, § 3.3.3.2, para. 78. Under that section, the Kenyan Government has promise to "[e]stablish mechanisms for the creation of leasehold interests out of public, community, and private land." *Id.* § 3.3.3.2, para. 79(b). Enacting this section would help fulfil that promise.**

## 8. Right of occupancy.

- (1) A right of occupancy includes the rights to:
  - (a) access, use, farm, and live on the land;
  - (b) access, use, and farm resources on the land;
  - (c) plant and benefit from trees, crops, plants, or seeds on the land; and
  - (d) benefit from and control the profits from the trees, crops, livestock, or by-products of the occupant's labour on the land.

- (2) A dependant of the primary holder of the right of occupancy shall enjoy a derivative right of occupancy on the land.
- (3) A right of occupancy is available for all categories of land.

**The right of occupancy, a beneficial interest or right less than ownership, will guarantee that all women, including female dependants, will have rights to land; however, it eliminates discriminatory requirements of dependence on men by relying on statutory law, not customary law. Currently, Kenya's land statutes do not explicitly recognize any rights of women to land that may exist when another person like her husband or brother is the primary rights holder and do not even recognize the access and use rights women had under customary law. See KLA, DRAFT NATIONAL LAND POLICY, supra, at 5; HUMAN RIGHTS WATCH, DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA 7 (2003), available at <http://hrw.org/reports/2003/kenya0303/kenya0303.pdf> [hereinafter HUMAN RIGHTS WATCH, DOUBLE STANDARDS]. Under customary law, even though male heads of the village or family would be allocated the land, women had rights to occupy and cultivate the land. Akinyi Nzioki, The Effects of Land Tenure on Women's Access and Control of Land in Kenya, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 218, 228, 230 (Abdullahi A. An-Na'im ed., 2002). According to a Kenya National Commission on Human Rights report, for example, under Luo customary law a man usually parcelled out his tract of land to his wife or wives, and each wife cultivated her tract and could amass a larger tract based on her labour. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, FROM DESPAIR TO HOPE: WOMEN'S RIGHT TO OWN AND INHERIT PROPERTY 3 (2005).**

**This section is modelled after Uganda's Land (Amendment) Act, 2004, which provides that "[e]very spouse shall enjoy security of occupancy on family land" which means "a right to have access to and live on family land." The Land Act, (1998) Cap. 227 § 38A(1)–(2), as amended by The Land (Amendment) Act, 2004, § 19. (Uganda.). However, this section extends protections to cohabitants and family members, as well.**

## **9. Joint spousal rights to matrimonial land.**

- (1) As of the date of effectiveness of this Act, spouses must register matrimonial land as joint proprietors.
- (2) A spouse may not register matrimonial land as a sole proprietor during the subsistence of the marriage.
- (3) A spouse may register as sole proprietor of non-matrimonial land.
- (4) If matrimonial land is not jointly registered in violation of subsections (1) and (2) of this section—
  - (a) the Registrar shall register the spouses as joint proprietors;
  - (b) the spouse who is not the registered proprietor has the same rights to the land as the spouse who is the registered proprietor; and
  - (c) any transaction in the matrimonial land made without the consent of both spouses is void and shall be set aside.
- (5) Matrimonial land registered in the name of only one spouse prior to the date of effectiveness of this Act shall be presumed to be owned by both spouses, and both spouses will be presumed to have the same rights to the land.
- (6) From the date of effectiveness of this Act, a right of leasehold granted to a spouse for matrimonial land must be granted in the name of the applicant and the applicant's spouse or spouses who will live on the land with the applicant, who will hold equal rights to such leasehold.



- (7) For an application for a right of leasehold after the date of effectiveness of this Act, the names of both the applicant and the applicant's spouse or spouses who will live on the land with the applicant must be included on the application form.
- (8) Spouses shall hold equal rights of occupancy to matrimonial land, including to land allocated to a spouse prior to the date of effectiveness of this Act if the spouses live together on the land.

**Kenya must rectify the historically unequal rights of spouses to land, under which men have dominated all types of land rights. See Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008). Because the Registered Land Act vests absolute ownership of land in the registered proprietors, who are overwhelmingly men, women effectively have been denied rights to land. KLA, NATIONAL LAND POLICY, *supra*, at 4.**

Section 101(1) of the Registered Land Act, (2006) Cap. 300, allows for registration of land "made in favour of two or more persons" however, joint registration "is relatively rare." Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008). According to Leah Kiguatha, a Kenyan Attorney, "[t]he practice is for property to be registered in the man's name, even if I contribute to the property as a wife, I can't insist that it be registered in my joint name." Interview with Leah Kiguatha, Kenyan attorney, in Wash., D.C. (Feb. 22, 2008). Only 35 percent of married interviewees asked about joint registration owned their property jointly with a spouse. International Women's Human Rights Clinic (IWHRC) & FIDA-Kenya, *Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya* (Mar.–Apr. 2008) (on file with author).

**This provision ensures that husbands and wives have equal rights to matrimonial land under all categories of land and all types of land rights by requiring that any leasehold or registration be in the names of both spouses. It is loosely based on Tanzania's Land Act, which establishes a presumption of co-occupancy of land among spouses. See Land Act, (2002) Cap. 113 § 161(1). (Tanz.) ("Where a spouse obtains land under a right of occupancy for the co-occupation and use of both spouses, or where there is more than one wife, all spouses, there shall be a presumption that . . . the spouses will hold the land as occupiers in common and, unless the presumption is rebutted . . . , the Registrar shall register the spouses as occupiers in common."). This section, however, provides further protection than a presumption by establishing a legal requirement of joint registration, which will make the safeguards for spouses more automatic.**

Other countries across the globe with comparable circumstances have successfully established such a joint registration requirement. For example, Article 29 of Nicaragua's Law 278 (1997) requires joint titles for couples, whether married or unmarried, and a title issued in the name of the head of the household is deemed issued to both members of the couple. LORENZO COTULA, FOOD AND AGRICULTURE ORGANIZATION LEGAL OFFICE, *FAO LEGISLATIVE STUDY NO. 76, GENDER AND LAW: WOMEN'S RIGHTS IN AGRICULTURE* 21 (2002), [ftp://ftp.fao.org/docrep/fao/005/y4311E/y4311E00.pdf](http://ftp.fao.org/docrep/fao/005/y4311E/y4311E00.pdf). Similarly, under Memorandum Circular 18 of 1996 and Administrative Order 1 of 2001, administrative guidelines pursuant to the Comprehensive Agrarian Reform Law of the Philippines, land titles must be issued in the names of both spouses, whether or not they are legally married,

for land they jointly work and cultivate. *Id.* at 59–60. Both legal reforms increased women's land ownership. *Id.* at 21, 60.

Of 29 Kenyans asked whether joint registration should be required, 28 supported such a requirement. International Women's Human Rights Clinic (IWHRC) & FIDA-Kenya, *Fact-finding on Women's Property, Land, and Inheritance Rights in Kenya* (Mar.–Apr. 2008). They favoured the requirement because it would increase the prevalence and acceptance of joint registration, promote equal rights to land during marriage and at divorce, and prevent widow disinheritance. See, e.g., Interview with Joyce Wangui, divorced woman, in Nanyuki, Kenya (Mar. 30, 2008) (via interpretation); Telephone Interview with Lily Murei, *supra*; Interview with Leah Kiguatha, *supra*; Interview with Cecilia Mbaka, Assistant Commissioner, the Ministry of Gender, Sports, Culture and Social Services, in Nairobi, Kenya (Apr. 4, 2008). It would thus guarantee the rights to equality in marriage under article 16(1)(h) of CEDAW and article 23(4) of the ICCPR.

## 10. Incentives for joint registration.

10. The following incentives should be granted to encourage joint registration:

- (1) A registration instrument is exempt from the stamp duty under the Stamp Duty Act, Cap. 480, where at least one man and at least one woman register a parcel of land together as joint proprietors.
- (2) Where at least one man and at least one woman register a parcel of land together as joint proprietors, the administrator of the Fund established in section 19 of this Act may make a grant to each proprietor as established by the Fund guidelines.
- (3) The Minister of Lands or the Minister of Finance may provide additional incentives to encourage women's registration of land.

- (4) Joint proprietors need not be married to receive any of the benefits mentioned in subsections (1), (2), or (3) of this section or in the Seventh Schedule.

The statutory incentives in this provision would also increase the prevalence and acceptance of joint registration. This section extends incentives both to spouses and to men and women who are not married, including brothers and sisters, fathers and daughters, cohabitating couples, and other dependants to increase all women's access to land titles. Of 25 Kenyans asked, 23 supported at least some form of incentives for joint registration. IWHRC & FIDA-Kenya, *supra*. No one rejected the proposal. *Id.* Supporters included 6 national government officials, in addition to professors, lawyers, civil society members, and rural men and women. *Id.*

This section eliminates the stamp duty under the Stamp Duty Act, (2004) Cap. 480, and provides for a possible cash grant that would be funded by land corruption fines and for additional, discretionary incentives for joint registration. The Seventh Schedule of this Act relaxes the conveyancing fees for joint registration. Eliminating the stamp duty, the primary land registration fee, would encourage joint registration. Interview with Hellen Kwamboka Ombati, Advocate of the High Court of Kenya and FIDA-Kenya member, in Nairobi, Kenya (Apr. 1, 2008). According to Hellen Kwamboka Ombati, the stamp duty is the primary land tax that the national government receives. *Id.* The Ireland Family Home Protection Act, 1976 similarly eliminates any "stamp duty, land registration fee, Registry of Deeds fee or court fee," albeit only for joint spousal registration. Family Home Protection Act, 1976 § 14 (Act No. 27/1976) (Ir.), available at [http://www.bailii.org/ie/legis/num\\_act/1976/zza27y1976.1.html#zza27y1976](http://www.bailii.org/ie/legis/num_act/1976/zza27y1976.1.html#zza27y1976) (last visited February 27, 2008). Quebec, Canada

has implemented grant programs to promote equal treatment of female farmers. Canada, Third Periodic Reports of States Parties to the Committee on Economic, Social and Cultural Rights (19th Sess., 1998), para. 1055–56, U.N. Doc. E/1994/104/Add.17 (Jan. 20, 1998), available at <http://documents.un.org>. (After clicking “welcome,” then click “simple search,” and insert the U.N. Doc. No. at “symbol.”) The Act to Promote the Development of Agricultural Operations, R.S.Q., ch. M-36 (1986) (Can.), provides grants of \$15,000 (918,170 Kenyan shillings) to farmers between 18 and 40 years old, and the Programme d'accès à la propriété pour les conjoints de 40 ans et plus (an ownership programme for spouses over 40), provides grants of up to \$5,000 (306,133 Kenyan shillings) when a woman acquires 20% of farm assets. *Id.*; see Currency Converter—Yahoo! Finance, <http://finance.yahoo.com/currency> (last visited May 12, 2008). These policies have “increased the number of women farmers who owned property from 4,951 to 11,234.” Although Kenya might not afford such cash large grants, it might afford eliminating fees and taxes on land registration and smaller cash grants, especially if such grants are funded from fines paid by corrupt land officials or people who commit fraud before land boards. One national government official, Cecilia Mbaka, asserted that the benefits of such incentives to Kenyan society would probably outweigh the cost to Kenya's government revenues:

Of course it will not be good for Kenya's government revenues . . . , but I think in the long run, . . . the people themselves stand to benefit because I think you will not see all these cases going to court . . . . [I]t will also have its advantages that you might not be able to put a monetary value on.

Interview with Cecilia Mbaka, Assistant Commissioner, the Ministry of Gender, Sports, Culture and Social Services, in Nairobi, Kenya (Apr. 4, 2008).

## 11. Requirement for spousal consent and consideration of other interests in the land.

- (1) In a transaction for which consent of a land body, including the land control board, is required, the land body must –
  - (a) obtain the consent of the applicant's spouse if the transaction involves the matrimonial land; and
  - (b) consider the interests of all persons who hold a right of occupancy on the land, including dependants living on their parents' land.
- (2) In polygamous marriages, the spouse or spouses whose consent is required shall be determined pursuant to the property distribution agreement entered into pursuant to section [20(A)] the Marriage Act.

**This provision requires that spousal consent to a transaction in land, even if, for example, the land is only in the husband's name. Thus, a wife's consent will always be required when the sale of her family's agricultural land is contemplated. The lack of a spousal consent requirement currently leaves women vulnerable to being dispossessed and rendered homeless by sale of their land.**

**Kenyan law fails to protect women's decision-making authority in land transactions, whether they are married or non-married women living as dependents on another person's land. While the Land Control Act requires the consent of land control boards for transactions affecting agricultural land, the act does not require the consent of both spouses if one of them objects to the sale or mortgage of their land.**

In the 2006 Court of Appeal case of *Kamau v. Kamau*, the court held that spousal consent is not required to sell matrimonial property when the land is registered solely in the husband's name. The judge stated that "[u]ntil recently it has never been the practice and certainly not a legal requirement that before the legal proprietor of a piece of land disposes of it he or she should consult any third party be it his/her husband or wife." *Kamau v. Kamau* (2006) 59 K.L.R. (C.A.K.).

Other countries have recognized the critical importance of requiring spousal consent for the sale of family land. For instance, Tanzania requires spousal consent for a mortgage of the matrimonial home. Land (Amendment) Act, (2004) § 114(1). (Tanzania). The Tanzanian Act also requires spousal consent for assignment or transfer of land. Land Act, (1999) § 161(3). (Tanzania). South Africa provides for the equal powers of spouses and requires consent for transactions in its Matrimonial Property Act. South African Matrimonial Property Act (88 of 1984) (S. Afr.). Namibia has enacted a similar provision as well. The Married Persons Equality Act, s. 5-7 (Act I of 1996) (Namib.). The Ireland Home Protection Act, 1976 voids the conveyance of an interest in the family home without the prior consent of both spouses. Ireland, Second Periodic Report of States Parties to the Human Rights Committee (69th Sess., 2000), para. 298–99, U.N. Doc. CCPR/C/IRL/98/2 (Apr. 28, 1999), available at <http://documents.un.org>. (After clicking "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol.")

## 12. Procedures for verifying spousal consent.

- (1) Subject to the provisions in subsection (2), a spouse whose consent is required pursuant to section 11 of this Act must testify to his or her consent in person before the land body and must show proof of identity as the applicant's spouse by submitting –
  - (a) a government-issued identity card;
  - (b) a marriage certificate; or
  - (c) a letter from the chief, assistant chief, or an elder from the area verifying the person's identity and the validity of the marriage.
- (2) If a spouse whose consent is required pursuant to section 11 of this Act is unable to appear before the land body in person, he or she may submit a letter from the chief, assistant chief, or an elder attesting to –
  - (a) the validity of the marriage, if no marriage certificate exists;
  - (b) identity of the spouse whose consent is required; and
  - (c) the validity of the spouse's consent.

## 13. Rejection of transactions lacking consent.

- (1) Land Bodies, including the Land Control Board, must refuse consent to all transactions where:
  - (a) the conditions in section 11 and 12 of this Act are not met;
  - (b) the Board has reason to suspect that the spouse's consent was coerced through physical or mental pressure; or
  - (c) the Board has reason to suspect that the applicant committed fraud before the board by misrepresenting the identity of his or her spouse or presenting a fraudulent document purporting to show his or her spouse's consent to a land transaction.
- (2) If the land control board discovers a violation of this Act subsequent to approval of the transaction, the board shall automatically set aside the transaction pending appeal.

Provisions 12 and 13 ensure that a wife's consent to the sale is genuine. The decisions of land control boards have not adequately accounted for the interests of women because "[m]en have reportedly bribed land control boards, fraudulently brought imposter 'wives' to the boards to consent to land transfers, and threatened their wives with violence or eviction if they withhold consent." HUMAN RIGHTS WATCH, *DOUBLE STANDARDS*, *supra*, at 33. See also Telephone Interview with Evelyn Opondo, Senior Counsel, FIDA-Kenya (Feb. 11, 2008); Interview with John Kinyua, Land Control Board Member at Meru, Kenya (March 30, 2008); Interview with Hellen Kwamboka Ombati, *supra*.

as family interests in land." See NATIONAL LAND POLICY, *supra*, § 3.3.1.2, para. 64(b) (2007). This provision would explicitly require consideration of women's rights during those processes where women do not hold the primary rights to the land.

#### **14. Recognition of the right of occupancy during the consolidation or adjudication process.**

Adjudication Committees and Arbitration Boards constituted under the Land Consolidation Act, Cap. 283, and adjudication committees, recording officers, and adjudication officers under the Land Adjudication Act, Cap. 284, shall recognize and consider a right of occupancy under this Act as a right in respect of land during the consolidation or adjudication process.

Because Kenya's land statutes do not recognize women's rights to use, access, and occupy the land, the rights of women, including wives and female relatives, are largely ignored in land allocation under the Land Consolidation Act and the Land Adjudication Act, which provide the processes for converting communal Trust land to private registered land. See KLA, NATIONAL LAND POLICY, *supra*, at 5. In the National Land Policy, the Kenya Government has acknowledged that the land adjudication and consolidation processes have "[i]gnor[ed] customary land rights not deemed to amount to ownership, such

## PART III - PROCEDURAL SAFEGUARDS AND DISPUTE RESOLUTION

### 15. Procedures to facilitate registration.

The Minister of Lands shall adopt the following procedures to facilitate land registration:

- (1) The Minister of Lands shall permit chiefs to register land that has been registered in the name of one spouse in the joint names of both spouses. A chief shall promptly report all such registrations to the Registrar.
- (2) The Minister of Lands shall establish, staff, oversee, and allocate funds and training for one mobile land registration unit for each province in Kenya, which will visit every village or location within its respective province at least once each year to encourage joint registration in rural areas.
- (3) Whenever land is registered in favour of two or more persons, the Registrar shall provide each proprietor with a brief document and an oral statement in the proprietor's language of proficiency explaining the nature of his or her interests and explaining his or her rights to the land.

**The procedures in this section would render the registration process more accessible to women. If chiefs and mobile land registration units conduct registrations, they can reach more people than land registrars alone and thus more people can register jointly. According to Geoffrey S. Birundu, Collector of Stamp Duty, mobile registration programs are already in place. Interview with Geoffrey S. Birundu, Collector of Stamp Duty, Ministry of Lands, in Nairobi, Kenya (Apr. 1, 2008). This provision would make them a formal requirement. Additionally, woman can make informed decisions about her land and can enforce her rights more easily if she receives an explanation of her rights as joint proprietor or proprietor in common.**

### 16. Equal access to credit.

- (1) All lending institutions must offer the same terms and opportunities for credit and loans to men and women, regardless of marital status.
- (2) Lending institutions may adopt remedial measures to enhance access of women to credit and loans, including, but not limited to:
  - (a) longer payment periods for women; and
  - (b) alternative collateral, other than land titles, including collateral based on —
    - (i) the reasonable value of crops, livestock, or estimated crop yields;
    - (ii) titles to vehicles;
    - (iii) pay slips;
    - (iv) leases; and
    - (v) other movable property of value.
- (3) If any lending institution unreasonably refuses collateral under subsection (2) from a woman or discriminates against a woman in violation of subsections (1), the woman may—
  - (a) sue the institution to compel it to lend to her based on the collateral she proposed or for damages; and
  - (b) report the institution to the Ministry of Finance.
- (4) Upon receiving a report under subsection 3(b), the Minister of Finance will issue a warning to the lending institution.
- (5) A private lending institution that receives more than three warnings may lose its charter to do business in Kenya.
- (6) The Minister of Finance may recommend clients or subsidies to encourage lending institutions that have not received any warnings under section 4.

**Because women often do not have land titles, which are common collateral for loans, women cannot access loans, in violation of their right to equal access to credit. See MINISTRY OF GENDER,**

SPORTS, CULTURE, AND SOCIAL SERVICES, NATIONAL GENDER AND DEVELOPMENT POLICY 7 (2000), available at <http://www.culture.go.ke/images/stories/pdf/genderpolicy.pdf> [hereinafter NATIONAL GENDER AND DEVELOPMENT POLICY]. Equal access to credit is guaranteed under article 13 of CEDAW, which requires Kenya “to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (b) The right to bank loans, mortgages and other forms of financial credit,” and under article 14(2)(g) of CEDAW, which provides for “access to agricultural credit and loans” for women in rural areas. The major lending institutions in Kenya, including the Agricultural Finance Corporation (AFC) and Kenya’s three major commercial banks, Standard Bank, Barclays Bank, and Commercial Bank usually require a land title as collateral for loans. See COTULA, *supra*, at 121; Nzioki, *supra*, at 218, 246. In the National Gender and Development Policy, the Government of Kenya has acknowledged that “[i]n most cases, access to credit . . . is linked to access to land ownership. Women cannot therefore qualify for any credit that is tied up with collateral requirements, which are often based on a land title deed.” NATIONAL GENDER AND DEVELOPMENT POLICY, *supra*, at 7. In reports to the CEDAW Committee, the Government of Kenya further acknowledged that “women are faced with greater challenges than men due to the fact that not many of them hold titles to land which is the major collateral to bank loans.” Kenya’s Report to CEDAW Committee, *supra*, para. 10.

**This provision would ensure that women who do not have collateral may still obtain loans by requiring lending institutions to accept alternative collateral from women. Section 19(1) of the Agricultural Finance Corporation Act, (2004) Cap. 323, says that “[t]he Corporation**

**may . . . upon such terms and conditions as to interest, repayment, security or otherwise and in such manner as the Board may think fit, make a loan to a farmer to enable him to engage more effectively in agriculture.” This gives the AFC discretion to accept alternative collateral from women. This provision also provides an incentive for institutions that lend to women because they may attract more business and a disincentive for institutions that do not lend to women because they may lose business and possibly their charter to do business in Kenya. It also provides legal remedies for women.**

Kenyan lending institutions already benefit when they provide loans to women. Banks are starting to realize that women represent a “lucrative,” “untapped” market, and microfinance has increased. John Ndegwa, Kenya: All Eyes On Women, E. AFR. STANDARD, Mar. 31, 2008, available at <http://allafrica.com/stories/200803310991.html>. According to the General Counsel of a bank in East Africa, loan repayment rates are higher for women than for men. Interview with General Counsel, Bank in East Africa, in Nairobi, Kenya (Apr. 2, 2008). Women have successfully accessed credit in groups called “merry-go-rounds.” Interview with Dorothy McCormick, Professor, University of Nairobi, in Nairobi, Kenya (Apr. 2, 2008).

## **17. Representation of women in land bodies.**

17. Women shall constitute at least one-third and endeavouring toward one half (fifty percent) of the members of all appointed or elected public institutions that determine land rights, including registering or allocating land, arbitrating or adjudicating land disputes, and controlling land transactions, including on:
  - (a) County Councils that address trust land rights pursuant to section 115 of the Constitution and section 2 of the Trust Land Act;



- (b) Divisional Land Boards appointed by county councils under section 5 of the Trust Land Act;
- (c) any Committee for any adjudication section appointed by Adjudication Officers under section 9 of the Land Consolidation Act;
- (d) any Arbitration Board appointed by the Minister of Lands and selected by Adjudication Officers under section 10 of the Land Consolidation Act;
- (e) any land control board or land control appeals board appointed by the Minister of Lands under the Land Control Act;
- (f) the panel of elders for each registration district under section 5 of the Land Disputes Tribunals Act;
- (g) the African Advisory Committees appointed by Settlement Officers under the Trust Land (Lambwe Valley) Rules, the Trust Land (Sarora) Rules, the Trust Land (North Yatta, Yatta Plateau and Ithanga) Rules, and the Trust Land (Olenguruone) Rules; and
- (h) any other public institution constituted in the future for purposes of land administration or management, determination of land rights, or resolution of land disputes.

**The representation of women in institutions that deal with land will ensure that women's rights are recognized in crucial decisions that affect their homes and livelihoods. The current land statutes make no provision for female representation in land bodies. In addition, stereotypes about women's role in society have led to the exclusion of women from these bodies in accordance with custom and tradition. See Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008) (stating that there are no women elders because custom does not allow it). As a result, almost all of the land adjudicators, consolidators, arbitrators, and council members are men. Nzioki, *supra*, at 218, 237. When women are not represented in the decision-making process, they cannot effectively protect women's rights to land.**

**The lack of female representation in institutions that deal with land violates fundamental human rights protected in the Constitution and in international treaties that Kenya has ratified. The Constitution guarantees the right to be free from discrimination on the basis of sex in section 82(1), which declares that that "no law shall make any provision that is discriminatory either of itself or in its effect." The laws that set up adjudicatory bodies for land violate section 82(1) because they are discriminatory in effect. Since elders are traditionally male, appointing them as the decision-makers in land disputes discriminates against women and thereby violates section 82(1).**

**Kenya must provide for representation of women in decision-making bodies to fulfil its international legal obligations to protect women's right to equality and their right to participate in political life. Kenya has a duty to protect the right of women to participate in political life pursuant to ICCPR article 25 (the right to "take part in the conduct of public affairs" without distinction as to sex) and CEDAW article 7 (it must "ensure to women, on equal terms with men, the right . . . [t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government"). The CEDAW Committee raised this issue with the Kenyan government in 2006, expressing its concern about "the under-representation of women in political and public life, in particular . . . in appointed decision-making bodies, in particular at decision-making levels." Committee on the Elimination of Discrimination Against Women, Concluding Comments: Kenya, at para. 27, U.N. Doc. CEDAW/C/KEN/CO/6 (2007), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya).**

By failing to provide seats for women in institutions that concern land, the government is effectively excluding women from a fundamental area of social and political life which is extremely important in Kenya. Where women play such an integral role in cultivation of agricultural land, this failure to provide for equal representation is a serious detriment to the country: "Women's full participation is essential not only for their empowerment but also for the advancement of society as a whole." Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23, Women in political and public life (16th Sess., 1997), para. 17, U.N. Doc. A/52/38/Rev.1 at 61 (1997), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> [hereinafter CEDAW General Rec. 23].

International law supports the use of affirmative measures to include women in government institutions. In accordance with ICCPR article 25, the Human Rights Committee has declared that states must take "effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate affirmative action." HRC, General Comment No. 28, *supra*, para. 29. In addition, CEDAW article 4 provides for temporary special measures "aimed at accelerating de facto equality between men and women," which applies to achieving women's equal participation in politics. CEDAW General Rec. 23, *supra*, para. 15.

The Kenyan government has made laudable efforts to promote the representation of women, but further action is needed to realize these aspirations in enforceable legal provisions. Kenya's National Land

Policy reflects the need for increased female representation in the specific context of land, declaring that "[w]omen are not sufficiently represented in institutions that deal with land." NATIONAL LAND POLICY *supra*, § 3.6.10.3, para. 223. To solve this problem, the policy provides that the Government shall "[e]nsure proportionate representation of women in institutions dealing with land at all levels." NATIONAL LAND POLICY *supra*, § 3.6.10.3, para. 225(h).

Both the Kenyan government and the population support the inclusion of women in decision-making bodies. During public consultations carried out by the Kenya Law Reform Commission in 2007, there was unanimous agreement on the need for broader legislation on affirmative action and 85% of respondents supported equal representation of women. Kenya Law Reform Commission and Mohammed Muigai Advocates, *The Proceedings Report of the Provincial Public Consultative Meetings on the Review and Analysis of the Marriage Bill 1993, the Married Women Property Bill, the Gender Equality Bill 2002 and the Family Protection (Domestic Violence) Bill 2002 Held Between 27th February 2007 and 10th April 2007* (June 2007) (on file with author). In interviews conducted in March and April 2008, 92% of the 26 respondents supported a requirement of women's representation on land bodies. IWHRC & FIDA-Kenya, *supra*.

Several of Kenya's neighbours and other sub-Saharan African countries have recognized the importance of ensuring female representation in institutions that deal with land. Uganda requires that "[a]t least one-third of the" at least five members of a district land board "shall be women." The Land Act, (1998) Cap. 227 §

57(3). (Uganda). Tanzania has also enacted provisions requiring representation of women on land adjudication bodies. Village land councils consisting of between five and seven members must include at least two women. The Village Land Act, (1999) Cap. 114 § 60(2). (Tanzania). In addition, village adjudication committees consisting of between six and nine members must include at least three women, which guarantees between 30 and 50% female representation on the committees. Village Land Act, (1999) Cap. 114 § 53(2). (Tanzania). Similarly, Namibia has enacted a requirement for four women to be appointed to communal land boards. Communal Land Reform Act, (2002), § (4)(1)(d). (Namibia).

## 18. Qualifications for membership of land bodies.

In appointing members to public institutions that determine land rights, regard shall be had to the person's skill or practical experience in agriculture, land management, or governance.

This provision is designed to ensure that members of land bodies are qualified to make decisions regarding land rights and that women with relevant experience are included. Because so many Kenyan women engage in agriculture, they would be well-qualified to serve on boards that make decisions about land allocation and management. Women have a unique perspective in land disputes: they are most likely the ones who take care of the home and the crops. See Interview with Paul Ndungu, Chairperson of the Ndungu Commission on Land, in Nairobi, Kenya (Apr. 3, 2008). According to government estimates from 2000, women headed 38% of agricultural operations in Kenya. NATIONAL GENDER AND DEVELOPMENT POLICY, *supra*, at 7. Furthermore, women constitute over 80% of the

agricultural labour force and provide approximately 60% of farm-derived income. HUMAN RIGHTS WATCH, DOUBLE STANDARDS, *supra*, at 10. Under the current system, important decisions affecting women's participation in agriculture and food production are made without their participation. NATIONAL GENDER AND DEVELOPMENT POLICY, *supra*, at 7. Once they are included in the process, they can utilize their expertise to contribute to local development and thereby benefit the society at large.

Namibia provides a model for this provision in its specification of qualifications for land board membership. The Communal Land Reform Act specifies that the communal land board shall elect four women, two of whom are "engaged in farming operations" and two of whom are women "who have expertise relevant to the functions of a board." Communal Land Reform Act, (2002), § (4)(1)(d). (Namibia). Tanzania also sets forth general qualifications for members of land bodies to ensure that they possess skills or practical experience in land management. Land Act, (1999) Cap. 113 § 11(2). (Tanzania).

## 19. Bribery of land officials.

- (1) A person who,
  - (a) being a member of an institution that deals with land, solicits or receives any payment from any person to whom any service is rendered, including under the Registered Lands Act, the Trust Land Act and its subsidiary legislation, the Land Consolidation Act, the Land Control Act, or the Land Disputes Tribunal Act, which the member is not authorised to collect or receive; or
  - (b) being a party to a matter under the statutes listed in subsection (1)(a), offers or tenders any payment to a member of a land body in an attempt to influence the outcome;

commits an offence and is liable to a fine of not less than [5,000] shillings, giving regard to proportionality to the value of the property at issue, or imprisonment of not less than 30 days and not exceeding six months, or both such fine and imprisonment.

- (2) Offences specified in subsection (1) shall be tried by a Special Magistrate appointed pursuant to section 3 of the Anti-Corruption and Economic Crimes Act of 2003.
- (3) The fines collected pursuant to subsection (1) shall be deposited in a national fund for the promotion of joint registration of land pursuant to section 10 of this Act.

**The prohibition of bribery and fraud in land matters is designed to address the problem of corruption while simultaneously creating incentives for joint registration of land. The criminal penalties would also help resolve the problem in Kenya of husbands who bribe land boards to induce them to consent to transactions without their wives' consent. Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Feb. 11, 2008); Interview with John Kinyua, *supra*; Interview with Hellen Kwamboka Ombati, *supra*. By converting the collected fines into tax credits for joint registration of property, the provision promotes women's property rights by encouraging joint registration of land that is usually registered solely in men's names.**

This provision draws from the Anti-Corruption and Economic Crimes Act of 2003, which provides for the prevention, investigation and punishment of corruption in Kenya. The Anti-Corruption and Economic Crimes Act of 2003, (2003) Cap. 3 of 2003 § 3(1). (Kenya). Although this Act makes great strides in the fight against corruption, the current laws have been insufficient to address the problem. See Interview with Gitobu Imanyara, *supra*.

**This provision is also modelled after section 92 of the Uganda Land Act, which states that any person who "being a member of the land tribunal, a board, a committee, solicits or receives any payment from a person to whom any service is rendered under this Act being payment which the member is not authorised to collect or receive under this Act, commits an offence." The Land Act, (1998) Cap. 227 § 92(1)(d). (Uganda).**

## 20. Fraud before land bodies.

A person who, being a party to a matter before an institution that deals with land,

- (1) misrepresents the identity of his or her spouse; or
- (2) presents a fraudulent document purporting to show his or her spouse's consent to a land transaction

shall be guilty of an offence and liable to a fine proportional to the value of the property at issue, or to imprisonment of not less than 30 days and not exceeding six months, or to both such fine and imprisonment.

**This provision is modelled after the Land Control Act's punishment for false statements in section 21. The Land Control Act, (2004) Cap. 302 § 21. To ensure that such punishments extend beyond land control boards, this provision applies to all institutions that deal with land.**

**This provision helps ensure that a spouse's consent to the sale is genuine. The decisions of land control boards have not adequately accounted for the interests of women because "[m]en have reportedly bribed land control boards, fraudulently brought imposter 'wives' to the boards to consent to land transfers, and threatened their wives**

**with violence or eviction if they withhold consent.” HUMAN RIGHTS WATCH, DOUBLE STANDARDS, supra, at 33. See also Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Feb. 11, 2008); Interview with John Kinyua, supra; Interview with Hellen Kwamboka Ombati, supra.**

## **21. Expedited access to land bodies for people living with HIV/AIDS.**

- (1) People living with HIV/AIDS shall qualify for an automatic certificate of urgency entitling the holder to expedited access to all decision-making bodies that determine or adjudicate land rights.
- (2) Upon application for such a certificate, the land body must automatically certify the case as urgent, provided that the applicant presents supporting documentation of HIV-positive status, such as, but not limited to, a medical card issued by a hospital or the Ministry of Health showing that the applicant is taking anti-retroviral medication.
- (3) All information related to the applicant's HIV status must remain strictly confidential and shall not be disclosed to any person other than the applicant, with additional protections provided by the privacy guidelines prescribed under section 20 of the HIV & AIDS Prevention and Control Act.

**This provision will ensure that all Kenyans living with HIV/AIDS will be able to access land tribunals expeditiously to determine their rights and interests to land. This provision is especially important for people on anti-retroviral medications that must be accompanied by good nutrition. By guaranteeing that HIV patients can access these tribunals, this provision will help maintain their rights to farmland as their source of nutrition.**

## **22. Education and training.**

- (1) Relevant government agencies, including the Institute of Administration shall provide training on the provisions of this Act for all officials and members of institutions that deal

with land, including chiefs and elders, to educate them on the purpose and content of the foregoing provisions regarding women's equal rights to land and property.

- (2) The Institute of Administration shall incorporate training on women's equal rights to land and property into its curriculum for civil service officers and all land body members.
- (3) Local officials who receive training pursuant to this section shall thereafter hold trainings for the public to educate men and women on the purpose and content of the foregoing provisions regarding women's equal rights to land and property.
- (4) Parliament shall allocate the necessary funds to provide for training pursuant to this Act.
- (5) Curriculum for the training shall be developed by or with extensive input from civil society actors, in particular organizations that specialize in women's rights and land rights.

**This provision will ensure that the protections for women's property rights contained in this bill will be promulgated and implemented throughout the country. Currently, almost 90% of the poor in rural areas are not aware of formal laws. Interview with Beatrice Wamalwa, Development Assistance Assistant, USAID, in Nairobi, Kenya (Apr. 2, 2008). The current lack of awareness of women's rights in rural areas often hampers women's ability to challenge instances of discrimination against them such as dispossession and fraud. The inaccessibility of the land statutes leads to a reliance on custom instead. Interview with Jackson Kirigia, supra. Where customary law denies women equal rights to land, this represents a serious violation of their rights, albeit a preventable one: local leaders can be trained to implement the land statutes instead of falling back on custom.**

**The Institute of Administration is well-positioned to undertake such a training initiative based on its programs targeting civil service officers. Telephone Interview with Evelyne Opondo, Senior Counsel,**

**FIDA-Kenya (May 7, 2008). Beneficiaries of the training programs should include chiefs and elders in addition to members of bodies that deal with land such as county councils, land control boards, and land disputes tribunals. Once local leaders are aware of the land laws, they can hold trainings for the general public to educate them on the rights and obligations contained in the statutes. By providing for training of officials that deal with land rights and adjudication of disputes, chiefs and elders will be more knowledgeable about the legal protections afforded to women and will be less likely to make decisions that discriminate on the basis of sex.**

## AMENDMENTS TO EXISTING LAWS

The Acts of Parliament listed in the Schedules are amended accordingly.

### FIRST SCHEDULE – Amendment to the Land Disputes Tribunals Act.

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Land Disputes Tribunals Act</b>	Section 8(9) of the Land Disputes Tribunals Act is amended by striking “(other than customary law)”.	(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:  Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law ( <del>other than customary law</del> ) is involved.	(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:  Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law is involved.
<b>Land Disputes Tribunals Act</b>	Section 8(10) of the Land Disputes Tribunals Act is amended by replacing “fact” with “law”.	(10) A question of customary law shall for all purposes under this Act be deemed to be a question of <del>fact</del> <u>law</u> .	(10) A question of customary law shall for all purposes under this Act be deemed to be a question of law.

The Land Disputes Tribunals Act forecloses appeal to the Kenyan High Court on points of customary law, which is contrary to Kenyan law and to due process rights under international law. Sections 8(8) and 8(9) of the Land Disputes Tribunal Act, (2004) Cap. 287, currently state that “[t]he decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court,” except on a point of law to the High Court, but a “question of customary law shall . . . be deemed to be a question of fact.” § 8(10). Under this statute, a woman can only appeal a customary law decision to the Appeals Committee and not to the High Court. Thus, this statute insulates the decision of elders from review.

The Land Disputes Tribunals Act should reflect that customary law is treated as law in the Kenyan legal system. Section 3(2) of the Judicature Act states that customary law is a source of law for the Kenyan courts: “[t]he High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law . . .” The Judicature Act, (2004) Cap. 8 § 3(2). (Kenya). Kenyan courts are competent to hear customary law cases and often do. See, e.g., *Otieno v. Ougo*, (1987) K.L.R. 371 (H.C.K.), *aff’d* by (1987) K.L.R. 407 (C.A.K.) (holding that Luo customary law dictated that the head of the household determines where a family member is buried). Magistrates’ courts also can and do adjudicate cases involving customary law. See *Magistrates’ Courts Act*, (2004) Cap. 10 § 2, 17. (Kenya).

Additionally, Kenya and other countries have already acknowledged the importance of addressing land disputes in the courts. Magistrate courts “have jurisdiction to settle disputes and make declarations” under the Land (Group Representatives) Act. (2004) Cap. 287 § 10(2). In the Draft National Land Policy, the Kenyan



Government committed to “[e]stablish an independent, accountable and democratic system backed by law to adjudicate land disputes at all levels.” MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 3.5.9, para. 170(a) (2007). The Government also plans to establish “a land division of the High Court” to deal with land disputes. MINISTRY OF LANDS, DRAFT NATIONAL LAND POLICY § 4.3.5, para. 259 (2007). Thus, after the draft Land Policy is adopted, the High Court will have jurisdiction over land disputes. Ghana reformed its “stool lands” disputes settlement process to send such cases to the courts: “the High Court shall have original jurisdiction to hear and determine any dispute arising from, in respect of or related to a stool land boundary.” Stool Lands Boundaries Settlement (Repeal) Act § 1, No. 587 (2000) (Ghana).

The restrictions on appeal in the Land Disputes Tribunals Act violate the right to equality before the courts and tribunals under article 14(1) of the ICCPR and the right to appeal under article 7 of the African Charter. Women do not face equal treatment in the Land Disputes Tribunals because their decisions are based on customary law, which grant men more land rights than women, and those decisions are insulated from judicial review. Because women usually are granted fewer rights to land than men and cannot appeal discriminatory decisions, they are denied the right to an effective remedy, guaranteed in article 2(3)(a) of the ICCPR, and the right to appeal, guaranteed in article 7 of the African Charter, for violations of their rights to equality and to land.

## SECOND SCHEDULE – Amendment to the Land Disputes Tribunals (Forms and Procedure) Rules.

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Land Disputes Tribunals (Forms and Procedure) Rules, 1993</b>	The Land Disputes Tribunals (Forms and Procedure) Rules, 1993 is amended by replacing section 19 with the following new section—“(19) A party to or other person interested in a proceeding before a Land Disputes Tribunal or a Land Disputes Appeals Committee may be represented by an advocate.”	(19) <del>No party to or other person interested therein shall be entitled to appear by or to be represented by an advocate in any proceedings unless a Tribunal or an Appeals Committee directs otherwise.</del>	(19) A party to or other person interested in a proceeding before a Land Disputes Tribunal or a Land Disputes Appeals Committee may be represented by an advocate.

The Land Disputes Tribunals (Forms and Procedure) Rules exacerbate the discriminatory effect of the Land Disputes Tribunal Act because the Rules prohibit advocate representation for all persons party to or interested in Land Disputes Tribunal or Land Disputes Appeals Committee proceedings. See Land Disputes Tribunals (Forms and Procedure) Rules, 1993, (2004) Cap. 287 § 19. (Kenya). Women cannot present effective claims without advocate representation because they are unfamiliar with land laws and because the tribunals, which consist of elders and apply customary law, are predisposed to rule against women. See KLA, NATIONAL LAND POLICY, supra, at 10–11; Telephone Interview with Lily Murei, supra. Because the Land Disputes Tribunals (Forms and Procedure) Rules deprive women of the advocates they need to present effective claims before tribunals which put women at a particular disadvantage, the Rules deny women the right to equality before the courts and tribunals under article 14(1) of the ICCPR and the right to an effective remedy under article 2(3)(a) of the ICCPR. In *Airey v. Ireland*, the European Court of Human

Rights held that a woman was denied the rights to a hearing and to an effective remedy under the European Convention for the Protection of Human Rights and Fundamental Freedoms when she could not afford legal representation before a court to obtain a judicial separation. See 2 Eur. H.R. Rep. 305 para. 11, 19–28 (1979). Similarly, the Land Disputes Tribunals Act, which forecloses all legal representation before the Land Disputes Tribunals and Appeals Committees, denies women the rights to a hearing and to an effective legal remedy in land disputes.

The prohibition on advocate representation under the Land Disputes Tribunals (Forms and Procedure) Rules differs from provisions in other Kenyan statutes regarding other tribunals. For example, an appellant is entitled to an advocate before the Agricultural Appeals Tribunal. See The Agricultural Appeals Tribunal Rules, (2004) Cap. 318 § 3(1). (Kenya). An appellant is also entitled to an advocate before the Income Tax Tribunal. See The Income Tax (Tribunal) Rules, (2004) Cap. 470 § 2. (Kenya). According to a staff member of the Law Society of Kenya, it is standard for national tribunals to permit advocate representation: “Every national tribunal I know of permits representation.” Interview with staff member, the Law Society of Kenya, in Nairobi, Kenya (Apr. 4, 2008). Thus, adopting this amendment would render the Land Disputes Tribunals (Forms and Procedure) Rules consistent with other tribunal rules under Kenyan law.

### THIRD SCHEDULE – Amendments to the Registered Land Act.

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Registered Land Act</b>	Section 27(a) of the Registered Land Act is amended by deleting the word “absolute.”	27. Subject to this Act—  (a) the registration of a person as the proprietor of land shall vest in that person the <del>absolute</del> ownership of that land together with all rights and privileges belonging or appurtenant thereto;	27. Subject to this Act—  (a) the registration of a person as the proprietor of land shall vest in that person the ownership of that land together with all rights and privileges belonging or appurtenant thereto;

This provision gives effect to the Kenyan Government’s commitment to repeal “the principle of absolute sanctity of first registration under the Registered Land Act” under section 3.3.3.1 of the National Land Policy. MINISTRY OF LANDS, NATIONAL LAND POLICY § 3.3.3.1, para. 77(a)(ii) (2007). Under the Registered Land Act, the first person to register title to a portion of land has absolute title, free from any other interest or claim. See The Registered Land Act, (2006) Cap. 300 §§ 27, 28. (Kenya). Although women may register titles, men were the first ones to register titles after the Act was passed, and now women are unable to register land titles. KENYA LAND ALLIANCE, THE CASE FOR WOMEN’S LAND RIGHTS IN THE PROPOSED NEW CONSTITUTION 9 (2006), <http://www.kenyalandalliance.or.ke/Women%20land%20rights%20bk.pdf> [hereinafter KLA, PROPOSED NEW CONSTITUTION]; Telephone Interview with Lily Murei, supra (“[I]n the majority of communities the system is so patriarchal or patrilineal that . . . the men are the ones that have the land in their names, the titles are in their names.”). Currently, women only hold 1 percent of registered land titles in their own names and only about 5–6 percent of land titles jointly. KENYA LAND ALLIANCE, POLICY BRIEF: WOMEN, LAND AND PROPERTY RIGHTS AND THE LAND REFORMS IN KENYA 1 (2006), <http://www.kenyalandalliance.or.ke/women%20policy%20brief.pdf>.

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Registered Land Act</b>	Section 101(3)(a) of the Registered Land Act is amended by replacing the word "one" with "two".	<p>(3) Subject to subsection (2), the Minister may for any registration section with the consent of the county council (if any) concerned prescribe either—</p> <p>(a) the maximum number (whether <del>one</del> <u>two</u> or a greater number) of persons who are allowed to be registered in the same register as proprietors; or</p>	<p>(3) Subject to subsection (2), the Minister may for any registration section with the consent of the county council (if any) concerned prescribe either—</p> <p>(a) the maximum number (whether two or a greater number) of persons who are allowed to be registered in the same register as proprietors; or</p>

This section amends the Registered Land Act to implement the rights recognized in this bill. Subsection (1) ensures that women's rights of occupancy will be recognized as overriding interests to a proprietor's rights, even if such rights are not recorded on the register. The Registered Land Act currently allows the Minister of Lands to limit joint registration by "(a) the maximum number (whether one or a greater number) of persons who are allowed to be registered in the same register as proprietors." (2006) Cap. 300 § 101(3)(a). Thus, a limit of one proprietor may be imposed, and spouses may not be able to register property jointly. This amendment would raise the maximum to two, so at least a husband and wife may jointly register.

<b>Registered Land Act</b>	The Registered Land Act is amended by replacing subsection 32(1)(i) with new subsection (1)(i): "the registrar shall issue a separate title deed or certificate to each proprietor,"	(i) <del>only one title deed or certificate shall be issued in respect</del> <u>the registrar shall issue a separate title deed or certificate to each proprietor</u> of each parcel of land or lease;	(i) the registrar shall issue a separate title deed or certificate to each proprietor of each parcel of land or lease;
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Section 32(1)(i) of the Registered Lands Act, which currently provides that "only one title deed or certificate shall be issued in respect of each parcel of land or lease," allows one proprietor to claim title to land that is jointly registered. This amendment would instead allow the issuance of a title deed or certificate to all proprietors and would reinforce the notion that both spouses have equal rights to the land. Kenya's Registration of Titles Act allows the registrar or the Registrar-General to issue multiple title certificates "[w]hen two or more persons are entitled as tenants in common," although the registrar or Registrar-General may charge a prescribed fee or refuse the separate title certificate. Registration of Titles Act, (2004) Cap. 281 § 22(4)(a)–(c). (Kenya). Tanzania's Land Act simply provides that each person holding rights to the land "shall be entitled to receive a copy of the certificate of title" and that the Registrar shall issue a copy if such a person applies for one. Land Act, (2002) Cap 113 § 160(1)–(2). (Tanz.). Ghana's Land Title Registration Law also states that "[a] separate land certificate may be issued to each proprietor in common of any land or interest in land and such certificate shall show the undivided share of the proprietor," although "only one certificate shall be issued" if the persons register as joint proprietors. Land Title Registration Law, 1986 § 51(4)–(5) (Ghana). This amendment would also operationalize the Draft National Land Policy's commitment to "[p]ut in place appropriate legislation to ensure effective protection of women's rights to land." MINISTRY OF LANDS, NATIONAL LAND POLICY § 3.6.10.3, para. 225(a) (2007).

**FOURTH SCHEDULE – Amendment to the Land Consolidation Act.**

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Land Consolidation Act</b>	<p>Section 5(1) of the Land Consolidation Act is amended as follows –</p> <p>(a) by adding “orally”</p> <p>(b) by inserting a comma after “barazas”</p> <p>(c) by adding “county council meetings, and markets”</p>	<p>5.(1) Whenever, in accordance with the provisions of this Part, any notice is required to be given, the Adjudication Officer shall publish the same in writing at the office of the Civil Secretary of the Region within which the area is situated and at the office of the Regional Government Agent for the area and elsewhere as he may direct in such manner as he shall think fit, and the Regional Government Agent shall also cause the purport of such notice to be promulgated orally at barazas, county council meetings, and markets throughout the area and on such other occasions or in such other manner as he may determine.</p>	<p>5.(1) Whenever, in accordance with the provisions of this Part, any notice is required to be given, the Adjudication Officer shall publish the same in writing at the office of the Civil Secretary of the Region within which the area is situated and at the office of the Regional Government Agent for the area and elsewhere as he may direct in such manner as he shall think fit, and the Regional Government Agent shall also cause the purport of such notice to be promulgated orally at barazas, county council meetings, and markets throughout the area and on such other occasions or in such other manner as he may determine.</p>
<b>Land Consolidation Act</b>	<p>Section 12 of the Land Consolidation Act is amended by replacing “seven” with “ninety”</p>	<p>(12) Every Committee or Arbitration Board shall give <del>seven</del> <u>ninety</u> clear days warning of its intention to carry out an adjudication or arbitration, specifying the parcel or parcels of land upon which it proposes to adjudicate or arbitrate and stating the time and place at which it intends to adjudicate or arbitrate.</p>	<p>(12) Every Committee or Arbitration Board shall give ninety clear days warning of its intention to carry out an adjudication or arbitration, specifying the parcel or parcels of land upon which it proposes to adjudicate or arbitrate and stating the time and place at which it intends to adjudicate or arbitrate.</p>

**This provision will ensure transparency and accountability in the land consolidation process by notifying the public of pending land consolidations in a timely and accessible manner. The Land Consolidation Act currently requires only seven days notice before adjudication or arbitration of rights to trust land, which disadvantages women who may not have adequate time to make a claim to the land. Furthermore, the Act does not specifically require oral notice of pending adjudications. This is especially important for rural women who may not have access to the Gazette and may not be proficient in English or Kiswahili. By requiring that such notice is given at public meetings known as barazas in addition to county council meetings and markets, this provision aims to provide notice to a wider audience.**

**FIFTH SCHEDULE – Amendments to the Trust Land Act.**

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
Trust Land Act	Section 57(1) of the Trust Land Act is amended as follows –  (a) by striking “may” and inserting “must”  (b) by adding “Announcements shall be made orally at county council meetings and at barazas, and markets throughout the area.”	57.(1) Any order, notice or other document required by this Act, or any rule made thereunder, to be published <del>may</del> <u>must</u> be published by affixing a copy in the District Commissioner’s office and in some other public or conspicuous place or situation in the area concerned, and, where it is deemed necessary, by publishing it in the Gazette. <u>Announcements shall be made orally at county council meetings and at barazas and markets throughout the area.</u>	57.(1) Any order, notice or other document required by this Act, or any rule made thereunder, to be published must be published by affixing a copy in the District Commissioner’s office and in some other public or conspicuous place or situation in the area concerned, and, where it is deemed necessary, by publishing it in the Gazette. Announcements shall be made orally at county council meetings and at barazas and markets throughout the area.
Trust Land Act	Section 57(2) of the Trust Land Act is amended by –  (a) deleting “Such publication or affixing shall be deemed good and sufficient publication and notice to all persons concerned”  (b) adding “Every such notice shall be published, and the purport of such notice shall be promulgated in such language or languages as the county council shall deem to be most likely to be understood by all persons affected thereby.”	57.(2) <del>Such publication or affixing shall be deemed good and sufficient publication and notice to all persons concerned.</del>  <u>Every such notice shall be published, and the purport of such notice shall be promulgated in such language or languages as the county council shall deem to be most likely to be understood by all persons affected thereby.</u>	57.(2) Every such notice shall be published, and the purport of such notice shall be promulgated in such language or languages as the county council shall deem to be most likely to be understood by all persons affected thereby.

**This provision will ensure that all persons with interests in trust land are duly notified of decisions regarding the land. As currently written, the Trust Land Act does not require notice to be provided in local languages of the community concerned. Chairman of the Meru County Council explained that notices are normally written in English and there is no requirement for it to be translated into local languages. Interview with Charles Murithi Marangi, Chairman, Meru County Council, in Meru, Kenya (Mar. 31, 2008). By requiring that such notice is given at public meetings known as barazas in addition to county council meetings and markets, this provision aims to provide notice to a wider audience.**

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
Trust Land Act	<p>Section 8 of the Trust Land Act is amended—</p> <p>(a) by inserting a new subsection:“(2) For the purposes of this section, “in some other way prejudicially affected by the setting apart” includes, but is not limited to, persons who have a right of occupancy to the land, as defined in the Land Equality Act.”; and</p> <p>(b) by renumbering the current subsection (2) as subsection (3).</p>	<p>(1) Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who—</p> <p>(a) under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or</p> <p>(b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.</p> <p><u>(2) For the purposes of this section, “in some other way prejudicially affected by the setting apart” includes, but is not limited to, persons who have a right of occupancy to the land, as defined in the Land Equality Act.</u></p> <p><u>(3)</u> <del>(2)</del> A notice of setting apart published under section 7 of this Act shall also be published by displaying a copy at the District Commissioner’s office and at some other public or conspicuous place in the area concerned.</p>	<p>(1) Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who—</p> <p>(c) under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or</p> <p>(d) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.</p> <p>(2) For the purposes of this section, “in some other way prejudicially affected by the setting apart” includes, but is not limited to, persons who have a right of occupancy to the land, as defined in the Land Equality Act.</p> <p>(3) A notice of setting apart published under section 7 of this Act shall also be published by displaying a copy at the District Commissioner’s office and at some other public or conspicuous place in the area concerned.</p>

**Because the rights of women to land are not adequately recognized in the Trust Land Act, women are generally not compensated when Trust land is set aside. This provision would explicitly require compensation to women who live on Trust land but do not hold the primary rights to the land.**

**SIXTH SCHEDULE – Amendments to the Trust Land Rules.**

Law	Amendment	Example of Marked-Up Version of the Provision	Example of How the Provision Reads As Amended
<b>Trust Land (Meru Concessional Area) Rules, Trust Land (North Yatta, Yatta Plateau and Ithanga) Rules, Trust Land (Isiolo) Rules, and Trust Land (Olenguruone) Rules</b>	<p>The definition of “dependant” in section 2 of the Trust Land (Meru Concessional Area) Rules, section 2 of the Trust Land (North Yatta, Yatta Plateau and Ithanga) Rules, section 2 of the Trust Land (Isiolo) Rules, and section 2 of the Trust Land (Olenguruone) Rules are amended as follows—</p> <p>(a) by inserting “or her spouse,” before the word “father”;</p> <p>(b) by deleting “such of”;</p> <p>(c) by inserting “or her” before the word “children”; and</p> <p>(d) by deleting “as are unmarried and under the age of eighteen years”.</p>	<p>“dependant” means, in relation to a licensee, his <u>or her spouse</u>, father and mother and <del>such of his or her children as are</del> <u>unmarried and under the age of eighteen years</u>;</p>	<p>“dependant” means, in relation to a licensee, his or her spouse, father and mother and his or her children;</p>
<b>Trust Land (Irrigation Area) Rules</b>	<p>The definition of “authorized dependant” in section 2 of the Trust Land (Irrigation Area) Rules is amended as follows—</p> <p>(a) by inserting “or her” before the word “father”;</p> <p>(b) by replacing the word “wives” with “spouse(s)”;</p> <p>(c) by deleting “such of”;</p> <p>(d) by inserting “or her” before the word “children”; and</p> <p>(e) by deleting “as are unmarried and under the age of eighteen years”.</p>	<p>“authorized dependant” means, in relation to a licensee, his <u>or her father and mother, wives spouse(s) and such of his or her children as are</u> <u>unmarried and under the age of eighteen years</u>;</p>	<p>“authorized dependant” means, in relation to a licensee, his or her father and mother, spouse(s) and his or her children;</p>
<b>Trust Land (Shimba Hills) Rules</b>	<p>The definition of “dependant” in section 2 of the Trust Land (Shimba Hills) Rules is amended as follows—</p> <p>(a) by replacing “wife” with “or her spouse”;</p> <p>(b) by deleting “such of”;</p> <p>(c) by inserting “or her” before the word “children”; and</p> <p>(d) by deleting “as are unmarried and under the age of eighteen years”.</p>	<p>“dependant” means, in relation to a licensee, his or her <u>spouse wife</u> and father and mother and <del>such of his or her children as are</del> <u>unmarried and under the age of eighteen years</u>;</p>	<p>“dependant” means, in relation to a licensee, his or her spouse and father and mother and his or her children;</p>



Law	Amendment	Example of Marked-Up Version of the Provision	Example of How the Provision Reads As Amended
<b>Trust Land (Meru Concessional Area) Rules, Trust Land (Irrigation Area) Rules, Trust Land (North Yatta, Yatta Plateau and Ithanga) Rules, Trust Land (Isiolo) Rules, Trust Land (Olenguruone) Rules, and Trust Land (Shimba Hills) Rules</b>	<p>The Second Schedule to the Trust Land (Meru Concessional Area) Rules, the First Schedule to the Trust Land (Irrigation Area) Rules, the First Schedule to the Trust Land (North Yatta, Yatta Plateau and Ithanga) Rules, the First Schedule to the Trust Land (Isiolo) Rules, the First Schedule to the Trust Land (Olenguruone) Rules, the First Schedule to the Trust Land (Shimba Hills) Rules, and the Second Schedule to the Trust Land (Shimba Hills) Rules are amended as follows—</p> <p>(a) by replacing “son” with “child”;</p> <p>(b) by inserting “and ..... , and ..... , child of ..... and ..... ”; and</p> <p>(c) by replacing “is” with “are”.</p>	<p>LICENCE</p> <p>Under the Trust Land (Meru Concessional Area) Rules</p> <p>..... ,  <del>son</del> <u>child</u> of  ..... and  ..... , and  ..... , child  of .....  and .....  of the ..... District of the Northern Province, <del>is</del> <u>are</u> hereby authorized to occupy that part of the Meru Land Unit commonly known as the Meru Concessional Area as described in the Trust Land (Meru Concessional Area) Rules, and to keep thereon not more than the following number of stock</p>	<p>LICENCE</p> <p>Under the Trust Land (Meru Concessional Area) Rules</p> <p>..... , child  of ..... and  ..... , and  ..... , child  of ..... and  ..... , of the  ..... District of the Northern Province, are hereby authorized to occupy that part of the Meru Land Unit commonly known as the Meru Concessional Area as described in the Trust Land (Meru Concessional Area) Rules, and to keep thereon not more than the following number of stock</p>

Through their use of words like “his” and “son,” these Rules discriminate against women on their face. They allow men to apply for licences but do not allow women to apply for licences. There is no provision of the Trust Land Rules, the Trust Land Act, or any general definitional statute that renders their terms gender-neutral. Such facial discrimination violates the freedom from discrimination guaranteed in several international instruments, including article 26 of the ICCPR, articles 2, 14(2), 15(1) of CEDAW, and articles 3(1) and 18(3) of the African Charter on Human and Peoples’ Rights. The amendments replace the facially discriminatory words “son” with “child” and “his” with “his or her;” provide spaces for both parents of the applicants; allow for spouses to apply for licences; recognize the rights of adult children as dependants; and bring these Rules into conformity with international law.

**SEVENTH SCHEDULE – Amendment to the Advocates (Remuneration) (Amendment) Order, 2006.**

Law	Amendment	Marked-Up Version of the Provision	How the Provision Reads As Amended
<b>Advocates (Remuneration) (Amendment) Order, 2006</b>	<p>Schedule I of the Advocates Act is amended by striking the period and inserting at the end of section 2:</p> <p>“, except where at least one man and at least one woman purchase and register land as joint proprietors.</p> <p>For investigating title to a freehold or One-half of the scale fee set out leasehold property and preparing and under 1 above.</p> <p>completing conveyance (including perusal and completion of contract, if any, where at least one man and at least one woman purchase and register land as joint proprietors.”</p>	<p><b>2. PURCHASER'S ADVOCATE</b></p> <p>For investigating title to a freehold or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any; <u>except where at least one man and at least one woman purchase and register land as joint proprietors.</u></p> <p>The scale fee set out under 1 above</p> <p><u>For investigating title to a freehold or fee set out leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any, where at least one man and at least one woman purchase and register land as joint proprietors.</u></p> <p><u>One half of the scale fee set out under 1 above</u></p>	<p><b>2. PURCHASER'S ADVOCATE</b></p> <p>For investigating title to a freehold or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any, except where at least one man and at least one woman purchase and register land as joint proprietors.</p> <p>The scale fee set out under 1 above</p> <p>For investigating title to a freehold or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any, where at least one man and at least one woman purchase and register land as joint proprietors.</p> <p>One half of the scale fee set out under 1 above</p>

This section provides additional incentives to encourage joint registration by relaxing conveyancing fees when a man and a woman register jointly. Schedule I of the Advocates Act is the remuneration order setting forth the scale for conveyancing fees to advocates. The current conveyancing fees are:

1. VENDOR'S [ADVOCATE]	Scale fee	KSh.
For preparing and completing contract, answering any preliminary enquiries, deducing title (including any necessary abstraction to a freehold or leasehold property, answering any requisitions on title, perusing and completing conveyance or assignment.	On the first 5,000 minimum charge	12,000
	Over 5,000 to 25,000 per 100	52
	Over 25,000 per 100	30
2. PURCHASER'S ADVOCATE		
For investigating title to a freehold or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any.	The scale fee set out under 1 above	

The Advocates (Remuneration) (Amendment) Order, 2006, sched. I § 1–2. The property amounts in the scale are in Kenyan pounds (1 Kenyan pound = 20 Kenyan shillings). The amendment would reduce the conveyancing fees in the scale provided by half where a man and a woman register jointly. The new conveyancing fees for joint registrants would equal the conveyancing fees for mortgagors “[f]or deducing title (including any necessary abstraction) to a freehold or leasehold property, answering any requisitions on title, perusing and completing mortgage.” Id. § 3(a).

## Notes

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## Notes

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