



The Case for Women's Land Rights in the Proposed New Constitution



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PREFACE

This booklet is a further Kenya Land Alliance (KLA) advocacy contribution to the elimination of discrimination of women in access to land. KLA holds the view that the denial of women's land rights is a key contributing factor to their inability to overcome poverty. Thus, from whichever vantage point, the Proposed New Constitution presents an opportunity towards outlawing the discriminatory customary and social practices that are largely responsible for women's inequities. Through this booklet KLA brings to fore the power relations that impede women's attainment of productive and fulfilling lives both at domestic and public levels. These are exacerbated by legal restrictions that impede women's access to land and finances to develop the same.

To redress the ever-widening gender asset gap in Kenya, it is necessary that the constitution, as a supreme social contract in society provides for women's land rights. Otherwise women's enjoyment of full and equal rights and freedoms is likely to remain illusory and subject to the whims of tradition and political expediency.

In this booklet, KLA makes the case for the Proposed New Constitution to have outright provisions that provide for women's land rights. This is the surest way the women's role in development and their access to political and economic power commensurate with their numbers, needs and contribution shall be guaranteed and protected.

It is KLA's hope that this booklet shall be a lobbying and advocacy tool for reformers to come up with specific strategies to ensure that women's land rights are part and parcel of the new constitution. Unless this is done, existing gender inequities in allocation of land rights could be exacerbated. Kenya cannot afford to go the gender neutral route taken by other countries on women's land rights. To do so yields a negative, rather than positive effect on gender equity and consequent enjoyment of women's land rights.

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National Co-ordinator, KLA

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I. INTRODUCTION

In November 2005, Kenyans rejected the Proposed New Constitution in a referendum. The run-up to the referendum was characterized by an intense political polarization between the supporters of the government-backed Proposed New Constitution and its opponents. The ethnicization of the debate over the Proposed Constitution by politicians on both sides further obscured the good from the bad and irretrievably turned the referendum into what one commentator termed a question of “power and ethnic politics”.¹

By late 2006, the political push for comprehensive constitutional reforms had been overshadowed by the clamor by politicians for minimum electoral reforms ahead of the 2007 general elections. Nevertheless, it is correct to suggest that the decades-long quest for a new constitutional dispensation remained, although the civil society that had been its lead proponent was less organized in its advocacy as 2006 comes to a close. Given the ethnic and political polarization spawned by the referendum debate, it is tempting even at the level of analysis, to dismiss every aspect of the rejected Proposed Constitution and hope for another less contentious draft in future. While it is true a majority of Kenyans rendered their negative verdict in the Draft, it is equally true that the Proposed New Constitution contained some important provisions touching on women’s land rights that were a product of women’s struggles over a long period of time. Those provisions retain their relevance to future constitutional reform proposals. Consequently, it is wise, in the post-referendum calmness, to cast a reflective eye on what provisions in the rejected Proposed Constitution can be rescued for the purposes of future reforms.

The Constitution of Kenya is expected to represent the aspirations of all citizens. Much more important, it should represent major gains towards gender equality and equity, and protect human rights of all men, women, boys and girls of this country. The constitution as the supreme law of the land provides the template that is used to fashion the rules under which people in a country live. With respect to women’s rights to land, a constitution should guarantee security of tenure to land through mechanisms for equitable access to, ownership of and control over land. Women expect the constitution to shield them from laws, customs and practices that discriminate against them where land, a critical source of their livelihoods, is concerned.

It is important to point out that the women of Kenya, who are 52% of the population, have clamoured for a long time, for a constitution that recognizes and protects their rights as human rights. In this regard, we also need to remember that since independence, Parliament has amended the Constitution without optimum consultation with Kenyans, and especially women. This is much more so because of women’s under-representation inside Parliament. It also needs to be noted that the whole process of constitution review, including the setting up of the Constitution of Kenya Review Commission, entailed a struggle to ensure gender equality and equity. Gender activists have for a long time questioned many of the constitutional provisions. They saw the current constitution as not guaranteeing women equal rights with men. For example, until 1997, Section 82 of the Kenyan Constitution dealing with the question of discrimination excluded “sex” as an objectionable ground for discrimination. However, the revision of the Constitution in 1997 included “sex” as an objectionable ground for

discrimination in Section 82(3) but did not include it in Section 82(4). This left women open to discrimination in the areas where they were very vulnerable- in matters relating to the family.

Further, gender-neutral laws on property ownership have not resulted in more women owning land because of structural barriers such as access to credit and general lack of resources to purchase land. Women are under-represented in institutions that deal with land, their rights under communal tenure are not defined and this allows men to dispose off family land freely. Few have land registered in their names and lack of financial resources restricts them from entering the land market. Women have been of the view that to deal with male dominance in land matters, the law should explicitly provide for women's rights to own land and go further to provide for ways of assisting women to raise capital to purchase land and other property. In matrimonial contexts, women have argued for a presumption of spousal co-ownership of matrimonial property and specific provisions protecting spouses from sale of jointly occupied land without their knowledge and consent and protecting women's interests in the allocation of land. Women have also demanded that laws regulating the registration of land and other property rights should be amended with a view to simplifying the procedures and making them more accessible to women.

In this book, we first seek to review the legal and judicial context which influenced women's participation in the constitution-making process with specific focus on land rights. Second, we analyze the constitution-making process and highlight the issues that women were clamoring for in a new constitutional dispensation, including expectations under Nairobi Forward Looking Strategies and the Beijing Platform of Action. Third, we glean through the rejected Proposed New Constitution's provisions on the rights of women on land and property. Fourth and finally, we assess the practicability and implications of these provisions to the lives of majority of women.

II. LEGAL PROVISIONS ON WOMEN'S LAND RIGHTS

a. INTERNATIONAL LAW

In analysing the rights to land for women in Kenya, one has to look at both the international and domestic dimensions. Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women. She also has domestic laws touching on this issue. Kenya is a member of the United Nations therefore has an international legal obligation to provide for equal rights to men and women as provided for in the UN Charter and the Universal Declaration of Human Rights. Moreover, Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Political Rights of Women and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979). There is no shortage of obligations in the area of equality of the sexes in international law. Many of these provisions have however, not found their way into the Kenyan domestic legal regime. Domestication of such obligations is imperative if they are to be realized. Kenya does not have an automatic domestication clause in respect of ratified international covenants and domestication of the conventions has to be through legislation. International legal obligations are expressed in general terms and for them to form part of Municipal Law, there has to be specific legal enactment encompassing the international legal obligations as pointed out above.

At the 1985 World Conference on Women held in Nairobi, the domestication of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was singled out as an important step toward implementation of the basic strategies formulated at the conference at the national level. Paragraph 62 specifically points out that agrarian reform measures have not always ensured women's rights even in countries where women predominate in the agricultural labour force. Such reforms should guarantee women's constitutional and legal rights in terms of access to land and other means of production. Issues of equality in the areas of political participation, education, employment, civil codes pertaining to family law, ownership of property, availability of credit, health and social security, to name but a few were also identified as crucial intervention points.

The Optional Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa which came into force in 2005 pays particular attention to the rights of women to land. At Article 15, the right to land is linked to food security while Article 19 dealing with sustainable development exhorts states' parties to promote "women's access to and control over productive resources such as land and guarantee their right to property".

b. NATIONAL LAWS

1. Constitutional Provisions

a) Constitution of Kenya 1963 (As Amended in 1982, 1997)

The Constitution in chapter five provides for the fundamental rights and freedoms of the individual. These rights include the protection of the right to life, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment;

protection from deprivation of property; protection against arbitrary search or entry; provisions to secure protection of the law; protection of freedom of conscience; protection of freedom of expression; protection of freedom of assembly and association; protection of freedom of movement and protection from discrimination on grounds of race. Article 70 on non-discrimination provides that every Kenyan is entitled to the fundamental rights and freedoms of the individual whatever his or her sex, but these rights can be limited to ensure that the enjoyment of those rights and freedoms of any individual does not prejudice the rights and freedoms of others or the public interest.

Section 82 of the Kenyan Constitution deals with the question of discrimination. Section 82 (1) provides that no law shall make a provision that is discriminatory “either in itself or in the effects” and neither should a person be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of functions of a public office or public authority” (Section 82 (2)). Under Section 82 (3) discrimination is defined as “affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connection, political opinions, colour, creed or sex ...” (Section 82(3)). A number of laws are exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial, devolution of property on death and personal law matters; laws affecting members of a particular tribe or race in matters exclusively concerning them and such an action is seen as justifiable in a democratic society. The laws exempted by Section 82 (4) are in areas that directly affect women. One therefore finds that women’s enjoyment of the fundamental freedoms guaranteed by the Constitution is severely restricted.

Section 82 (4) legitimizes the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. This presents problems when we seek to apply statutes such as the Law of Succession Act (Cap. 160) which gives both men and women equal rights in matters of succession.

Under the current Constitution women can acquire, own and dispose of property as they wish. However, under the patriarchal (the ordering of society under which standards – political, economic, legal, social- are set by, and fixed in the interests of men) customary settings, women do not own property such as land. The Constitution’s claw back clauses at Section 82 sanction discrimination and application of customary law and this can be used to deny women the right to own property. As land is the most accepted form of security to acquire credit and because women generally lack land they cannot mobilize loans to enable them to buy property. Kenya has no local legislation on matrimonial property and courts apply the 1882 Married Women’s Property Act. While judicial decisions on the matter have increasingly recognised spouses’ rights to matrimonial property, the absence of firm anchorage for the positive provisions has resulted in conflicting decisions. It would assist if the principle of entitlement for spouses is enshrined in the Constitution to provide a firm grounding for claims to entitlement to a share of that property.

Other than this, the Marriage Bill (1985) sought to give equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. This Bill failed to go through Parliament.

2. Women's Rights under the Land Laws in Kenya

Land in Kenya is vested in different legal entities and governed under different laws each of which has implications for women's rights to own, access and use. The main classifications of land ownership in Kenya are individual / private, government and group or community.

Individual Private Ownership

Individual ownership of land ensues after the process of consolidation and adjudication.² The Minister in charge of land affairs has power to declare any area a land adjudication area, following which the entitlements of different persons to that land are determined and a document of title issued. The Registered Land Act (RLA) and the Transfer of Property Act govern individual ownership of land in Kenya.

The Registered Land Act

Sections 27 and 28 of the RLA provide for absolute proprietorship. They define the quantum of rights that the registered proprietor gets upon registration as absolute ownership of land together with all rights and privileges belonging or appurtenant thereto and not liable to be defeated except as provided for in Section 30 of the Act. Section 30 lists rights capable of overriding the rights of an absolute proprietor. It is notable that customary rights are excluded from this list. Customary rights are therefore not capable of qualifying the absolute proprietor's rights unless they are recorded in the register.³ The exact quantum of rights for an individual under this law vis-à-vis customary claims is however, a controversial matter. The High Court has held in some cases that customary law claims should be recognized and is capable of qualifying an individual's rights⁴ and in others that they are not overriding interests and should therefore be ignored.⁵ The holder of the absolute proprietorship to land has rights to use, abuse and dispose of her rights as she pleases subject to minimum restrictions.

- The Effect of the Registered Land Act on Women's Property Rights

Registration frees the registered proprietor from claims of other parties. The power of allocation is what is considered a registrable interest. The provisions of the Act are gender neutral. However, right from the beginning, registration was bound to exclude most women from acquiring titles to land since they only had rights of use while men retained those of allocation. The Registered Land Act thus only took into consideration the rights of people who had land and not the landless or those who had rights that did not amount to ownership. In most cases families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom. Cases of such family representatives seeking to evict the other family members from the family land escalated.⁶

The process of consolidation as understood by native Kenyans was the vesting of trusteeship in the family head and not the expropriation of family rights by an individual as the registration process turned out to be. The registration process thus excluded most women from property ownership and the benefits accruing from such ownership. The RLA does not recognise customary rights of use and women are therefore left at the mercy of the title-holder. Section 30 states that registered land is subject to overriding interests but does not regard customary law rights as one category of such interests. This provision thus excludes rights of use. In *Obiero v. Opiyo*,⁷ the Court indicated that the legislature did not intend to recognise customary law rights. The judge said,

"Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so."

The decision was followed in *Esiroyo v. Esiroyo*.⁸ The effect of this case law is that a woman has no interest in registered land and unless she claims and proves that the land in question is held and registered as trust property, for the benefit of members of the family, and consequently she has no way of claiming a right to the land.

The RLA also limits the number of people who can be registered as common or joint owners, of property to five,⁹ in order to control subdivision coupled with the Land Control Act¹⁰ which controls transactions in agricultural land and generally discourages fragmentation, the Act affects the rights of women especially in polygamous households. Sections 120 and 121 of the RLA also empower the courts to determine succession of registered land in accordance with the tribal custom of the deceased. Sub-division into uneconomic units will not be upheld by the courts and this has the indirect effect of excluding some widows (if widows are many and land is small) from ownership of the land.

The RLA therefore has the effect of weakening the position of women, in that registration has been monopolised by men and a large proportion of women do not therefore have title to land. Registration confers certain powers which strengthen one's economic power and the lack of title to land means that one cannot exploit such powers.

Registration places one in a position free from the interference of parties whose interests are not shown on the register. The right of use is not registrable therefore many women have no interest in the registered land even though such land was family property in which members of the family could claim rights and consequently, in which women could claim rights of use. Even where the title holder may be dealing with it unscrupulously prior to registration, women cannot interfere with the acts of the title holder since they hold no registered interest. Registration has in essence resulted in the increased exclusion of women from access to, control over and ownership of land.¹¹

The Transfer of Property Act (TPA)

This Act was introduced into Kenya from India to provide for the exercise of fee simple rights to land for the incoming settlers. It still governs land in settler and formerly settler occupied areas, designated during the colonial period as the white highlands, because the aim of bringing all land under the RLA has not yet materialised. The bundle of rights one gets under it is the same as what one gets under the RLA and the Agriculture Act provisions also apply to land held under it.

- The Effect of the TPA on Women's Property Rights

An interesting provision under this law is Section 29 which limits the rights of a married woman to own property individually. This provision achieves quite some significance when one considers the role of women in resource management in Kenya.¹² Despite the fact that this provision may be disregarded by courts which have now widely applied the provisions of the Married Women's Property Act of England of 1882,¹³ it could still be used to deny women rights over property that they have nurtured.¹⁴

The Land Control Act, Chapter 302 of the Laws of Kenya

This Act controls transactions in agricultural land. It makes any dealing in agricultural land subject to the consent of the land control board in the area within which the land is situated.¹⁵ Section 6 of the Act defines dealing to include a sale or a charge. It seeks to prevent the sub-division of land into sub-economic units. To achieve its objectives, the Act establishes Land Control Boards to control transaction in agricultural land. Owing to the hue and cry of families from different parts of the country whose male head had sold or mortgaged family property leaving families destitute, a Presidential decree was put in place for the boards in the 1980s requiring them to confirm proposed subdivisions were agreed to by all in the family before giving consent. The wives' and mature children's consent is therefore necessary before any sub-division consent is given, at least in theory. The practice however is different. Firstly, since most members of the boards are men, they do not give much weight to women's voices. Secondly, the guideline has no force of law and remains an administrative device which may be disregarded. Finally, corruption may lead to the presentation of a 'fake wife' who consents before the Board while the real family is in the dark with regard to the transaction.

Government Ownership: Government Lands Act

The taking up of land by the colonial government and the assumption of title to all land in the Crown gave the government the power to assume rights over land and vest them in other holders as it deemed fit. The Land Regulations of 1897 governed the earliest government titles issued in Kenya.¹⁶ These were subsequently taken up under the Crown Lands Ordinance of 1902 and later the Crown Lands Ordinance of 1915.¹⁷ While the 1902 Ordinance empowered the Commissioner to sell freehold estates to settlers, the 1915 Ordinance further extended the meaning of Crown land as discussed above. The net effect of these provisions was the assumption of ownership of all land in the Protectorate by the colonial government.¹⁸

The precursor to the Government Lands Act, the Crown Lands Ordinance Chapter 280 of the Laws of Kenya, was originally passed to make provision for regulating the leasing and other disposal of crown lands. Upon independence, the Crown Lands Ordinance became the Government Lands Act, Chapter 280 of the Laws of Kenya. Section 3 thereof gave the President, like the Governor before him, power to make grants or dispositions of any estates, interests or rights in or over un-alienated government lands. The Commissioner of lands also has power to divide any portion of government land into plots for the erection of buildings for business and residential purposes.¹⁹ In recent years, a lot of government land has been converted to private land granted mainly to politicians supporting the government.²⁰

- The Effect of the GLA on Women's Property Rights

Ownership of land by the government does not assure women access to such land. There is literature that suggests that government ownership is akin to private ownership where the government has, as is the case in Kenya, the right to pass the land on to individuals indiscriminately.²¹ Whilst there has been hue and cry over the conversion of government land to private ownership, no empirical research has been done to indicate who the beneficiaries of the grants are in gender disaggregated terms. The beneficiaries of government land grants documented in the Presidential Commission of Inquiry into the Illegal / Irregular Allocation of Public Land, popularly referred to as the Ndung'u Report are mainly men.

Group Ownership: Trust Lands Act

The notion of trust land is a way of giving recognition to group and native rights. Trust land consists of areas that were occupied by the "natives" (as opposed to settlers) during the colonial period and which have not been consolidated, adjudicated and registered in individuals' or group names and native land that have not been taken over by the government.²² It is governed by the Trust Lands Act and is vested in local authorities designated as Councils.²³ Councils manage all the resources within the trust land under their jurisdiction and control the development of that land. Trust land is divided into two: that supposed to be registered under the RLA and that which is not for registration.

With respect to the occupation, use, control, inheritance, succession and disposal of any trust land, every tribe, group, family and individual has all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof.²⁴ There is an elaborate procedure to be followed in the event that the government or the County Council wants to set aside trust land for public purposes thus protecting the rights of residents from expropriation without compensation.

Tenure to trust land is increasingly changing from the trust status to ownership by individuals, legally constituted groups and the state. The implications of this change are significant since the controls that the Council can exercise over the use of the land are eliminated. The application of customary law is ousted and the land is removed from the ambit of Council control for conservation and development purposes. In instances where the state or individuals take(s) over the ownership of the land, access thereto for communities previously occupying the land is curtailed significantly.²⁵ In areas where communal ownership is perceived as capable of encouraging good resource husbandry through the trust land system, land has been parcelled out to groups that do not necessarily have anything in common to the detriment of the management of resources within those areas.²⁶

Land (Group Representatives) Act

The Report of the East Africa Royal Commission of 1953-1955, concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that individualization of land ownership should be the main aim. It however noted that such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives and customary associations of Africans.²⁷ The tenure reform process in Kenya has, however emphasized more the control of the state and the individual and only in exceptional cases has group tenure been recognized as such. Group or community ownership in Kenya is through the institution of the group ranch, which is defined as “a demarcated area of rangeland to which a group of pastoralists, who graze their individually owned herds on it, have official land rights”.²⁸

The group ranch status in Kenya is granted to a group of herders that is shown to have customary rights over the range or pasture land in question. The operative statute in this regard is the Land (Group Representatives) Act.²⁹ A group for the purposes of the Act is a “tribe, clan, family or other group of persons, whose land under recognised customary law belongs communally to the persons who are for the time being the members of the group, together with any person whose land the group is determined to be the owner” where such person has, under recognised customary law exercised rights in or over land which should be recognised as ownership.³⁰ Excluded from membership, however are those members who are under any kind of disability. The guardian of such a person is included to look after the interests of the ward.³¹

Most group ranches are in the areas occupied by pastoral communities in Kenya. The composition of group ranches was an attempt at formalising traditional community structures. The principle idea behind them was to create a land unit smaller than the traditional community but larger than the individual. This smaller unit is not necessarily capable of maintaining economically viable livestock herds.³² As has been pointed out above, group ranches have not worked as well as was hoped for a variety of reasons. Firstly, the group representatives lack the authority of traditional leaders. John Galaty for instance notes that the relationship of these groups to the traditional social organisation is often tense.³³ Secondly, government policy has tended to emphasise individual rights and there is a prevalent view that the group rights would eventually mature into individual ones. Further, despite the fact that 37 % of Kenyan land is used for pastoralism as compared to the 9 % used for agriculture, the latter has received greater attention in policy making. Like in many other parts of the world, pastoralism in Kenya has not been fully recognised as an important land use system.³⁴

The Effect of Group Ownership on Women's Property Rights

While community ownership is promoted as egalitarian and more likely to guarantee disadvantaged groups rights to resources such as land, there is no literature illustrating whether this is the case in trust land and group ranches in Kenya. With regard to trust land, it is worth noting that the governance institutions, County Councils, have very few women. Women's interests in such land are therefore at best articulated by male intermediaries. Given the patriarchal social ordering, it would be surprising if indeed women have greater rights in these

areas. In a study carried out among the Samburu, Rendille and Maasai where group ranches are the norm, it was noted that most fora for making decisions were dominated by men and that most of these cultures excluded women from such fora.³⁵ Those whose names are registered in the group title are also largely men who are regarded as community leaders.

3. Judicial Decisions on Women's Rights to Property Generally

Kenya's legal system has since 1971 established the principle that spouses have equal rights in ownership of property. This principle was enforced in the case of *I v. I* (1971) E.A. 278) in which the court applied the English married property of 1882. The act has since become a statute of general application and has been invoked to deal with matrimonial property disputes. This has contributed to the general advancement of women in relation to ownership of property.

Section 1 (1) of the Act provides that a married woman is capable of acquiring, holding and disposing by will or otherwise of movable or immovable property as her separate property, in the same manner as if she is a single women (*femme sole*). Sub-Section 2 of this section of the Act provides that a married woman may sue or be sued in respect of her separate property either in contract or tort as if she were a *femme sole*. A married woman carrying on business separately from her husband is subject to the law of bankruptcy in respect of her separate property.

Although the parties in *I v. I* were not subject to customary law, the Married Women's Property Act has been extended to parties married under customary law, for example in *Karanja v. Karanja*. (1976) K.L.R. 307). The implication of the decision in *Karanja's* case is that the Act is applicable to all the systems of marriage recognized under Kenya Law, and has the potential of removing inequalities experienced by women especially within the context of customary law. It should be recognized however that the continued application of the English act shows that the Kenyan legal system is wanting. It has yet to be decided with certainty whether relevant developments in English law should be applied in Kenya.

Moreover, there are practical problems in the application of the principle of equality of sexes in the matrimonial context. During the dissolution of a marriage, questions arise as to which spouse owns which property where the property is registered in the name of one spouse and the other spouse claims an equitable interest therein or where it is registered in the names of both spouses but the exact amount of contribution of each is not ascertained. The question as to whether a wife can be deemed to have contributed to matrimonial property by looking after children and attending to other domestic chores also arises.³⁶ This raises the broader question of society's perception of women's work.

With regard to the issue of registration of property in the name of the spouses, it has been established that where such property is registered in the name of the husband, a wife who claims an interest therein must show that she contributed some money towards the purchase of the property. It has also been established that where the spouse holds the title to the matrimonial home, the other spouse may gain an interest in the property by making substantial improvements to such property.

In the absence of local legislation, Kenyan courts have yet again to resort to English law. English rules of equity and common law are applicable in Kenya “so far only as the circumstances of Kenya and its inhabitants permit and subject to qualifications as those circumstances may render necessary”. Under rules of equity, where property is purchased by the husband and is transferred to the wife, there is a rebuttable presumption of a resulting trust in favour of the wife.

Where a wife and husband have a joint bank account they are presumed to be entitled to it in equal shares. Where investments are made out of the joint account in the name of the husband, he will be held to be a trustee for his wife, who would be entitled to a half share. This position was succinctly stated in *Karanja v. Karanja* as follows:-

The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor prelude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both.

Where the woman is unemployed our law is silent on the value of her non-monetary contribution to the matrimonial kitty. The Tanzania Court of Appeal was seized with the opportunity of determining whether or not the domestic services of a housewife amounted to a “contribution” in acquiring matrimonial assets in the case of *Hawa Mohamed v. Ally Sefu* (Unreported Civil Appeal No. 9 of 1983) and it observed:

On examination of the Law of Marriage Act 1971, and the law as it existed before its enactment one cannot fail to notice that the mischief which the law ... sought to cure or rectify was what might be described as oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned.

This thinking is also to be found in justice Omollo’s decision in *Mary-Anne Matanu Kivuitu v. Samuel Mutua Kivuitu* (1991) KAR 241 where he was of the view that non-monetary contribution by the housewife in preparing for the family and keeping the family going generally constituted contribution to the acquisition of matrimonial property. There have been more recent cases recognizing the wife’s contribution to the acquisition of matrimonial property.³⁷ Such progressive thinking should form the basis of legislation with regard to matrimonial property if the gains made are to be firmly consolidated. The practical application of such principles in favour of women raises questions in view of the fact that resolution of conflicts is largely dependent on legal counsel and access to courts. Legal services are out of reach of a majority of Kenyan women implying that special legal aid arrangements are necessary to enable them challenge discriminatory practices inherent in personal laws. For example under customary law, there is a general principle, that the husband should manage the wife’s property except for movables such as personal effects and there are divergent practices on the position of the woman as regards her property rights on dissolution of marriage as noted above. Although this situation is changing through liberal judicial intervention and increasing advocacy on women’s rights, specific policy interventions and legislative measures are necessary to ensure that women are empowered to have access to property. More training and employment opportunities are

but examples of the necessary interventions. Legislation is also necessary to address rights of women involved in situations of cohabitation for a considerable number of years without going through a ceremony of marriage. Courts in Kenya have had to grapple with disputes emanating from associations that do not neatly fit into any of the four systems of marriage. The parties to these relations may be those who are on the road to customary marriages not having completed the process or persons who come to live together outside a formal marriage. In the event of such cohabitees acquiring property together or bringing their individually owned property to the union, questions as to property rights to such are bound to occur in the event of death or the relationship turning sour.

Faced with such disputes, courts seek to determine whether in fact the cohabitation constituted a marriage for purposes of allocating property rights. Proof of existence of marriage always tends to be disadvantageous towards a woman who has to prove her status as wife before the court. In *Mary Njoki v. John Kinyanjui and others* (Unreported Civil Appeal Case No. 71 of 1984) the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. It was necessary in the court's view, that such cohabitation be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or by customary law. The determination of what constitutes a qualitative relationship can be pretty harsh on women.

III. THE PROPOSED NEW CONSTITUTION 2005

It is within the context of the above legal provisions and court decisions as well as lived realities of women's lives that Kenyan women approached the constitution review clamour. At each step, they were anxious to ingrain women's concerns in both the process as well as substantive outcomes of the review process.

a. BACKGROUND TO THE PROPOSED NEW CONSTITUTION

1. Establishment of the Constitution of Kenya Review Commission (CKRC)

For over ten years, there was debate on whether or not Kenya's current social contract should be recreated or overhauled. After numerous negotiations among different stakeholders such as political parties, civil society, and religious groups, a legislative and institutional framework for reviewing the Constitution was agreed on in November 2000. The Constitution of Kenya Review Act (CAP 3A) established the Constitution of Kenya Review Commission and was later gazetted on November 10, 2000.

Before the CKRC was established, a parallel initiative to review the current social contract had already been started by religious groups, civil society and other stakeholders. The Ufungamano Initiative, as it was known, was founded on the premise that the structure and mandate of the CKRC as established by the legislation was not inclusive, comprehensive and people-driven.

Evidently, there was division in the political environment evidenced by the fact that there was a proposed version of the CKRC and the existence of a parallel People's Commission of Kenya (PCK). The CKRC was seen as an instrument of the ruling party KANU and Ufungamano's PCK as that opposed to KANU. The negotiations that followed amongst the various stakeholders resulted in a merger between the two commissions in June 2001 to form the unified CKRC.

2. The Mandate of the Constitution of Kenya Review Commission

The Constitution of Kenya Review Act CAP 3A specifically set out the mandate of the Commission. The primary mandate was to ensure a comprehensive review of the current Constitution "by the people of Kenya". The Commission was the primary organ of review and consisted of 29 commissioners (of which two, the Attorney General and its Secretary were ex-officio). Commissioners were appointed by the President upon nomination by the National Assembly. The President appointed the Chairperson from among the Commissioners. The Commission reflected Kenya's ethnic, geographical, cultural, political, social and economic diversity and the principle of gender equity.³⁸

The objectives of the review addressed what were generally considered to be the weaknesses of the present Constitution and the reasons why a new social contract was necessary.³⁹ They were binding on all organs of review outlined in Section 3 of the Act. First and foremost, they aimed at guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people.⁴⁰ Secondly, they sought to establish a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity. Thirdly, they aimed at promoting the peoples'

participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power; Fourthly, they promoted respect for ethnic and regional diversity and communal rights including the right of communities to organize and participate in the cultural activities and the expression of their identities; Fifthly, they aimed at ensuring the full participation of people in the management of public affairs; and finally, sought to enable Kenyans to resolve national issues on the basis of consensus. For a deeply divided populace along the lines of social and economic classes, ethnicity, religion, gender and generation, the objectives of the review were extremely ambitious.

- The Context for Women in the Mandate of the Commission

The Review Act provided an expansive agenda for affirmative action and the inclusion of the historically marginalized and minority groups into the national fabric. Section 3 of the Review Act demanded that all organs of the review process ensure that the final outcome guaranteed and safeguarded the well being of the people of Kenya. In particular, the review process was to ensure the following: gender equity; equal citizenship; equality and redress of the discrimination or hardships suffered in the past; respect of human rights and fundamental freedoms; equitable access to national resources; full and inclusive participation in public affairs; and the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth. The Review Act gave a high priority to human rights and basic needs and provided for an expansive agenda for inclusion in Constitutional reform. The agenda included: the protection of human rights and democracy, gender equity and gender parity in the right to citizenship.

b. WOMEN'S WISH LIST FOR INCLUSION IN THE PROPOSED NEW CONSTITUTION

Several fora were held by the Review Commission to receive memoranda from different interest groups. Also the Review Commission was keen to be inclusive. With regard to gender interest groups, it held a seminar to deliberate on the gender question from the 5th to 8th December 2001 at which papers on diverse aspects of the gender question were discussed. Three main background papers were presented on the legal, political and economic and socio-cultural aspects of the gender question. Alongside these papers were presentations from other jurisdictions that had gone through the review process such as Uganda and South Africa; presentations from national and international scholars on the gender question; members of parliament and of the diplomatic corps. A number of organizations and individuals also presented memoranda to the Commission and the Commission organized Provincial Women's Consultative Workshops between 12th and 13th April 2002.

In the memoranda submitted by women to the Constitution of Kenya Review Commission, they demanded inter alia, equal access to resources for men and women; equality before the law for men and women, boys and girls without discrimination on the basis of gender; guarantee of security and equal protection by the law to both men and women; gender equity in all sectors and provisions addressing contradictions and inadequacies of legal framework in the area of gender rights. With regard to land, they explicitly demanded guarantees for women's land rights and outlawing of customary law and practices that derogate from human and women's rights.

In a nutshell, some of the issues of concern raised by women included:

- Ensuring and enhancing the participation of women in the electoral process.
- Enshrine equal access to resources for men and women
- Equality before the law to men, women, boys and girls without discrimination on the basis of gender
- Guarantee security and equal protection by the law to both men and women
- Need to effectuate gender equity in all sectors
- Deal with contradictions and inadequacies of legal framework in the area of gender rights
- Principle of gender balance to be observed in the composition of all offices and governance structures to ensure women's participation
- Guarantee women's rights under the Bill of Rights
- Citizenship laws to be amended to accommodate concerns of women
- Discrimination in the area of personal law to be proscribed
- Entrench principle of affirmative action in the Constitution
- Proportional representation with a third of total number being women in all Constitutional offices, organs and structures including Cabinet, Judiciary, Civil Service and Disciplined Forces
- Gender Commission as an institutional mechanism for the advancement of women's rights
- Domestication of international conventions on women's rights that Kenya has signed/ratified
- Guarantee women's land rights
- Provide for women's rights to health care, nutrition and education
- Protection of the institution of the family
- Outlaw cultural practices inimical to women's rights and human rights
- Outlaw customary law and practices that derogate from human and women's rights.
- Gender equality in political parties' affairs and Constitutional provisions to engender national budget

C. PROVISIONS IN THE 2005 PROPOSED CONSTITUTION HAVING A BEARING ON THE RIGHTS OF WOMEN

There were provisions in the Proposed New Constitution of Kenya that sought to benefit women in tandem with other members of the Kenyan population. Our attention here is however on provisions addressing inequalities between the male and female genders in Kenya and which have implications for their rights to land.

Broad Basis for Equality: National Goals, Values, Principles and Goals

According to Article 13(1) (i) the State was to ensure full participation of women and all citizens in the political, social and economic life of the country. Article 13(1) (j) held that the state shall implement the principle that no more than two-thirds of the members of elective and appointive bodies shall be of the same gender.⁴¹ Additionally Article 13 (1) (l) adverted to the responsibilities that the state and society owe to among others the family and the institution of marriage. In view of the fact the family is the locus of many women's articulation of their rights, this provision put the responsibility for the family beyond the members of the family and that was likely to lend some level of objectivity in adjudicating issues between different members of the family. This would have impacted indirectly on rights to land for women.

The Bill of Rights - Equality

Every person is equal before the law and has the right to equal protection and equal benefit before the law. Equality as espoused in Article 36(1) included full and equal enjoyment of all rights and freedoms.

- Freedom from Discrimination

Article 36(1) The state shall not discriminate directly or indirectly against any person on any ground, including sex, race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Further, the affirmative action principle was entrenched.

- Gender

Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities under article 38(1). Further, under Article 38(2) women and men have the equal right to inherit, have access to and manage property. Thus equal treatment of all genders was to be safeguarded and this included the right to equal opportunities in political, economic, cultural and social activities. Women would have an equal right to inheritance, access and management of property as men. Moreover, any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women was to be prohibited.

- Family

Parties to a marriage are entitled to equal rights in entering the marriage, during the marriage, and at dissolution of marriage. This was espoused under article 42(4). Article 42 further stipulated under Section 5 thereof that Marriages conducted under traditions of various communities were to be protected.

- Gender Commission

Article 76(1) provided for the establishment of a Gender Commission whose purpose was to promote gender equality and equity. It is important to note that proposals for the establishment of this Commission have been made over the years and there have been debates against having it as an independent Constitutional Commission. In 2004 the government created the National Gender Commission through an Act of parliament.

Principles Relating Directly to Land: Principles of Land Policy

The state was required to eliminate gender discriminative laws, regulations, customs and practices related to land and property in land. Article 78(2)(a) required the state to define and keep under review a national land policy ensuring equitable access to land and associated resources. More specifically, Article 78(2) (f) stipulated that the Government shall define and keep under review a national land policy ensuring the discouragement of customs and practices that discriminate against the access of women to land.

Legislation on Land

Article 86 (1) (d) provided that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular, the matrimonial home during and at the termination of marriage. Further Article 86 (1) (j) proposed that such legislation protect the dependents of deceased persons holding interests in any land including the interests of spouses in actual occupation of land.

Environment

Environmental resources are very closely linked to land and women, by virtue of the roles they play, women have a very close relationship with the environment and natural resources. Consequently, women have an interest in the integrity of these resources. While the chapter provided the rights for all persons to participate in the management of the environment, special attention should be paid to the situation of women and the structural handicaps they face in their quest to participate in decision-making. In the carrying out of environment impact assessments for instance, the ability and availability of women to travel to venues where hearings are conducted should be given special attention. The Environment Management and Coordination Act (EMCA) provides for public participation in environmental decision-making but in reality only a handful of persons participate meaningfully owing to distances to meeting venues and inappropriate media of communication of intended hearings. Thus there is also women under-representation in Institutions dealing with environmental management.

IV. PRACTICALITY OF THE PROVISIONS IN THE PROPOSED NEW CONSTITUTION

A. BEYOND LEGAL PROVISIONS: SOME PREREQUISITES FOR TRANSLATING CONSTITUTIONAL PROVISIONS INTO CONCRETE GAINS FOR KENYAN WOMEN.

Looking at the provisions of the Proposed New Constitution, it is clear that it made very bold steps towards effectuating women's rights. Indeed looking at the list of issues of concern raised by women during the review process, the draft accommodated most of these issues. It needs to be underscored here that the provisions in that Proposed New Constitution should be treated as a minimum. The challenge therefore is firstly, to ensure that these progressive provisions remain in any subsequent new draft and finalized constitution in light of the contentions that still surround some of the provisions. Secondly, it is imperative that the provisions are implemented to benefit Kenyan women. There are challenges in the way of realizing the rights provided for which go beyond legal provisions. These include social-engineering and education.

The fact that statutory law competes with customary law whose hallmark is the dominance of male members points to a contestation in the way of meaningful realization of constitutional rights by women. The mere proscription of customary laws and practices that are based on the superiority or inferiority of one gender will not eliminate these laws and practices which are within the very fabric of society. The situation would have been confounded by the provision on religious courts at Article 195 which might have been the basis for the establishment of traditional religious courts that apply personal law with biases against women. Similar concerns arise from Article 3 on the laws of Kenya which included personal laws of the people of Kenya. The hope here is that when called upon to determine issues involving conflicts between the bill of rights and these other provisions where rights of women to land are concerned, courts will uphold the equality and non-discrimination provisions in the Bill of Rights.

Social Engineering

Whilst the draft bill of rights had pro-women provisions, it was also clear on the principle of equality and allowed for differential treatment to correct past and existing inequalities, it is important to point out that administration of laws can also occasion the subordination of women to men. Juridical power has been singled out as a formidable obstacle to women's rights. Indeed one of the greatest problems for Kenyan women has been the quest to operationalize legal rights that do not per se discriminate against them. The socio-economic realities in Kenya and the patriarchal ideology pervading society stands in the way of swift and effective translation of abstract rights into real substantive rights. Constitutional provisions, such as those contained in the 2005 Proposed New Constitution may remain paper rights for women unless real efforts

are made to operationalize them. So far, women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. This requires broad-based campaigns to educate society on the benefits of gender equality and to diffuse tensions between the genders as well as legal education on the substance of the rights and procedure to enforce the same.

De jure Equality, De Facto Discrimination

At present, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed. Gender neutral laws guaranteeing women equal rights with men have, in many instances, been ignored with discrimination persisting. This is because law does not operate in a vacuum. It operates in a social, economic and political context and that context in Kenya, has not been very supportive of gender equality and equity. Certain norms of customary law are so ingrained in people's minds that to deal with them necessitates a robust strategy. There is need for aggressive campaigns to ensure that past and current injustices that have constrained women's participation are addressed in practice. We should not stop at enshrining the rights in the Constitution; we need to ensure that the constitutional provisions inform law and practice. In this regard, it is clear that our work is only just beginning.

a. A NATIONAL LAND POLICY AS A RAY OF HOPE IN MOVING TOWARDS WOMEN'S RIGHTS TO ACCESS, OWN AND CONTROL LAND AND LAND-BASED RESOURCES

The need for a holistic land policy reform process has been felt in Kenya for a long time. In 1999, the Commission of Inquiry into the Land Law System of Kenya was appointed by the President (also known as the Njonjo Commission). It was charged among others with the tasks of reviewing land issues in Kenya with a view to recommending principles that would foster economically efficient, socially equitable and environmentally sustainable land tenure and use system. The Commission reported back in 2002 and among its recommendations was the need to address gender issues in land access, control and ownership.⁴² Following up on the Commission's recommendations, a national land policy formulation process was started in 2004. This process was yet to be finalized by 2006 and it will definitely address the question of women's rights to land. Among the principles governing the land policy reform process is gender equity and non-discrimination. It is also very conscious of the plight of women in matrimonial contexts. (see Appendix)

V. CONCLUSION

The road to a new Constitution has been long and winding. It is unfortunate that we cannot say categorically that we are out of the woods. The aspiration for inclusivity has been a major challenge. This challenge can be traced from 1997 reforms, the Ufungamano Initiative, the Bomas draft, the Naivasha Accord and the Kilifi draft. These stages involved a negotiation and balancing act as different interest groups were engaged in a 'give and take' to get the process to move forward. The referendum was another step and the rejection of the Proposed New Constitution in November 2005 means that the journey is far from over. The women's cause where land is concerned remains a very fragile one with many men perceiving women's rights to land as an encroachment into their space. Land rights are very much part of the patriarchal structures and changing them will remain a big challenge. Moreover, as pointed out above, law reform through facilitative provisions is only the beginning of a much longer journey towards gender equity in land matters. Social engineering to change attitudes is a critical leg of the journey that we must make if land rights are to be secured meaningfully for the women of Kenya.

VI. APPENDIX: DRAFT PROPOSALS FOR LAND POLICY REFORM ⁴⁴ **(DRAFT NATIONAL LAND POLICY OCTOBER 2006)**

3.3.1.10 Gender and Equity Principles **- Non-Discrimination in Land Distribution**

102. The Government shall adhere to principles of non-discrimination.
It shall:

- a) Repeal existing laws and outlaw regulations, customs and practices constituting discrimination against women in relation to land. It shall put in place appropriate legislation to ensure effective protection of women's rights to land and related resources;
- b) Review, harmonize and consolidate all the laws relating to children's inheritance of family property in order to protect and promote the rights of orphans;
- c) Enforce existing laws and establish a clear legislative framework for protecting the rights of boy and girl-child, youth and women in issues of inheritance to land and land-based resources;

- Matrimonial Property

106. To secure the rights of spouses to matrimonial property, the Government shall:

- a) Review succession, matrimonial property and other related laws to ensure that they conform to the principle of equality between women and men;
- b) Enact specific legislation governing division of matrimonial property to replace the Married Women's Property Act of 1882 of England;
- c) Protect the rights of widows, widowers and divorcees through the enactment of law on co-ownership of matrimonial property;
- d) Put in place appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources, before marriage (in cases of inheritance), during marriage, upon dissolution of marriage and after the death of the spouse; and
- e) Put in place mechanisms to curb selling and mortgaging of family land without the involvement of the spouses.

VII. FOOTNOTES

- ¹ Maina Kiai, Chair, Kenya National Commission on Human Rights, in Pambazuka News, an onlineNewsletter: Cited in Kenya Human Rights Commission, Human Rights Report, Vol 7, No. 3-4, July December 2005, .92.
- ² Chapters 283 and 284 of the Laws of Kenya.
- ³ Section 11(4) of the Registered Land Act, Cap 300 of the Laws of Kenya.
- ⁴ Mwangi Muguthu V. Maina Muguthu, Civil Case No. 377 of 1968; Samuel Thata Misheck & Ors. v. Priscilla Wambui & Anor; H. C. C. C. No. 1400 of 1973; Edward Limuli v Marko Sabayi H. C. C. C. No. 22 of 1978 and Alan Kiama v Ndia Muthunya & Ors C.A. No 46 of 1978.
- ⁵ Selah Obiero v. Orenge Opiyo (1972) East African Law Reports 227; Esiroyo v. Esiroyo 1973 East African Law Reports 388 and Belinda Murai & Ors v. Amos Wainaina C.A. No. 46 of 1977.
- ⁶ Obiero V. Opiyo (1972) East African Law Reports 227; Muguthu V. Muguthu Civil Case No. 377 of 1968 (Unreported) and Esiroyo V. Esiroyo 1973) East African Law Reports 388.
- ⁷ E. A. 227 (1972).
- ⁸ E.A. 388 (1973).
- ⁹ Section 101.
- ¹⁰ Chapter 302, of the Laws of Kenya.
- ¹¹ Marjolein Benschop, Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa? (Nairobi: United Nations Human Settlements Programme -UN HABITAT, 2002).
- ¹² generally, Gender, Environment and Development in Kenya: A Grassroots Perspective Barbara. P. Thomas-Slayter & Dianne E. Rocheleau, 1995) Boulder, CO: Lynne Rienner; 1995. and Shanyisa A. Khasiani, ed., Groundwork: African Women as Environmental Managers, (Nairobi: ACTS Press, 1992).
- ¹³ This law provides for the rights of a married woman to own property, revising the common law position under which married women had no legal capacity to own any property individually.
- ¹⁴ The Kenyan Constitution, Section 82 allows discrimination on the basis of sex in the realm of private law. A woman who is the victim of such a provision is at the mercy of the presiding court officer who may use precedents to grant her right to the property or use the Constitutional provision to deny her such a right.
- ¹⁵ Land Control Act Section 6 Chapter 302 of the Laws of Kenya.
- ¹⁶ Land Regulations No. 26 of 1897.
- ¹⁷ 1902 Crown Lands Ordinance and Crown Lands Ordinance, of 18th May, 1915. also Colony and Protectorate of Kenya, Land and Land Conditions in the Colony and Protectorate of Kenya (1931)
- ¹⁸ Yash .P. Ghai and J. P.W. B. McAuslan, Public Law and Political Change in Kenya (Nairobi: Oxford University Press, 1970), 28.
- ¹⁹ section 9 of Chapter 280 of the Laws of Kenya.
- ²⁰ Michael O. Odhiambo, "Liberalization, Law and the Management of Common Property Resources in Kenya: The Case of Public Land and Forests," (1996) (mimeographed paper presented at the East African regional symposium on Common Property resource management, Kampala, 26-28 Mar. 1996, on file with the author), noting that the President deals with government land as if it is his personal estate.
- ²¹ Patricia Kameri-Mbote, Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife (Nairobi: ACTS Press, 2002).
- ²² Section 115 of the Constitution of Kenya (1983).
- ²³ Section 114 of The Constitution of Kenya (1983) and Chapter 288 of the Laws of Kenya.
- ²⁴ Section 69 of Chapter 288 of the Laws of Kenya.
- ²⁵ Section 68 of Chapter 288 of the Laws of Kenya which saves the rights of the government to repossess

trust land.

- ²⁶ John Galaty, "The Maasai Group-Ranch: Politics and Development in an African Pastor Society," in *When Nomads Settle: Process of Sedentarization as Adaptation and Respo* Salzman and Edward Sadala, (eds), (New York: Prager, 1980), 157
- ²⁷ Report of the East Africa Royal Commission of 1953-1955, Cmd. 9475 (1955). [351
- ²⁸ Clare Oxby, *Pastoral Nomads and Development* (London: International African Instit
- ²⁹ Chapter 287 of the Laws of Kenya, No. 36 Of 1978 introduced as an Act of Parliament the incorporation of representatives of groups who have been recorded as under the Land Adjudication Act Chapter 284 of the Laws of Kenya.
- ³⁰ Id. at Section 23 (2) (a).
- ³¹ Id. at Section 2.
- ³² R.K Davis, *Some Issues in the Evolution, Organization and Operation of Group Ranches in Kenya* Discussion Paper No. 93, (Nairobi, Kenya: Institute for Development Studies, 1970).
- ³³ John Galaty, *supra* note 26. also John G. Galaty, "Introduction : Nomadic Pastoralists and Social Change - Processes and Perspectives," in John B. Galaty and Philip C Salzman (eds), *Change and Development in Nomadic and Pastoral Societies* (Leiden: Brill, 1981) and John G. Galaty, "Land and Livestock among Kenyan Maasai: Symbolic Perspectives on Pastoral Exchange, Change and Inequality," in *Change and Development in Nomadic and Pastoral Societies* (Leiden: Brill, 1981), 68.
- ³⁴ André Bourgeot, "Nomadic Pastoral Society and the Market: The Penetration of the Sahel by Commercial Relations", in *Change and Development in Nomadic and Pastoral Societies* (Leiden: Brill, 1981) 116 and Charles Lane, *Pastures Lost: Barabaig Economy, Resource Tenure, and the Alienation of their Land in Tanzania* (Nairobi: Initiative Publishers, 1996).
- ³⁵ Patricia Kameri-Mbote & Kamau Mubuu, "The Impact of Traditional/Religious Institutions on Gender Relations and Gender Discriminative Practices and Scope for Changing the Negative Trends: A Case Study of Select Pastoral Communities in Kenya", Report prepared for the Netherlands Development Cooperation Organization (SNV) (Nairobi, October 2004).
- ³⁶ In the case of *Tabitha Wangeci Nderitu v. Simon Nderitu Kariuki*, Civil Appeal No. 203 of 1997 (Nairobi), the Court of Appeal awarded the wife 50% of the matrimonial property on account of her non-monetary contribution to the business in spite of the husband's argument that she had three of their five children through caesarean operations and was therefore incapacitated during those months and incapable of contributing to the family business. The High Court had accepted the husband's argument and awarded the wife only 30% of the property.
- ³⁷ *Muthembwa v. Muthembwa* (2001) 1 LLR 3496 (CAK).
- ³⁸ Constitution of Kenya Review Act 2002, Section 6(5)
- ³⁹ All modern Constitutions have a great deal in common, covering certain standard topics. There is a global consensus on the uses and limits of public power and a growing convergence of views as to how these objectives might be secured through laws and institutions. However, Constitutions must also reflect local cultures and realities.
- ⁴⁰ Sections 3(a) and 3(k) of the Constitution of Kenya Review Act.
- ⁴¹ The proposed New Constitution of Kenya, Kenya Gazette Supplement, 2005, Drafted and Published by the Attorney General Pursuant to the Section 27 of the Constitution of Kenya Review Act CAP 3A of the Laws of Kenya.
- ⁴² Republic of Kenya, Report of the Commission into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration, November 2002.
- ⁴⁴ Draft National Land Policy, October 2006.

