



# *Handbook On Provisions Securing Women's Property And Land Rights In Kenya*

## *Introduction*

Property rights are claims to property that are legally and socially recognized and enforceable by external legitimized authority. In the context of this paper, property is land. Broadly defined, land rights can be understood as a variety of legitimate claims to land and the benefits and products produced on that land. Inheritance, transfers from the State, tenancy arrangements, and land purchase are all constructs of land rights. These rights can be in form of actual ownership or the rights of use. To claim a right over any piece of land, the titling of parcels was established by the state. A title is prima facie evidence of ownership. In Kenya, land holding may be leasehold or freehold. For a long time, the process of titling has been administered with strong gender bias, with women usually denied equal ownership rights. Furthermore, property and inheritance claims are generally processed through loosely organized administrative bodies consisting of local leaders and clerks with limited legal training. Closer inspection of the decision makers notes a body of mostly males. Consequently, landholding was mostly vested in men.

The **barring factors** that make it impossible for women to realize their right to property ownership may either be general and legal factors;

- ❖ Inadequate laws and systems of enforcement,
- ❖ Lack of awareness existing laws and insufficient understanding of legal redress options
- ❖ Prevalence of traditional attitudes and practices
- ❖ Sex discrimination
- ❖ Sexual harassment
- ❖ Lack of mentors

- ❖ They are often not part of decision making related to land with the African status that men have granted themselves.
- ❖ Inadequate resources to acquire the land they desire.
- ❖ They face challenges in documenting and registering what they are able to acquire.

The following are just a few of some of the **recommendations**;

- ❖ Plan for civic education projects (capacity building) that disseminate legal information, encouraging rural women to fight discrimination and exercise their rights in land cases involving family relations and inheritance.
- ❖ Promote women's projects on investments.
- ❖ Promote land acquisition and registration of rights thus giving women opportunities to secure their proprietary rights to land that is registered in their names.
- ❖ Support gender equity as it is essential to the viability of the laws that are currently securing women property rights.

### 1.0 CURRENT STATUS IN KENYA ON WOMEN'S RIGHTS

In as much as there are barriers to women's proprietary rights status, fortunately the changes in the current laws that enforce their rights may finally bring about opportunities to women's status. To empower women, the Government of Kenya has passed legislations on Women Land Rights and Gender justice on Land and Natural Resource Rights and Governance. Statutory norms on Land Conflict relationship, Marriages, customs and practices have also been reviewed in a bid to ensure that women are not discriminated against.

#### a) International Laws

Among the sources of Law in Kenya, the Constitution adopts general rules of international law and treaty or convention ratified by Kenya to form part of the law under **article 2 (5) (6)**. This gives room for international conventions like Convention on the Elimination of all forms of Discrimination against Women (CEDAW) as well as Protocol to the African Charter on Human and People rights on the Rights of Women in Africa (Maputo Protocol). All this International convention and especially the Maputo Protocol that was specific on Women in Africa are very beneficial as they try to solve the plight of an African woman. This convention having all its members being African States looks at all realities of injustices facing women in Africa as they have facts on African women injustices. **Article 21(4)** imposes on the State the obligation to enact and implement legislation to fulfill its international obligation in respect of Human Rights and Fundamental Freedoms.

At the regional and sub-regional we have several instruments such as African Charter on Human and Peoples' Rights (ACHPR) which requires the elimination of discrimination against women and ensure protection of rights of a woman and child as stipulated in the international declaration and conventions. Then there is the Common Market for Eastern and Southern Africa (COMESA) Gender Policy that provides for elimination of gender inequality and ensure women's economic empowerment and equal access to and control of resources and opportunities. Lastly is the East Arica Community Treaty which recognizes gender equality as one of its fundamental principles that will govern the community.

The international legal instruments include; Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which provides that States are obliged to ensure equal treatment of men and women in land and agrarian reform. Land rights under marriage and inheritance laws be based on equality. Further that the land tenure reforms must ensure women's property rights during marriage, at divorce and in the event of her husband's death (mirrored in Kenyan Constitution). The Universal Declaration of Human Rights has several provisions on land and property which include; the rights to equality before the law and to equal protection of the law, the right to own property and the right to adequate housing. Lastly, the Beijing platform for Action, 1995 which undertakes legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other properties, credit, inheritance, natural resources and appropriate new technology.

#### b) National Land Policy

The policy provides for gender and equity principles. The policy provides that there is need to protect women's property rights as culture and traditions need to be gender sensitive, communal ownership and group ranches need to be defined as men continue to dispose of family land without consulting women and there is need to secure women land registration as it helps providing women with financial stability (land market). The policy provides guiding principles to the government in protecting women's rights.

- ❖ Enact appropriate legislation to ensure effective protection of women's rights to land and related resources;
- ❖ Repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;
- ❖ Enforce existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;
- ❖ Make provision for
- ❖ Joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure;
- ❖ Secure inheritance rights of unmarried daughters;
- ❖ Facilitate public awareness campaigns on the need to write wills to protect dependants;
- ❖ Carry out public education campaigns to encourage the abandonment of cultural practices that bar women from inheriting family land; and
- ❖ Ensure proportionate representation of women in institutions dealing with land at all levels.

#### c) Constitution of Kenya

The general thread running through the Constitutional provisions on property rights is gender equity. The Constitution appreciates that men and women are equal hence either may own property in any lawful form. The national values and principles of governance under Article 10, Equality and freedom from discrimination under Article 27, **Article 60 (1) (f)** which provides for elimination of gender discrimination in law, customs and practices related to land and property in land among other provisions are geared towards encouraging women to own property.

The Constitutional provisions are laudable in the quest to gender equality in land ownership. To achieve the goal the Constitution provides for National Values and principles of governance which include equity, social

justice, inclusiveness, equality, human rights, non-discrimination and protected of the marginalized in **article 10 (2) (b)**. The national values govern the application of law and thus touch on gender discrimination and advocates for equality on any aspect of life whether social, political, economic and cultural. Of course, where gender discrimination is eliminated, women's proprietary land ownership rights are guaranteed. To foster nondiscrimination especially in marriage, **Article 45 (3)** of the Constitution guarantees parties to marriage equal rights during the subsistence and dissolution of the marriage. Effectively, this extends even to the right to own matrimonial property.

**Article 27 (4)** the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, consciences, belief, culture, dress, language or birth. **Article 19 (2)** obligates the state to recognize and protect human rights. Promote social justice that is important and relevant to women's struggle for gender equality and equity. The article provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

**Article 68 (c) (iii)** provides that parliament shall enact legislations to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on termination of marriage or upon death of a spouse. . However there are limitations under **article 40 (1)** that stipulates the protection to right of property being of any description and in any part of Kenya. Subsection 2 prohibits parliament to enact laws that deprive any person property of any description or of any interest in, or right over, any property or to limit, the enjoyment of any right on the basis of any of the grounds specified or contemplated in **article 27 (4)**.

The Constitution further under **article 159(2)** provides that the courts must be guided by the principles hereunder:

- ❖ Justice is to be done to all irrespective of their status being that women are mostly disadvantaged thus must benefit from justice processes;
- ❖ Justice is not to be delayed as women tend to give up on their cases when they take too long
- ❖ Alternative dispute resolution which include traditional justice mechanism are to be applied this protects women as they sometimes shy away from the public hearings.  
But do note that article 159 (3) provides that traditional dispute resolution mechanism are not to be used in a way that it contravenes the bill of rights, is repugnant to justice, and morality or results in outcomes that are repugnant to justice or morality and lastly is inconsistent with this Constitution and any other written law.
- ❖ Justice is to be administered without undue regard to procedural technicalities as this will assist the women who are not conversant with legal technicalities can pursue their cases even with limited knowledge of court procedures.

#### d) [The Land Act, 2012](#)

Pursuant to **article 68** of the Constitution, the Land Act was enacted by parliament in 2012 to revise, consolidated and rationalize land laws and to provide for sustainable administration and management of land and land based resources. As regards women rights on land and natural resources, this act is very vocal and

outlines provisions that govern the same. To begin with, the Act has its guiding values and principles set out **section 4** that entails the virtues that have to be upheld when implementing the provisions of this Act. Among the principles is **section 4 (2) (f)** provides that the application of the provisions of the act shall be such that it eliminates gender discrimination in law, customs and practices related to land and property to land. **Section 5(2)** of the act further provides for equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of and access to land under all tenure systems.

**Section 12 (1) (b)** provides that the NLC may allocate public land on behalf of the national and county government public auction, an application that is to be confined to a targeted group of persons or groups in order to ameliorate their disadvantage position. Further on allocation of public land, **section 14 (1)** provides that the commission is to send a notice to the general public and other interested parties informing them of the same. **Section 19** provides for the development of regulations on measures to facilitate, access, use and co management of forests, water and other resources by communities who have customary rights over these resources. **Section 38** provides for contracts over land; that must be in writing, signed by *all parties* to it and are to be attested by a witness unless the sale is through a public auction. **Section 51 and 62** provides for a woman in a marriage set-up is by law the beneficiary entitled to lease hold, charge or land. In most cases they are usually personal representatives of first instances in case of death.

**Section 105** provides that the court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties. **Section 106**, with regards to private land, the act recognizes the right of a private land owner to charge their land. Further, the Act prohibits unfair dealings and practices between chargors and charges or discrimination based on gender. It however upholds discrimination against a charger or refusal to grant charges to persons on account of gender if such discrimination advances the interest of women.

**Section 134 (4) (f)** provides the formula of establishing a settlement scheme; identification of beneficiaries shall be carried out and verified by a sub-county selection committee comprising a women's representative nominated by a local women's organization prescribed by the County Government. Others include; a representative of the county, sub-county administrator also chairperson, representative of the commission, national government representative, representative of persons with special needs and youth representative.

#### e) [The Land Registration Act, 2012](#)

Women's rights are not so pronounced because a majority of women are not empowered to defend their land rights. Women have little functional literacy because they are mostly deprived of the opportunity to access education. This is however changing with time. They lack documents, capacities and opportunities to voice their grievances and as such cannot reinforce gender equality with regard to access ownership and use of land. However, with the advent of the Land Registration Act, even the illiterate, un-empowered woman's right to property is protected.

**Section 24 and 25** provides that upon acquiring land and registering it, the registered proprietor becomes the absolute owner of the land. The certificate of title becomes prima facie evidence of absolute ownership and that the title can only be challenged by reason of fraud or misrepresentation by the proprietor or illegally or un-

procedurally acquired through corruption. **Section 28** also provides for overriding interests that all registered land is subject to overriding interests unless the contrary is indicated in the register. They include spousal rights over matrimonial property including holding land in trusts-customary rights. A wife will be considered in any dealings regarding the land in question.

Further into registration of titles, **section 44** the act provides for execution of instruments that execution must be verified by a witness for purposes of establishing identity. The Registrar has the discretion to dispense with this requirement if deemed appropriate. Also section 47 and 48 upholds all gender minor and person with disability rights respectively. In case of a minor, the minor's name may be entered to enable the minor's interest to be held in trust. A person with disability may be represented by a legally appointed guardian.

Key highlights under co-ownership between spouses include;

- ❖ Presumption that the spouses shall hold the land as joint tenants.
- ❖ Registering spouses as joint tenants.
- ❖ Acquired interest in land (including customary land) through contribution of labour or other means to the productivity, upkeep and improvement of the land.
- ❖ Participation of women in the settlement process.

**Section 93 (1)** stipulates that subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses: there will be a presumption that spouses shall hold the land as joint tenants unless there is prove of individual ownership and that the registrar shall register the spouses as joint tenants.

**Section 94** provides for partition of land by tenants in common, which can be done through applying to the Registrar. under 94(3)(e) where the tenants in common are spouses or dependants who are not agreeable to the partition, the Registrar is required to take their concerns into consideration before making a decision to partition or not to partition the land. Before making the decision to partition, the Registrar must ensure that spouses or dependents are not rendered homeless by the partition.

Further if the land is held in the name of one spouse only but the other spouse contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or spouses shall be deemed by virtue of that labour to have acquire an interest in that land in nature of ownership in common. In the spirit of protecting the rights of the afore-said co-tenant or co-tenants, **section 92 (1)** envisages that each co-tenant of land shall be entitled to receive a copy of the certificate of title of that land. It goes on to say that the only joint tenancy that shall be capable of being created shall be between spouses on and after the effective date as per **section 91 (8)**.

Land sought to be partitioned cannot be partitioned due to failure of the parties to agree on terms and conditions of sale, or because of any other reason, the parties may approach court for orders that the land be sold and proceeds shared accordingly (**section 96**). This provision may be applied, for example, when sharing matrimonial property upon dissolution of a marriage and the parties cannot agree on who should keep the matrimonial home.

#### f) The National Land Commission Act, 2012

**Article 67(3)** of the Constitution provides that the National Land Commission may perform any other functions prescribed by national legislation. The National Land Commission is the body tasked with the formulation and implementation of the National Land policy. The commission is required to take any measures it considers necessary to ensure compliance with the principles of the land policy set out in the Constitution which include: equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive area, **elimination of gender discrimination in law, customs and practices related to land and property in land** and encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution. It therefore means that if the Commission performs its functions effectively, it is without a doubt that the dream of full gender equity in property ownership will be realized.

For the composition of the commission the composition is under section 7 and 8. This is completed under chapter fifteen of the Constitution **article 250 (11)** which provides that the chair and vice chair of a commission is not to be of the same gender. This means that if the chair is a man, the vice chair is to be a women and vice versa. The commission also has to observe the constitutional requirement that not more than two-third of its members are to be of the same gender. This means that out of nine commissioners a least three must be women.

#### g) Environment and Land Court Act

The environment and land court was established under **section 4** pursuant to **article 162 (2) (b)** of the Constitution to be the court that hears and determines disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates and rents, valuations, mining, minerals and other natural resources. **Section 13** provides for jurisdiction that the court is to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment protecting all genders with the remedies.

**Section 18 (b)** enumerates the values and principles that shall be guide the court. These, as mentioned above constitute: the principles of National Land Policy stipulated under **article 60 (1)** of the Constitution, the National Values and Principles of governance under **article 10 (2)** of the Constitution and the values and principles of public services under **article 232 (1)** of the Constitution. Of essential importance is **article 159** of the Constitution that provides for the judicial authority that restricts the court to performance of justice irrespective of status. Of course, being a court Law, it is required to give effect to the Law against non-discrimination of women in property ownership. So far, it is the most important adjudication body that if optimally utilized, will ensure full realization of Women's right to own property. Whenever a woman's right to own property is threatened or violated, the Court is in place to grant the necessary reliefs.

**Section 20** also upholds article 159(2) that secures the rights of women as they tend to be shy. The court may adopt and implement on its own motion with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including the traditional dispute resolution mechanisms. Bearing in mind that we have the illiterate group which most tend to be women due to our patriarchal history,

the court systems under **section 23** acknowledges that the court will facilitate the use of English, use by parties of indigenous languages, sign language, Braille and other formats and technologies accessible to persons with disabilities.

#### h) The Community Land Bill

The absence of community land law has been a catastrophe in Kenya as communities, based on history have continued to discriminate against women especially on land ownership. According to the Constitutional timelines, by August, 2015, parliament ought to have enacted a Community Land Act. Currently, there are two versions of the bill: one is before Senate (moved by a private member) and the other is before the National Assembly (moved by the Ministry of Lands). These two processes must be reconciled and harmonized if the country is to have this law in time. The reason why we have two bills is due to the fact that article 109 of the Constitution. Parliament is to exercise its legislative power through bills passed by Parliament and assented to by the President. Any bill may originate in the National Assembly. A bill not concerning county government is considered only in the National Assembly and passed in accordance with article 122 and 123 and the Standing Orders of the Houses.

A bill concerning county government may originate in the National Assembly or the Senate and passed in accordance with article 110 to 113, article 122 and 123 and the Standing Orders of the House. A bill may be introduced by any member or committee of the relevant House of Parliament, but a money bill may be introduced only in the National Assembly. All in all, the bills have responded positively towards curbing discrimination of women. The following provisions have been elaborated under the 9<sup>th</sup> June, 2015 (before National Assembly). The bill has provided as follows;

**Section 3** acknowledges and appreciates **Article 10** of the Constitution on the national values and principles of governance, the principle of non-discrimination and **article 60** on principles of land policy of the Constitution in its guiding principles of community land. Further to show protection and recognition of women's rights to own property, section 4 appreciates that the State may regulate the use of community land in the interest of the public order, **public morality**, public health or land use planning and pursuant with article 66 that provides for regulation of land use and property. **Section 13** emphasizes on the equality. It provides that all persons vested with a customary right of occupancy in community land will in every respect be equal in status.

To be specific **section 13 (4)(b)** emphasizes on equal treatment women and men and non-discrimination of any person on the basis of gender, disability, minority, culture or marital status. Under the basic requirements of a committee, **section 20** provides that composition is to meet the two-thirds gender principle. **Section 41 (3)** safeguards gender (women) rights in land use planning. The bill if passed mandates the State to regulate Land use or interest in or right over land, in the interest of defence, public safety, public order, **public morality**, public health or land use planning. In addition, **section 42** proscribes discrimination. The bill provides that every member of the community has the right to equal benefit from community land.

It ought to be noted that the 8<sup>th</sup> October, 2014 bill before Senate also has the same provisions on women but it has additional variations which tend to secure the fundamental rights and freedoms that women are to enjoy. The bill under **part II** provides for a structure to help in the administration and management of the community

land in the communities. **Section 17** provides for a committee and the composition of the committee which expressly provides that women are to be represented. It has also provided for the need to implement the two third gender rules which also secures women rights even is recognized under the Constitution of Kenya. This is to be implemented in all structures to be established under **section 27** the Community Land Board and **section 32** on the Community Land Appeals Board.

This are the unique features that the 8<sup>th</sup> October, 2014 bill is providing thus ensuring women's property and land rights well implemented. Due to the inconsistency under the Law of Succession Act mostly on the arid and semi-arid areas which also are the ones with massive community land, then having the structure will remedy the situation.

#### i) **The Marriage Act, 2014**

**Section 3 (2)** provides that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at dissolution of marriage. The marriage Act totally shifts the power play in the life and dissolution of marriages which for a long time had tilted towards men. The element of equality flows to among other things, property ownership. In essence, whatever is owned by a married couple is owned jointly as equal partners. In fact, **Section 83** of the statute allows the court to set aside or grant an injunction prohibition on a disposition of property meant to reduce the means of paying maintenance or is meant to deprive the spouse the right to that property. The provision will go a long way in curing the mischief hence ensuring women's right to own property even after dissolution of marriage. The only exception to the provision is when the person being transferred to the property does not know the object for which the disposition is being made or accepts the property in good faith.

#### j) **Matrimonial Property Act**

**Part II** on general provisions, the act states that a person professing Islamic faith may be governed by Islamic law in all matters relating to matrimonial property. A married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable, to enter into a contract and to sue and be sued in her own name. The interest of any person in any immovable or movable property acquired or inherited before marriage is not to form part of matrimonial property.

**Part III** on matrimonial property provides that matrimonial property is matrimonial home or homes, household goods and effects in the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Parties to an intended marriage may enter into an agreement before their marriage to determine their property rights but at the same time a party may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust. Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

**Section 8** provides for property rights in polygamous marriages. Each wife has a share with regards to the time the property was acquired. Where it is clear either by agreement or through the conduct of the parties that any wife has her separate matrimonial property with the husband, then any such wife will own that matrimonial

property equally with the husband without the participation of the other wife or wives. **Section 9** provides that where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

**Section 10** provides that any liability incurred by a spouse before the marriage and relating to the property is after, marriage, remain the liability of the spouse who incurred it. Save from liability incurred during the subsistence of the marriage for the benefit of the marriage or reasonable and justifiable expense incurred for the benefit of the marriage. **Section 11** provides that during division of matrimonial property, the customary law of the communities in question is subject to the values and principles of the Constitution be taken into account. The principles include; the customary law relating to divorce or dissolution of marriage and protection of community and ancestral land as per the Constitution article 63. Lastly on matrimonial property, **section 12** provides for special provisions to matrimonial property;

- ❖ No estate or interest in matrimonial property during subsistence of a monogamous marriage and without consent of both spouses, be alienated in any form whether by way of sale, gift, lease, mortgage or otherwise thus women will have a say.
- ❖ Any spouse in a monogamous or polygamous marriage and have interest in matrimonial property is capable of protection by caveat, caution or otherwise under any law that provides for the same.
- ❖ A spouse is not during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
- ❖ A spouse is not to be evicted from matrimonial home by any person except;
  - On the sale of any estate or interest in the matrimonial home in execution of a decree;
  - By a trustee in bankruptcy; or
  - By a mortgagee or charge in exercise of a power of sale or other remedy given under any law.
- ❖ Matrimonial home is not to be mortgaged or leased without the written and informed consent of both spouses.

#### k) Law of Succession

The act begins with defining a dependant under **section 29** by including a wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death. Unfortunately after providing this definition, the same act under **section 32** provides that the intestacy will not apply to agricultural land and crops or livestock in West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera and Narok. It ought to be noted that intestate is when there is no will and once there is no will the act tends to provide for those instances to ensure equality on distribution of property to all dependants while testate is when there is a will although there are still provisions to ensure that wills are well drafted. This will ensure that all dependants have been provided for thus safeguarding discrimination. Unfortunately with this provision, it will be difficult to ensure the same owing to the fact that our communities are patriarchal and the arid and semi-arid areas tend to be worse in being patriarchal. There is thus need to amend this provision to ensure that the intestate matters are secured.

### 3.0 RECOMMENDATION

It is without a doubt that the legal framework in place or anticipated is pretty sufficient in guaranteeing woman the right to own property. What is called for is religious implementation. No matter how great the policies are, without effective implementation, the policies will remain ideas. Therefore, RECONCILE recommends effective implementation of the policies in place.

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