
**WOMEN'S RIGHT TO LAND: A CRITICAL ANALYSIS OF THE DISPUTE
RESOLUTION PROCESSES OF INHERITED LAND UNDER CUSTOMARY LAW
AND ISLAMIC LAW: A CASE OF ILEMELA DISTRICT MWANZA, TANZANIA**

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Abstract

Women's substantive right to inherit land from their deceased husband's estate and their ability to enforce that right through various dispute resolution mechanisms are serious problematic areas of the law that affect thousands of women who live under either customary or Islamic law in Ilemela District, Mwanza in Tanzania. This is because the perception of many societies in Tanzania is that women are inferior to men and this adversely affects their right to inherit land under customary and Islamic laws. Equality for all citizens before the law and access to justice are two human rights which make ideal tools for women to rely on in their quest to inherit land from their deceased husbands. This study examines and analyses the challenges faced by women, especially widows, not only when they seek to enforce their rights through dispute resolution mechanisms which are controlled by men but also the substantive rights to inherit land (under customary, Islamic and statutory law) itself. These challenges essentially undermine women's right to inherit. For example, under customary laws a widow does not have the right to inherit the land of her late husband; and under Islamic law, according to the Holy Quran, women do not have the right to inherit the land of their deceased husband or father. There are additional factors that make women's right to inherit of land problematic in Mwanza, and these include the conflicting and discriminatory approaches to women's right to inherit land. While customary laws are highly patriarchal and fraught with gender discrimination, Islamic laws are based on the obedience of women to men and their submissive nature. In both cases, women are discouraged from pursuing their rights for fear of losing their existing economic dependence on male family members or as a result of false accusations of witchcraft against them. The majority of respondents who participated in the study believed that of the three systems of law available, statutory law (as opposed to customary or Islamic law) was the most supportive of their rights as it conforms to the provisions of the Tanzania Constitution and other international human rights conventions which prohibit discrimination against women. This study recommends that Tanzania should enact or reform its laws and abolish all discriminatory laws which undermine women's rights to inherit land, and conform with international human rights instruments.

Declaration

I, Rehema Hamidu Mtulya, certify that this dissertation is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed

Date

This dissertation was submitted for examination with my approval as the University Supervisor, Dr Rosalie Katsande

Signed

Date

Professor Julie Stewart

Director of the Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe (SEARCWL)

Signed

Date

Dedication

This work is dedicated to my parents and Muslim both women and men, my father Hamidu

Mtulya and mother Asha Kambi

Quran 20:114

'O lord give me greater knowledge.'

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Ahsanteni sana!

List of abbreviations and acronyms

AIDS	Acquired Immune Deficiency Syndrome
BAKWATA	Baraza la Kiislamu Tanzania (Islamic Reconciliation Board in Tanzania)
Cap	Chapter
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICESCR	International Convention of Economic, Social and Cultural Rights
GN	Government Notice
HCD	High Court Decision
HIV	Human Immune-Deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
JALA	Judicature and Application of Laws Act, Cap 358 RE 2002
LMA	Law of Marriage Act, Cap 29 RE 2002
LRT	Law Reports of Tanzania
MCA	Magistrates' Court Act, Cap 11 RE 2002
NGO	Non-governmental organization
PAEA	Probate and Administration of Estates Act
PBUH	Peace Be Upon Him
RE	Revised Edition
UDHR	Universal Declaration of Human Rights
URT	United Republic of Tanzania
SADC	Southern Africa Development Community
SEARCWL	Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe

List of international instruments

African Union Protocol on the Rights of Women in Africa (Maputo Protocol)
Beijing Platform for Action (1995)
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
International Covenant on Civil and Political Rights (ICCPR)
International Convention of Economic, Social and Cultural Rights (ICESCR)
Southern Africa Development Community Protocol on Gender and Development
Universal Declaration of Human Rights (UDHR)

List of local legislation

Constitution of the United Republic of Tanzania of 1977, Cap 2 RE 2002 (the Constitution)
Customary Rules, GN 436 of 1963 (the Customary Rules)
Interpretation of Laws Act, Cap 1 RE 2002
Judicature and Application of Laws Act, Cap 358 RE 2002 (JALA)
Land Act, Cap 4 of 1999
Law of Marriage Act, Cap 29 RE 2002 (LMA)
Local Customary Law (Declaration) Order No. 4 of 1963 (GN No. 436 of 1963)
Magistrates' Court Act, Cap 11 RE 2002 (MCA)
Probate and Administration of Estates Act, Cap 453 RE 2002 (PAEA)
Village Land Act, Cap 5 of 1999

List of local cases

- Attorney General v Lohay Akonaay* (1995) TLR 80
Bernado Ephrahim v Holaria Pastory and Gervazi Kazirege Civil Appeal No. 70 of 1989
Bi Hawa Mohamed v Ally Sefu (1983) TLR 31
Clementina Tikengwa and Another v Trases Kabogi (1978) LRT 49
Dewawoisia d/o Ndeamtzo v Immanuel Malasia (1968) HCD 127
Elizabeth Mtawa v Hassan Mfaume Risasi (1983) TLR 31
Eshugbayi Heko v The Government of Nigeria [1931] A.C 667-673
Estate of the late Salum Omari Mekeremi (1973) LRT 80
George Kumwenda v Fidelis Nyirenda (1981) TLR 211
Hussen Mbwana v Amiri Chongwe Civil Appeal No. 1 of 1963 (T) (unreported)
Ntiyahela Boneka v Kijiji cha Ujamaa Mutala (1988) TLR 156
Re Innocent Mbilinyi (1969) HCD 283
Scolastica Benedict v Martin Benedict (1993) TLR 1

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Executive summary

Tanzania's land inheritance laws are acknowledged by human rights activists as being discriminatory against women. This is particularly apparent when a man dies and his surviving wife and/or daughters seek to inherit his land, especially, clan or family land. This study aimed at examining the challenges faced by women, especially widows, as a result of existing discriminatory inheritance laws and legal procedures. It is proposed that a uniform law or single legal mechanism for resolving land inheritance disputes for widows is the best way of handling these challenges. This is due to the fact that inheritance laws discriminate against women and after the death of their husbands cause them to suffer as a result of the operation of the relevant mechanisms upon their claims to inherit land.

The study aimed at establishing the extent to which existing literature, laws (international and domestic laws, i.e, customary, Islamic and statutory) and cases which have been decided in Tanzania contribute to the problems women come across after the death of their husbands because of discriminatory inheritance laws. The literature shows the application of the three systems or bodies of inheritance laws. They are customary, Islamic and statutory law and they generally prohibit women from inheriting land. Islamic laws permit women to inherit a small portion from their deceased husband's estates. The literature proposed different recommendations, including reforming succession laws and strategies to empower women through dissemination of information and sensitization campaigns for society and its structures (i.e., judges, magistrates and chairmen) to change their negative attitudes regarding women's right to inherit land.

The research used different methodologies and methods to analyze, explain and explore the lived realities of women within their societies in relation to their right to inherit land in the Sukuma tribe and Muslims in Mwanza Region. I used the women's law approach to expose the gaps between the inheritance laws and policies and women's lived realities as a result of which they suffered various challenges at the hands of relevant authorities when they tried to claim their right to inherit land after death of the husbands and the problem women faced trying to inherit matrimonial property which they helped to acquire during their husband's life time. I used different approaches, for instance, the actors and structures approach (such as interviewing judges, lawyers, advocates and magistrates in the legal system) to understand

their position in relation to land inheritance and the different ways they resolved disputes. The human rights approach helped me to find out about how the government has failed to take the necessary measures to amend and eliminate discriminatory laws against women in accordance with the state's commitments to international human rights treaties. The sex and gender approach showed me how society could be influenced to change its negative attitudes towards women and to obtain a further understanding of the position of women in society. I used different methods of collection to obtain data from various respondents including in-depth interviews, focus group discussions with key informants and my own observations.

The major findings of the research indicate that inheritance laws are discriminatory against women, especially in relation to clan land. This study exposed that while women contribute to the acquisition of matrimonial property during their marriage, everything changes after the death of their husbands and, as a result, they either lose everything under customary law or inherit only a small share of such property under Islamic law. They face many challenges including making their claim before relevant authorities, property grabbing by insensitive relatives, and facing unfounded accusations (e.g., that they killed their husbands using witchcraft), and the ignorance of relevant inheritance laws on the part of service providers who ought to assist women who approach them. If they decide to enforce their rights through the judiciary complex procedures are involved and ordinary widows do not know about them or how to use them to their benefit.

Therefore inheritance laws need to be reformed, especially customary laws which exclude women from inheriting land, especially clan land, by enacting new gender and sex sensitive laws of inheritance which will remove the existing pluralist system of conflicting laws. There is a need to encourage husbands to write wills and to help women realize their right to inherit land to the full and beneficial extent guaranteed under the various human rights treaties to which Tanzania has promised to abide.

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

*‘Even if national legislation will fully recognize women’s equal rights to co-own, access, control and inherit land...existing practices will not automatically be changed; wider changes in social and cultural attitudes are necessary for these legislations to real women’
(Benschop cited Strickland 2004: 28).*

This statement reflects that women still face challenges in the equal enjoyment with men of the substantive right to inherit land. This is because many pieces of legislation are biased in terms of gender, inconsistent in their enforcement mechanisms (between men and women in their access to the justice system) and there is a lack of awareness among the majority of women of their rights due to the practices and social attitudes enshrined in customary and Islamic law of inheritance.

Women’s right to inherit land under both customary and Islamic laws in terms of dispute resolution is a serious problem that affects thousands of women in Ilemela District, Mwanza in Tanzania. There are different factors that make women’s inheritance of land problematic in Mwanza. Most women ought to inherit land after the death of their husbands as the laws provide for the right of women to inherit land. However, these laws are rarely applied.

In Tanzania, inheritance laws and dispute resolution mechanisms are in need of reform under both Islamic and customary law. Both these systems of law limit women’s right to inherit land on the basis of their gender and sex. Dispute resolution mechanisms and procedural laws also favour the selection of males in the administration of the deceased’s land, even if those males are distant relatives of the deceased husband, thus excluding women from the administration of the deceased’s land. The widespread exclusion of women in Tanzania from either inheriting or owning land is a factor which limits the written customs and religious practices concerning their access to and uses of the land of their deceased husband.

Therefore, the research questions and intervention strategies recommended by this study are intended to explore the relationship between the law on land inheritance and dispute resolution processes through which women/widows claim their rights to inherit land through the relevant authorities. By considering these factors, the research seeks to provide a critical analysis of the link between women's right to inherit and the different ways the relevant authorities decide and settle land disputes. The research concentrates on the differences between customary and Islamic laws, how to prevent discrimination regarding women's rights in relation to land inheritance and the different ways of resolving disputes applied to each authority.

1.2 Choice of research topic

I made my choice to research this topic after joining the Women's Law Programme at the Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe in Zimbabwe (SEARCWL). After a short while of study, I realised that women are oppressed and subordinated in my country because it has inheritance laws which prohibit women from inheriting their deceased husband's property. I felt I could do something to help women in my country. So, I decided to research and write on customary and Islamic laws in relation to women's right to inherit land.

In fact, in Tanzania, particularly in the Lake Zone region of Mwanza, women are routinely denied the right to own or control land.¹ One would expect that upon the deaths of their husbands, women would have the right to inherit and control land, but that is not the case as widows face many challenges from various groups of people and authorities.

Under the Constitution of the United Republic of Tanzania,² the right to own land is a human right enshrined in article 24.³ Women are entitled to own and inherit land and the

¹ Under Sukuma customary law, like many customs in Africa, women are regarded as second-class citizens.

² The Constitution of the United Republic of Tanzania, Chapter 2 of the Laws Revised in 2002 (the Constitution).

³ Article 24(1) provides that every person is entitled to own property and has the right to the protection of his property. 'Every person' has been interpreted to include women and 'property' to include land. See, *Niyahela Boneka v Kijiji cha Ujamaa Mutala* (1988) TLR 156 and *Attorney General v Lohay Akonaay* (1995) TLR 80.

Constitution guarantees them equality with men under the law.⁴ This means that their rights are protected from any form of discrimination on the grounds of their sex or gender.⁵

My specific interest in the research was to examine the extent of the effectiveness of the dispute resolution mechanisms⁶ in protecting women's right to inherit land under Islamic and customary laws in Ilemela District, Mwanza. The main issue is whether women's right to inherit land is enforced. If so, how is it enforced? And if it is not, why is it not being enforced?

1.3 Background of the study

This research basically focuses on the exclusionary and discriminatory inheritance laws and mechanisms which are used to resolve disputes, the majority of which involve men suing women and the promotion of practices and custom of both Islamic and customary laws. The study aimed at examining the challenges faced by women, especially widows, as a result of existing discriminatory inheritance laws and legal procedures, and it suggests that a uniform law or single legal mechanism for resolving land inheritance for widows is the best way of handling these challenges.

In Tanzania, there is no uniform law of inheritance and the relevant authorities that deal with inheritance disputes do not make consistent decisions about them. There is also much uncertainty in the law because of the different laws that apply to inheritance cases and this requires a court to exercise its discretion concerning which legal system to apply in a particular case. There is more certainty in cases where the deceased has left a will as their property is administered and distributed according to their wishes.

The laws which govern inheritance and their dispute resolution processes in Tanzania are in urgent need of reform under customary law as they constitute such a large number of disputes and it is universally acknowledged that land inheritance laws discriminate against women's rights to inherit on the basis of their sex and gender. Islamic inheritance law gives women (widows) and daughters the right to inherit certain portions from deceased husband's/father's estate and this is just and equitable. Problems still exist within our society due to the

⁴ Article 13(1) of the Constitution provides, 'All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.'

⁵ Article 13(5) of the Constitution.

⁶ The quality of women's right to access justice like men when enforcing their land right to inheritance.

weaknesses in and application of our Constitution in any matter which a widow tries to inherit land and we need to come up with more positive decisions in terms of equality for men and women in order to improve the system.

Tanzania is a signatory to different international human rights Conventions which require the government to protect, respect and fulfil the rights which they contain. Unfortunately, the country's inheritance laws and procedures for resolving disputes do not consider women's fundamental rights of equality such as their equal participation in decision making, owning and controlling land through inheritance. For example, the customary and Islamic laws of land inheritance do not consider matrimonial property which is acquired during the life time of the deceased. Once a husband dies there is a presumption that the property belongs to the deceased and the right of his widow to matrimonial land is totally forgotten.

The majority of authors and researchers have discovered that women are deprived of their land inheritance rights after the death of their husbands because the laws discriminate against them and/or they are ignorant of how to enforce their rights, for instance, through court procedures. In my research, I will focus on the dispute resolution processes of inherited land under customary law and Islamic law in relation to women's land rights. The research will help society, especially its widows, to be aware of their right to inherit land and the procedures which they will be entitled to follow once their husbands die and they take steps to enforce their rights through the mechanisms available under the legal system.

1.4 Statement of the problem

Tanzania's inheritance laws subordinate and impoverish women's rights. Women are denied equal shares of inheritance, they lack access to economic resources and are kept in a state of perpetual dependence. Indeed, the Tanzanian Law Reform Commission identified succession laws as 'the major factor that has greatly worked toward the derogation of status of women' (WLAC, 2009). Widows in Tanzania, especially those who claim the right to inherit land, find their rights are violated on a daily basis.

Population statistics show that Tanzania comprises 48.7% men and 51.3% women (Tanzania National Bureau of Statistics, 2015). Therefore, women's right to land should be acknowledged under customary, Islamic and statutory laws. In addition women face various

challenges when claiming their right to inherit land from their deceased husbands before the relevant authorities. Women also suffer during the exercise by relevant authorities as to whether customary or Islamic law applies to their claim. These laws do not conform with Tanzania's obligations under relevant international human rights instruments nor under its own Constitution and statutory laws.

The contributions that women make to the acquisition of matrimonial property during their marriage are not properly or full recognised. In short, customary laws are discriminatory in nature when it comes to the inheritance of land. This is attributable to the fact that most of the tribal groups in Tanzania are patrilineal and inheritance rights are based on male lines only. Women are normally regarded as minors who are not entitled to inherit land, especially clan or family land. Customary law rules on women's right to inherit land conflict with international human rights instruments and the Constitution which provide that women have equal rights with men to own land. Under Islamic law, however, women are entitled to inherit a small portion of their husband's estate. In this regard, Islamic law gives men a higher status than women under the laws of inheritance.

In addition to the fact that these various customary, Islamic and statutory laws discriminate against women, they also face many different challenges. These challenges start within the dispute settlement mechanisms at the lowest or family level and in every such mechanism right up to the final court in the legal justice system. These challenges are attributed to cultural, economic and social attitudes towards women that give rise to barriers against them and their efforts to enforce their land inheritance rights. Corruption and bribery in the legal system, especially in the subordinate courts where most succession cases are filed and heard, also constitute a further challenge to women.

It is within the above context that I shall analyse the various dispute resolution processes relating to women's right to inherit under customary and Islamic laws most of which are based on gender and sex. Such an analysis is necessary in order to begin to learn how to protect women, especially widows from their families, the offensive laws and the obstructive relevant authorities that they face. These authorities cannot be ignored because it is they who will finally be relied upon to enforce women's right to inherit land.

1.5 General objective of the study

The general objective of the study is to analyse and summarise the challenges faced by women in the dispute resolution process relating to their right to inherit land under customary and Islamic law.

1.5.1 Specific objectives of the study

- To examine why customary laws and Islamic laws are usually applied as opposed to the statutory law (Constitutional law)
- To scrutinise why customary and Islamic laws have failed to protect widow's right to inherit land
- To explore why widows are excluded from land inheritance, decision making, and why they inherit small share of land in Islamic than men
- To study why widows are discriminated against in their application of customary law and Islamic law within dispute resolution mechanisms such as in families, courts and Islamic Reconciliation Boards
- To scrutinise why religious faith and law under Islamic law never changes within Islamic societies
- To find a solution to legal barriers, for example, court procedures which widows face in accessing and enforcing their land inheritance rights
- To inspect changes in customs, social and economic conditions and their impact on the legal status of widows in relation to their right to inherit land
- To examine why there is such a high number of men as compared to women in decision making bodies governed by Islamic and customary rules
- To examine why the government is failing to reform the laws of inheritance of land despite the existence of the Bill of Rights in the Constitution
- To make recommendations as to whether the Constitution and human rights instruments can be applied to widows rights to land inheritance and suggest strategies that can be used for law reform through the amendment of existing laws or the enactment of new ones
- To sensitize policy makers, members of the legislature and other concerned stakeholders on the need to abolish discriminatory laws and procedures in the customary and Islamic laws of the land in women's rights to land inheritance

1.6 Research assumptions

1. That there are differences between the dispute resolution processes relating to women's right to inherit land under customary law and Islamic law in Tanzania.
2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of dispute resolution authorities.
3. That there are processes used to determine the choice as to which system of law (customary or Islamic) should be applied to a women's right to inherit land.
4. That there are laws which give women the right to inherit land under both customary and Islamic law.
5. That there are challenges which women face in claiming a right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.
6. That there is a need to develop strategies to empower women to participate effectively in dispute resolution processes to inherit land under customary and Islamic laws.

1.7 Research questions

1. Are there differences between the dispute resolution processes relating to women's right to inherit land under customary law and Islamic law in Tanzania?
2. Do disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of dispute resolution authorities?
3. Are there any processes which are used to determine the choice as to which system of law (customary or Islamic) should be applied to a women's right to inherit land?

4. Are there laws which give women the right to inherit land under both customary and Islamic law?
5. Do women face challenges in claiming the right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each?
6. Is there a need to develop strategies to empower women to participate effectively in dispute resolution processes to inherit under customary laws and Islamic laws?

1.8 Limitations of the study

Difficulties in obtaining statistical data from court. It was not possible to find out about the cases filed by widows in the Primary Court who were claiming their right to inherit land from their deceased husbands. Therefore, it was impossible to gauge to what extent the number of cases had increased or decreased, or the number of cases in which widows chose to go to an ordinary court after a decision was made by either an from Islamic Reconciliation Board or prior to that decision.

Rains and floods. The Lake Zone area of Mwanza receives a lot of rain during the year. At the time of my research, it was the rainy season and the floods that resulted destroyed the road infrastructure and made it difficult to reach the interior of Mwanza. However, I managed to interview those who came to market places near town.

Financial constraints. I conducted only a few group discussions because of the lack of finance. Many interested stakeholders demanded money rather than offer their cooperation in helping to improve women's rights.

1.9 Demarcation of the study

This research was conducted at Ilemela District in Mwanza Region (Figure 1) and it covered different places including Buswelu, Sengabuye, Nyamangolo, Kayenze, Kiseke and government offices. Mwanza as mentioned earlier is a city within the Lake Zone area and is also known as the Rock City of Tanzania because it has rocks everywhere (Figure 2). The study was conducted between October 2015 and January 2016 and targeted the customary

and Muslim communities comprising men, women, customary leaders, religious leaders and government officers who could shed light on the topic of inheritance. A few non-Muslims were consulted because they were key informants in obtaining their perspectives of customary laws. This was important because customary laws regulate Muslims, Christians and atheists. The respondents I targeted were from both the urban and rural areas within the District of Ilemela.

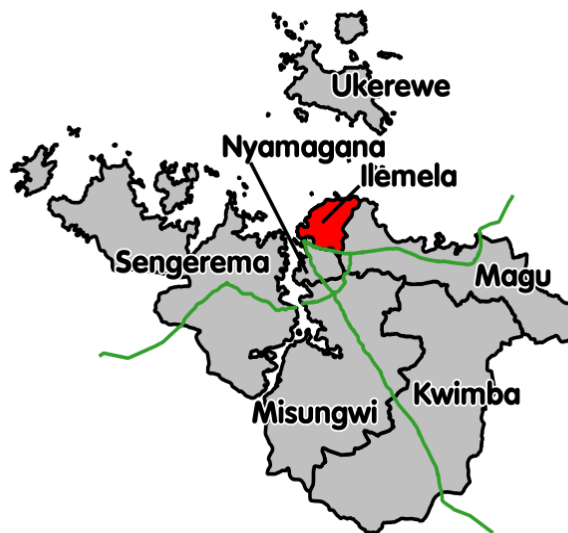


Figure 1: Map of Ilemela District in Mwanza Region of Tanzania



Figure 2: Photograph of Bismark Rock, symbol of Mwanza City

1.10 Definitons of key concepts

This research contains some technical terminology and words which need to be defined for the purpose of understanding the study.

1.10.1 *Islamic law*

The definition and scope of Islamic law is based on its two main sources, that is, Shariah and Hadith. Shariah means rules derived from the text of the Holy Quran and Hadith.⁷ Sada⁸ discusses the meaning and sources of Shariah and in its wider meaning are usually translated as Islamic law. He divides the sources of Islamic law into two components, that is, divine and human sources. The divine sources comprise the Holly Quran and the Sunnah (practices) of Prophet Muhammed, while human sources comprise Ijma, Qiyas, Maslaha, Urf which broadly means Ijtihad.

According to Shafii's doctrine, the two clearly recognized sources of law of a religious nature are the text of the Quran and the Prophet's tradition, Sunnah.

‘The only Quran is the primary source of Islamic jurisprudence. All imams and all the schools are agreed on this. The Quran is the highest source, since it is the result of divine revelation’⁹ (Dahl, undated: 19).

Sunnah is the tradition left by the Prophet (PBUH) which explains all his acts and words. All he said and did is religious, moral legality relevant. Thus the Quran authorizes the will and law giving of the Prophet, verse 7:157¹⁰ (Dahl, undated: 23).

The important question is whether Islamic law is static or dynamic. Sada concludes that Islamic law, if considered from the aspect of its divine component, is rigid and unchallengeable. It is flexible, dynamic and adaptable if viewed from the aspect of human opinion (Ijtihad) which speaks of the changing of human nature from both time to time and generation to generation. Fiqh means as the study and science of Islamic law (understanding in religion). Fiqh is used by Muslim scholars and Verse 7:179 of the Holy Quran states that:

⁷ See, Chapter 6 Verse 57, Chapter 5 Verse 67, and Chapter 53 Verse 3 of the Holy Quran.

⁸ ‘The Nature of Islamic Law: A Rigid or Dynamic System? A critique’ (2000-2001) Vol. 11 Journal of Islamic Law.

⁹ Verse 32:1, 4:106, 53:4, ‘Verily, we have revealed to thee the Book in truth that thou mayest judge between men of what God has shown thee; so be not with the treacherous a disputant.’

¹⁰ ‘Say, O ye folk! verily, I am the Apostle of God unto you all, of Him whose is the Kingdom of the heavens and the earth.’

The Quran's beneficiaries are those people who are entitled to get their share according to the Quran and stipulates that women (widows) are included, although they only get a small portion of inheritance.

1.10.2 Customary law

Black's Law Dictionary¹¹ defines 'customary law' as customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs and are so vital and form such an intrinsic part of a social and economic system that they are treated as if they were laws. The Interpretation of Laws Act¹² defines 'customary laws' as:

'any rule or body of rules whereby the rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 12 of the Judicature and Application of Laws Act, and references to native law or to native law and custom shall be similarly construed.'

In the case of *Eshugbayi Heko v The Government of Nigeria*¹³ the court defines customary law as the indigenous laws of people. Customary law is founded on the social norms or cultures of its people. It is a reflection of the habits and social attitudes of the people it governs. In Tanzania, there is no single set of customary laws of land inheritance because each customary law belongs and applies to the tribe concerned and the origin of that tribe. Therefore, customary laws differ from one tribe to another and from one community to another.

1.10.3 Widowhood

A 'widow' is defined¹⁴ as a woman whose husband has died and who has not remarried. Ncube and Stewart observe that in general law terms, a widow or widower is a person whose spouse has died during the subsistence of the marriage, regardless of whether at the time of death the couple were living together, were legally separated or were even in the process of divorce. Conversely, no matter how strong the union, no matter how long the couple may have cohabited with each other, if there was no marriage, the survivor will not be legally

¹¹ Eighth edition by Bryan A. Garner.

¹² Interpretation of Laws and General Clauses Act, Cap. 1 of the Laws Revised in 2002.

¹³ [1931] AC 667-673, where the Privy Council said, 'It is assent of the native community that gives a custom its validity.'

¹⁴ Black's Law Dictionary, Eighth edition by Bryan A. Garner.

regarded as a widow or widower, that is, a surviving spouse (Ncube & Stewart, 1995: 32). They also discuss whether the formal legal system, as it affects matters of inheritance and succession, determines whether a woman is a widow or a man a widower by reference to the existence of a valid marriage, be it under general law or custom, as the family or the community may apply their own criteria to such determination.

Discussing the concept, Aphane *et al.* (1995: 8) says that widowhood, as defined by society, customs and general law, presupposes that marriage in one form or another must have taken place between the deceased and the surviving partner. Tuhaise (2001: 307) presents the concept of widowhood in terms of customary law concepts. He states that the customary concept of widowhood is determined more by marriage practices and attitudes than by marriage laws, and it is more associated with women than with men. Marriage practices do not strictly conform with the statutory requirements of a valid marriage. Traditional values, like bride price and child bearing, play a vital role in determining the status of a marriage. He also insists that the traditional concept of marriage (and, therefore, widowhood) differs from the legal concept. The difference stems from various factors including gender roles, marriage practices, patriarchal attitudes and general property relations. According to Islamic law a woman who has not contracted an Islamic marriage during her lifetime is excluded from any right of inheritance, because the Quran distributes the deceased's property only among people who are entitled to receive it. Based on what different writers say about the concept of the widow we can conclude that widows are determined by their marriage to the deceased whether under customary or Islamic law, and it depends on the kind of marriage the widow contracted before her husband died which entitles (or does not entitle her) to inherit from his estate.

1.11 Conclusion

This chapter provided the background to the research problem being the challenges widows face under Islamic and customary law when they try to enforce their rights to inherit land from their deceased husband's estates. Such challenges include socio-economic factors and problematic legal procedures within the various dispute resolution mechanisms in the jurisdiction of Mwanza city. Also it covers important concepts which are used in this research.

The following chapter reviews the relevant literature and law on the subject in the context of women's lived realities. It details the theory and practice of Islamic and customary law relevant to women's right to inherit land from their deceased husbands. It also gives an overview of the relevant international Conventions and local legislation applicable to the topic as well as the opinions of various authors who share their helpful knowledge of the subject.

CHAPTER TWO

2.0 LAW AND LITERATURE REVIEW

2.1 Literature review

There is a great deal of literature on women's right to inherit land and ways of resolving disputes. As we have already seen, women's right to inherit land after the death of their husbands and the procedures to be followed take many different forms. It is a widespread experience not only in Tanzania but also in many countries in Africa that there are various obstacles which stand in the way and prevent widows from inheriting their deceased husband's land and claiming their rights through the relevant authorities. Many of the court procedures are linked to customary values, for example, the vast majority of courts do not allow women to be members (Pretorius 1993: 127).

These hindrances include culture, customs, practices, and court procedures, religious and economic dependence. If women do manage to succeed in inheriting some land it always turns out to be smaller than any portion inherited by males.

Legal pluralism has operated in Tanzania since independence 1961 and women's ability to obtain equal rights to inheritance has both been hindered and found expression in the law. Sieder and McNeish cited in Hellum and Stewart (2013: 182) take an anthropological approach to legal pluralism which describes the existence of an official legal system which recognizes more than one system of law as well as a regulatory or normative system other than the formal law that affects and controls people's lives.

When I conducted my research I realized that the Primary Court has jurisdiction to adjudicate matters under both Islamic and customary law. I also recognized that under both Islamic and customary law, the family meeting is the usual starting point for widows to claim their land rights.

Sieder and McNeish (1997: 76) have observed that the current trends to recognize religious and customary norms may, on the one hand, expand the spaces for the exercise of local

autonomy by different social, ethnic and religious group, but, on the other hand, they may reinforce existing inequalities within these groups in terms of gender, status and age.

Ncube and Stewart (1995: 32), for instance, state that:

‘The status of the widow under customary law is far more problematic since there is throughout the region evidence that the impact of customary law or, more properly, the customs and practices of the indigenous people impose constraints and restrictions on a widow.’

I agree with Ncube and Stewart because it shows that most women are still constrained by the restrictions surrounding land inheritance due to the customs and practices of certain tribes or ethnic groups and women are forced to follow all the practices and customs of their societies.

When I conducted an interview with a respondent and widow in Kayenze, she said that according to her culture, a woman is not allowed to go anywhere to claim her right to inherit land once her husband has died. Women are usually fearful that their community’s culture, customs and practices prevent them from doing so. However, customs and practices are not the only reasons discouraging women from pursuing their inheritance rights. Other reasons include factors pertaining to their class (urban or rural) background, education, religion and ethnicity, lack of legal literacy and financial constraints. The insensitive attitude of the courts toward women litigants also prevents them from turning to the formal court system as an institution to safeguard their rights. The geographical location of courts and administration offices in towns and big cities also poses a barrier for rural women against accessing the formal system (Mehdi and Shaheed, 1997: 28).

Akujobi (2013: 32) believes that there are discriminatory aspects to property inheritance under customary law and they affect the rights of spouses. She criticizes the role of customary law which prohibits a wife from inheriting the property of her deceased husband, because the customary law offends the principles of natural justice, equity and good conscience. She recommends that the government should promote and encourage the role of non-governmental organisations (NGOs), which educate women and society, to appreciate the unfairness of discriminatory laws and work toward eliminating discrimination and reforming the country’s laws. In addition, she recommends the reform of customary laws through unification, codification and harmonization to create certainty in formulating, applying and implementing of the laws bolstered as necessary by the principle of natural

justice. I agree with Akujobi because she shows how much customary law discriminates against women's rights to property (land) and she suggests how our legal rules in relation to customary laws should be reformed to bring about more equality between men and women within Tanzania's various communities.

In Islamic law the underlying religious principle which justifies women's right to inherit their late husband's property, including land, is found in the Quran which states that all material things are owned by God¹⁵ and he may give it to any one he chooses. Rwebangira *et al.* (1994: 12) explain this as follows:

‘The Holy Quran stipulates that all material things belong to God and therefore no man or woman can righteously claim to own any worldly goods...[E]very human being has the right to a meaningful living and those who hold economic power do not have the right to deprive others of the basic necessities of life by misusing resources which have been created by God for the benefit of humanity.’

The author is saying that Muslim women have a right to enjoy all human rights stipulated in the Holy Quran. Moreover, they have the right to complain against any form of domination or discrimination.

I also found that there is a lack of Islamic knowledge among the majority of Muslim women in Ilemela District, where women, especially widows, do not approach the Islamic Reconciliation Board to claim their rights or to solve their disputes. Once a dispute arises within their families and communities they apply Islamic law. Rwebangira *et al.* (1994: 4) argue that the inadequacy of Islamic knowledge among Muslim women is responsible for their low status in society. Contrary to common knowledge, Muslim men have in fact used such weaknesses to deny women rights conferred on them by the Quran. In this respect, Mehdi and Shaheed (1997: 134) quote Patel and state:

‘...women are exposed to misinterpretations of Islam by their religious leaders. Muslim clerics often lead women to believe that they are inferior and have limited role to play in society.’

¹⁵ Verse 4:126 (An-nisa). ‘For, unto God belongs all that is in the heavens and all that is on earth, and, indeed, God encompasses everything.’

When I interviewed a Muslim religious leader (Sheikh) at the headquarters of the Muslim Reconciliation Board, he said that the majority of women have no knowledge of Islamic law, especially the Quran and the practices of Prophet Muhammad (Sunnah), and this prevents them from enforcing their rights. There is a vital need to examine these laws and explore how advances could be made to them to ensure that they meet the needs and aspirations of the people, especially the women, they are meant to serve. Thus efforts have been directed towards raising legal rights awareness through legal literacy programmes and legal aid projects, on the one hand, and the implementation of Shariah (Islamic law) to make women live within a specific framework, on the other hand (Mehdi and Shaheed, 1997: 16).

Rwebangira *et al.*, citing Hassan, also point out that, according to Islamic teachings, only a small proportion of property is intended for women's ownership or inheritance in marriage.

Rwebangira notes that the Quran embodies pronouncements and reflections on various themes. The earliest Muslim communities observed these instructions. The author notes that there are four main schools of law in Islam and that the differences in the interpretation of these laws have adverse and varied consequences on women. The Holy Quran already provides a widow's share from her deceased husband but the challenges arise on the application and interpretation of the Quran within Islamic communities. Their inferiority complex and submissive conduct among the majority of women who underestimate themselves means that they lack the strength to enforce their rights to inherit land even though Islamic law provides for their specific right to inherit from their deceased husbands.

Rwebangira *et al.* observe that:

‘There are women do not consider inheritance as a right although Islam considers it so. Other factors discussed include submissive attitudes of women, witchcraft and inferiority feelings’ (1999:11).

Leila Sheikh echoes Rwebangira's statement in her paper, ‘The Rights of Women in Islam’, and she puts women's rights in Islam into context. Sheikh notes that the Quran does not create a hierarchy in which men are placed above women; neither does it pit men against women.

The knowledge of laws it seems is a big challenge among the women in both Islamic and customary system of laws. This is caused by the social, economic and cultural factors of particular societies which prevent women from claiming their rights of inheritance. According to Schuler and Rajasingham (1992: 22), the law is capable of providing women with protection and redress and they see the problem only in terms of women's lack of knowledge. Legal literacy or mere knowledge of the law is sufficient to ensure a citizen's enjoyment of their rights and obligations.

Tuhaise *et al.* express this problem as follows:

‘The ethnic groups studied generally lacked awareness of statutory laws and legal conception in inheritance, within varying degrees.... the men are more knowledgeable about the laws and invoked them more than the women’ (2001: 304).

I also found this was the case in Buswelu in the Ilemelela District, where the majority of women are not aware of the statutory laws which give them rights to inherit land.

Customary laws operate within traditional attitudes and practices as well as social, cultural and economic circumstances. Customary authorities are not aggressive toward women and they provide more effective or conducive arenas in which women can defend their rights, because they can access them and are composed of people who have knowledge to support women in any particular case in relation to her rights.

Thus, customary authorities provide the potential to recognize and take advantage of those aspects of customary law that can be drawn upon and integrated with those provisions of statutes which are consistent with non-discrimination and basic principles of equality.

Common superstitious accusations that husbands never die natural deaths but are murdered by their wives who are witches using witchcraft also discourage widows from pursuing their right to inherit their deceased husbands' property (Aphane, 2000: 87). Such cultural beliefs also drive widows from their matrimonial homes and communities.

A number of writers also encourage the use of different feminist approaches to encourage women to claim their rights through all the stages of adjudication right from the lowest level

(the family) to the highest court in the land level. Schuler and Rajasingham are of the view that a feminist approach to legal literacy involves educating women to empower them for action and change (1992: 97), because social structures do not encourage women to act independently in their own interests. Patriarchal, economic and cultural biases and practices keep women isolated, lacking in self-confidence, resources, access to the legal system, and support needed for making a claim or complaint. Where women have managed to gain access or recourse to the legal system, the insensitivity of the judiciary becomes another major obstacle (1992: 22).

Dahl cites Abdullah who believes that the gates have been closed since the tenth Century. Some therefore demand that they be opened again at a time when more and more voices are raised in favour of building a modern Islamic law. He also argues convincingly that an open use of *ijtihad* will not go far enough if the historic Shariah is to be reconstructed in a just, fair and appropriate form in the modern communities in which Muslim lawyers live (Dahl, undated: 27).

The above literature review shows that there are several factors which prevent women who are entitled to inherit land from accessing the justice system containing dispute resolution mechanisms of both customary and Islamic authorities. Since the abovementioned authorities do not specifically cover the Mwanza-Ilemela districts, this research intends to cover women's right to inherit land and the different procedures for resolving disputes in the Ilemela District area and it is hoped its findings will improve women's rights to inherit.

2.2 Human rights instruments

The research examined various international human rights instruments that the Government of Tanzania has either ratified or signed which deal with the issue of women's right to inherit land and the processes used by the relevant authorities when resolving disputes involving their right to inherit. Collectively, these international laws impose a duty on the part of the state to take appropriate steps to protect and promote widows' right to inherit land and different procedures for resolving their disputes. It is now time for women's right to inherit land to be recognised as part and parcel of their fundamental right to live a peaceful life free from any traditional or customary interference which prevents them from enjoying these rights and their full and equal participation in the legal system.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is one of the international instruments which Tanzania has ratified and it became a party to it on 20 August 1985. CEDAW is the first international human rights instrument to recognize formally the influence of culture and tradition in restriction, distinction and exclusion of women's enjoyment of their fundamental rights. CEDAW requires the state parties to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.¹⁶ It also requires state parties to treat every person as equal before the law.¹⁷ This is a good test to apply to the right of women to inherit land and to the processes involved when resolving disputes within the legal system, since CEDAW is meant to help to enforce rights and avoid discrimination against either of the sexes. Women should be given equal opportunities and the state should create enabling conditions for the empowerment of women in order for them to achieve equality both *de jure* (in law) and *de facto* (in fact) when they claim their rights within the legal system in order for them to redress the historical wrongs and inequalities which previously prevented them from accessing justice within the legal system.

This research highlights the challenges facing women when claiming their rights to inherit land within the justice system in both customary law and Islamic law. Most of these challenges come from the authorities who control and manage the justice system. Non-discrimination and equality between women and men are fundamental principles of human rights laws. Article 1¹⁸ of CEDAW defines 'discrimination against women' broadly as:

'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

In practice this discrimination may occur in the form of direct discrimination through different provisions in the laws or policies that restrict or distinguish women from men. The

¹⁶ Article 5 of CEDAW.

¹⁷ Article 15 of CEDAW.

¹⁸ Article 1 of CEDAW.

Convention demands state parties to eliminate all forms of discrimination. In the case of women's right to inherit land, this obligation entails that country legislation must expressly recognize the equal rights of men and women to inherit, use and own inherited land. Tanzania must recognize that it needs to amend some provisions of its laws especially its customary and Islamic laws since it is secular state. For instance, any law which grants inheritance rights to men and not women or denies women the rights to participate in decision making (i.e., being members of relevant authorities such as the legal system or clan meetings), must be amended to explicitly recognize the equal rights of both sexes.

CEDAW's definition has been expanded by the Human Rights Committee in its General Comment Number 28¹⁹ by requiring state parties to ensure that women have recourse to affordable accessible and timely remedies as well as access to legal aid and assistance if necessary, so that their disputes may be settled in a fair hearing by competent and independent courts or tribunals. This recommendation is incorporated in Article 15²⁰ of CEDAW which provides for access to justice and equality before the law. In other words every person must be treated equally without regard his or her sex and gender.

Another relevant instrument with the same emphasis on equality is the International Covenant on Civil and Political Rights (ICCPR)²¹ which establishes a general and independent protection against discrimination and protects such women's rights as the right to own, control and access land and property on a non-discriminatory basis. In addition, the ICCPR confirms that all persons shall be equal before the courts and tribunals.²² This article insists on the treatment of men and women being equal within the legal system regardless of a person's gender and sex, and this includes their right to access court procedures to ensure access to justice under the jurisdiction of relevant authorities. It provides for the right of everyone to be recognized everywhere as a person before the law,²³ and for equal protection of the law, without discrimination on any ground, including sex.²⁴

¹⁹ Human Rights Committee of the United Nations, General Recommendation No. 28 (2010).

²⁰ 15 of CEDAW.

²¹ Article 26 of the ICCPR.

²² Article 14 of the ICCPR.

²³ Article 16 of the ICCPR.

²⁴ Article 26 of the ICCPR.

The Universal Declaration of Human Rights (UDHR) provides that every person has a right to own land and for that right to be protected²⁵ and this means that women are free to inherit land from their deceased husbands. The International Convention of Economic Social and Culture Rights (ICESCR) prohibits discrimination of any kind, including sex,²⁶ culture and religion, and obliges state parties to undertake and ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.²⁷

The African Union Protocol on the Rights of Women in Africa (the Maputo Protocol) defines the term discrimination²⁸ to include distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life. Article 2(1) requires state parties to take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist. In Tanzania, customary and Islamic law continue to exist and discriminate against women's rights to inherit land based on sex and gender. In fact, widows are excluded and restricted from inheriting because of the customary laws. Article 8 of the Maputo Protocol also guarantees women's access to justice and equal protection before the law including their effective access to the relevant authorities which resolve disputes within the judiciary and other law enforcers. This includes the right of women to access legal aid to make sure that they are represented equally before law enforcement mechanisms, such as magistrates, court clerks, chairpersons of land and housing tribunals and clan leaders which are the major authorities which deal with dispensing justice. In other words, there must be equal treatment for both sexes in order to ensure that justice is not only done but also seen to be done. Article 9 of the Maputo Protocol²⁹ binds state parties to ensure effective representation and participation of women at all levels of decision-making.

Article 10 of the Southern Africa Development Community Protocol on Gender and Development³⁰ also provides that a widow has the right to an equitable share in the inheritance of the property of her husband. It also provides that a widow must have the right

²⁵ Article 17 of the UDHR.

²⁶ Article 2(2) of the ICESCR.

²⁷ Article 3 of the ICESCR.

²⁸ Article 1(f) of the Maputo Protocol.

²⁹ Article 9(2) of the Maputo Protocol.

³⁰ Article 10 of the SADC Gender and Development Protocol.

to continue to live in the matrimonial home after her husband's death. Tanzania is now addressing the situation of rural women with reference to customary law which affects women in this regard.

Finally, the Beijing Platform for Action (1995) requires the recognition of women's right to inherit and own property including land, and the government should take legislative reform measures to remove disparities from discriminatory laws and traditional customs, as well as prejudicial attitudes against women and their rights to own property.

2.3 Islamic human rights

In discussing this part, it is important to examine women's human right to inherit (discussed above) within the context of Islamic human rights.

Verse 49:13 provides that there is equality between men and women without any discrimination on the basis of sex or social status, with that if there is any (for want of a better word) superiority between them it is based only on one's faithfulness and good deeds.

Verse 4:1³¹ clearly explains that men and women under Islamic law are essentially equal.

2.4 The role of the national legislature in relation to women's inheritance of land and the dispute resolution processes

There are laws that deal with women, land inheritance, and dispute resolution in Tanzania. The legal system in Tanzania is different depending on the matter in dispute. For instance, land disputes are determined by one specific authority. And inheritance matters are dealt with by another. This creates confusion for women. For example, when a widow claims inheritance to land, she is required to go to a common law court, but when a dispute arises as to who is the original owner of the disputed land which is the subject of inheritance, she is required to claim that land before a land tribunal. Furthermore she is also required to have *locus standi* (i.e., if she is the administrator of the deceased's estates). Generally, land inheritance laws in Tanzania are regulated by several pieces of legislation and the following are some of the more important ones.

³¹ 'O mankind, fear your lord, who created from one soul and created from it mate and dispersed from both of men and women. And fear Allah through whom you ask one another and the womb. In deed is ever, over your and observer.'

2.4.1 Constitution of United Republic of Tanzania of 1977

The Tanzania Constitution is the supreme law of the country and one of its functions is to ensure that all people are treated equally by the law and receive an equal right to the protection of the law.³² Equal access to justice is one of the most important rights of the Constitution in that it guarantees individuals equal access to the justice system and therefore gives women the right to protect their right to inherit land. Tanzania is a signatory to several international instruments that protect and promote human rights.

The rights of equality are provided under articles 12 and 13 of the Constitution. Article 12 of the Constitution³³ states that all human beings are born free, and all are equal and that every person is entitled to recognition of and respect for his dignity. Furthermore, Article 13(1) of the Constitution³⁴ provides that all people are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.

The Constitution³⁵ provides that no law enacted by any authority in Tanzania to make any provision that is discriminatory either in itself or in its effect, and no person shall be treated in a discriminatory manner by any person acting by virtue of any law or discharge of a function of any state, office, party or organ. This article advocates for the protection of women against any form of discrimination in law or practice under customary and Islamic laws.

The Constitution³⁶ also defines discrimination to mean to fail to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, and place of origin or to treat persons differently on those grounds. Moreover, Article 13(4) prohibits discrimination and further empowers a court to declare discriminatory laws unconstitutional.³⁷ In this respect, the High Court in Tanzania has made decisions to modify customary law rules limiting the rights of women and daughters to inherit land from their deceased husbands and fathers, respectively.

³² Article 29(2) of the Constitution.

³³ Article 12 of the Constitution.

³⁴ Article 13(1) of Constitution.

³⁵ Article 13(2) of the Constitution.

³⁶ Article 13(5) of the Constitution.

³⁷ Article 30(3) of the Constitution.

In the case of *Dewawoisia d/o Ndeamtzo v Immanuel Malasia*³⁸ Saidi, J (as he then was), held:

‘It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race and colour. On the grounds of natural justice and equity daughter.’

The decision of Lugakingira, J, in the case of *Clementina Tikengwa and Another v Trases Kabogiis*³⁹ is another good example. The dispute involved the right of women to inherit land. It was argued that Rule 20 of the Local Customary Law (Declaration) Order No. 4 of 1963 (GN No. 436 of 1963) denied the daughters and the widow of a deceased their full right to inherit a portion of clan land held by the deceased. The court declared that all individuals are equal and have an equal right to inherit clan land regardless of their gender or sex. It was also stated in this case that article 64(5) of the Constitution provides that any law which contravenes the Constitution is null and void. This article also applies to those customs and practices under both customary and Islamic law which contravene the Constitution such as discriminatory laws against women and their right to inherit land and defend their rights before the relevant adjudicating authority.

2.4.2 Probate and Administration of Estates Act (PAEA)

Section 89(a) of the Probate and Administration of Estates Act, Cap 453 RE 2002 (PAEA) provides that it is valid for certain estates to be administered according to tribal practices and customs of certain ethnic groups. Section 89(c) provides that where an estate is to be administered according to Islamic Law the disposition must be recognized as valid by that law. These provisions of law recognize the application of customary and Islamic law upon the disposition of a deceased estate without taking into consideration the sex or gender of the heir. Section 88(1)(b) provides that the administration of the small estate of a Swahili is to be administered in accordance to Islamic law unless the court exercising jurisdiction over the estate is satisfied from written or oral declarations of the deceased or his acts or manner of life that he intended his estate to be administered, either wholly or in part, according to any customary law.

³⁸ (1968) HCD 127.

³⁹ (1978) LRT 49.

2.4.3 Local Customary Law (Declaration) Order

According to section 4 of the Interpretation of Laws and General Clauses Act⁴⁰ ‘customary law’ is defined as:

‘any rule or body of rules whereby the rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 12 of the Judicature and Application of Laws Act (JALA), and references to native law or to native law and custom shall be references to native law or to native law and custom shall be similarly construed.’

Section 11(1)(b) of JALA⁴¹ provides that:

‘Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature, relating to any matter of status of, or succession to a person who is or was a member of a community law relevant to the matter are established and accepted.’

In Tanzania, inheritance has been made uniform under the Local Customary Law (Declaration) Order No. 4 of 1963 (GN 436 of 1963) for patrilineal tribes which comprise about 80% of the population and are of the Bantu ethnic group. The remaining 20% is made up of matrilineal people from Eastern, Tanzania, such as the Zaramo and Luguru.⁴²

The Local Customary Law (Declaration) Order⁴³ and Customary Rules⁴⁴ govern the customary law of inheritance which can be divided into three degrees of inheritance as follows.

1. Rule 22 provides that first-degree heirs inherit and receive the largest share that is eldest son of the first wife (in case there is a polygamous marriage).
2. Rule 23 provides that second-degree heirs (i.e., all other sons) who receive a large share than their sisters but a smaller share than the first born.

⁴⁰ Interpretation of Laws Act, Cap 1 RE 2002.

⁴¹ Judicature and Application of Laws Act, Cap 358 RE 2002 (JALA).

⁴² *Tanzania Women Judges Association (TAWJA)* 2012, 17.

⁴³ Local Customary Law (Declaration) Order No. 4 of 1963 (GN No. 436 of 1963).

⁴⁴ Customary Rules, GN of 436 of 1963 (the Customary Rules).

3. Rule 25 provides that third-degree heirs are normally the daughters of the deceased. Their share of the inheritance is usually smaller than the sons.

Rules 27 and 28 of the Customary Rules provide that a widow receives no share of her husband's estate if there are children of the union and a husband cannot inherit from his wife who dies intestate unless she has left the wife left no children or any other member of left no children or any member of her own family. This customary law discriminates against women.

Land which may be inherited may be land that has been acquired through sale and purchase, it may be family land or clan land which is held under customary law which discriminates against women in that they cannot inherit, own or sell such land according to Rule 20, but they may enjoy usufruct rights in respect of that land.

According to Rule 5 of the Customary Rules the administrator at customary law of an intestate estate is the eldest brother of the deceased; if there is no brother it could be the deceased's father or any brother of the deceased chosen with the help of the clan council. This patrilineal selection process means that a woman cannot possibly be chosen as the administrator of a deceased's estate. Rule 6 provides for the meeting of the Clan Council and their duties are: to ascertain the deceased's possessions, to discuss the deceased's claim and debts, and finally to call upon claimants to present their claim. Rule 7 and 8 of the Customary Order provides ways on how to determine how to distribute the inheritance.

Under the Local Customary Law (Declaration) Order men inherit both movable and immovable (land) property absolutely according to the degrees of heirs provided, but women (i.e., widow and daughters) inherit land only for their use during their life time. They cannot sell or own land unless there are no male members in the family.

In the High Court case of *Bernado Ephrahim v Holaria Pastory and Gervazi Kazirege*,⁴⁵ Mwalusanya, J. (as he then was) declared the principle of customary law which denies women the right to inherit clan land unconstitutional for being discriminatory on the basis of gender.

⁴⁵ Civil Appeal No. 70 of 1989.

Rule 77⁴⁶ provides that all movable and immovable property acquired during the subsistence of a marriage shall be divided into two equal shares after paying all the debts of the deceased. In respect of movable property the widow's share is equal to a one-half (1/2) for each year of marriage. In respect of immovable property (i.e., land) the widow shall get a portion of land in the same proportion and shall have the right to use the land in a diligent manner until her remarriage or death. Rule 77(2) provides that in the case of permanent crops she shall get her share in the same proportion and may get its interest until she remarries or dies. Rule 77(3) provides that the widow should be allowed to stay in the house till she remarries or until her death, and Rule 77(4) provides that all immovable property shall revert to the deceased's relatives immediately upon the widow's remarriage. Therefore, Rule 77 contravenes the Constitution and the Land Act, Cap 4 of 1999 that provide that women enjoy equality with men and have the right to own land, and it does not take into account widows who have no children and their contribution to the property which was acquired during their marriage.

Rule 66A provides that a widow has the right to choose either to live as the wife of any one of her late husband's male relatives or to remain with her children in a house of the deceased, and thus become one of the deceased's clan members. This exposes widows to the risk of contracting HIV/AIDS and/or STDs and may create conflicts between widows where there are more than one and also widows who are childless.

2.4.4 Magistrates' Court Act (MCA)

The original jurisdiction in the administration of deceased estates is vested in the primary court by virtue of section 18(1)(a)(i) of the Magistrates' Court Act, Cap 11 RE 2002 (MCA). In relation to customary and Islamic laws, the MCA provides that:

'A primary court shall have and exercise jurisdiction in all proceedings of a civil nature: where the law applicable is customary law or Islamic law, provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the land registration Act.'⁴⁷

⁴⁶ First Schedule of the Local Customary Law (Declaration) Order.

⁴⁷ Section 18 (1)(a)(i) of the MCA.

Therefore the primary courts have original jurisdiction to entertain any case in which customary law and Islamic law apply in relation to land which form part of the deceased's estate whether the land was registered or not. Section 1(1) of the MCA⁴⁸ provides that primary Court has jurisdiction in the administration of deceased estates, where the law applicable to the administration or distribution of the estate is customary law and Islamic law. This may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the Primary Court's jurisdiction.

Section 2 of the MCA⁴⁹ provides that a primary court shall apply the customary law prevailing within the area of its local jurisdiction or, if there is more than one such law, the law applicable ; in the area in which the act transaction or matter occurred or arose, unless it is satisfied that some other customary law is applicable ; but it shall, subject to rules of court, apply the customary law prevailing within the area of its local jurisdiction in matters of practice and procedure to the exclusion of any other customary law. This is applicable to certain specific area.

Section 33(1) of the MCA limits lawyers and advocates to present their clients in Primary Courts. This situation makes it difficult for women to face challenge any discrimination due to the fact they may that the majority of women do not know court procedures.

In this specific provision specified that primary courts have jurisdiction to apply the living practices of custom of a give community or societies. Rwebangira and Mukoyoge (1995: 27) cited James and Fimbo that; This requirement may be a positive way of ensuring that the custom being enforced by the primary court is the same as those being practised by the community in which the said court is situated. Such a requirement would also give custom the flexibility that it is meant to have (James and Fimbo, 1973: 185) by allowing a community or particular lineage to change its norms whenever it suits their contemporary needs.

Section 7(3) provides that when the court is not conversant with Islamic law it can get opinion from Muslim council officials, this section gives magistrate and judges to seek opinion from the Muslim Authorities.

⁴⁸ Fifth schedule of the MCA.

⁴⁹ Fourth Schedule of the MCA.

2.4.5 Islamic law

Under Islamic law a person under Islamic law has a right to inherit either by marriage or birth. The Islamic law is not dynamic and is embodied in the Quran Surat Nisaa.⁵⁰ However, in Tanzania the laws which provide for the application of Islamic law in matters of succession are the JALA and P.A.E.A which provide the application of Islamic law if the deceased professed Islamic Law during his or her life time and declared either orally or in writing that it is her or his intention to have her or his property administered according to Islamic law upon death his or her.

According to Islamic law, a widow is entitled to inherit 1/8 from her deceased husband's estate if there are children, if there is no children half of her deceased husband. The situation of a polygamous marriage widow 1/8 share is divided between all the wives. Quran Chapter Verse 12 states that:

‘In that which wives leave, your share is a half if they have no child. But if they leave a child you get a fourth of that which they leave after payment of legacies that may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you have no child.’

Islamic law provides maintenance of widows one year without turning them out,⁵¹ Shariah considered on the maintenance of widow upon death their husbands. Also are rules which Muslim leaders should be followed upon resolving dispute,⁵² and chapter⁵³ God Almighty forbids making decisions in advance before the leader of the community purpose to avoid confusion of the Islamic management.

Islamic law does not discriminate against women in terms of inheritance or in the administration of deceased estates. The challenges inequality arises because when a wife dies, her husband's portion is larger rather to a widow portion in a polygamous union. This is because in polygamous unions, if the husband dies, all the widows have to share a 1/8 share

⁵⁰ Chapter 4 Verse 4 -12 of the Quran.

⁵¹ Surat al-baqrah 2:240.

⁵² Surat Nisaa 4:59. ‘O you who have believed, obey Allah and obey the messenger and those in authority among you. If you disagree over anything, refer it to Allah and the messenger.... Better suitable for final determination.’

⁵³ 49:1.

(if there are children) but if one wife dies, the surviving husband takes her share for himself and he does not have to share with anyone else.

2.4.6 *The Land Act*

According to section 3(2) of the Land Act, Cap 4 of 1999 women have an equal right to acquire, hold, use, and deal with land. This provision confirms that there is equality for all people to use and own land without to their sex or gender.

2.4.7 *The Village Land Act*

Section 20(2) of the Village Land Act, Cap 5 of 1999 provides that any customs, traditions and practices of the community which deny lawful access shall be void and may not enforced. As we have seen from the above, the challenge for women in respect of land inheritance arises from traditions, customs and practices which prohibit or limit them from the inheriting land, especially clan land. The Village Land Act provides⁵⁴ that where a village council establishes a land council, that council shall consist of not less than five and not more than seven persons, of whom not less than two shall be women, who shall be both nominated by the village council; and approved by the village assembly.

However section 3(2) of the Village Land Act states that the right of every adult woman to acquire, hold, use, deal with and transmit by or obtain land through the operation of a will, shall be to the same extent subject to the same restrictions as the right of any adult. The law insists on the elimination of any restriction against women from inheriting land through a will. Section 3 of the MCA⁵⁵ ensures that there is established an independent expeditious and just system for adjudication of land disputes which will hear and determine land disputes without undue delay. This section is separate from those legal systems which deal with matters of inheritance. The Village Land Act insist that any disputes concerning the land rights of a person occupying land under a customary right of occupancy, shall be determined under customary law.

2.4.8 *Law of Marriage Act (LMA)*

The Law of Marriage Act, Cap 29 RE 2002 (LMA) governs to all systems of marriage in Tanzania, both Islamic and customary marriages. The law was amended in 1971 to recognize the position of wives in the distribution of matrimonial property upon divorce or death of

⁵⁴ Section 60(2)(a)(b).

⁵⁵ 3(1)(a) of the MCA.

their spouse. Section 114 provides that upon divorce, the court has the power to order the distribution of matrimonial property acquired by the parties through their joint efforts during their marriage.

In the case of *Bi Hawa Mohamed v Ally Sefu*,⁵⁶ the Court of Appeal held that the domestic work of wives amounts to effort and its fruit constitute contributions which entitle them to a share of the matrimonial property upon divorce. A similar reformatory measure could be used to apply in a new law of succession where a widow could be allowed to inherit matrimonial land regardless of her contribution in the acquisition of the land. The Law of Marriage Act regards women land inheritance because it considers the issue of marriage within the spouses during life time, due to the fact that marriage and inheritance rights are related to each other, so a widow has the authority to claim inheritance from her deceased husband once the issue of marriage arises; However, section 68 of the Law of Marriage Act provides that:

‘Notwithstanding any customs to the contrary a woman whose husband has died shall be free to reside wherever she may please, and remain unmarried or, subject to the provision of section 17, to marry again any man of her own choosing.’

This section gives widows the right to live in the matrimonial home without any disturbance and forced marriage with elder or young brother of the deceased husband according to the customary law practice of widow's inheritance. Section 160 provides for the presumption of marriage which means that a widow is entitled to inherit upon proof that she lived with her deceased husband for many years in order to consider her contribution to the welfare of the family.

In the case of *Elizabeth Mtawa v Hassan Mfaume Risasi*⁵⁷ the parties lived together but were not married. The so-called husband died and a dispute over the deceased's property arose between the appellant, the deceased's so-called widow (because she had not been married to him), and the deceased's relatives. The court relied on the presumption of marriage. The lower court made an order allowing the appellant to live in the house until she died, remarried or the deceased's relatives secured alternative accommodation for her. The High

⁵⁶ (1983) TLR 31.

⁵⁷ Civil Appeal No. 12 of 2001, High Court of Dodoma.

Court however ruled that the terms of the order were in violation of Article 16 of the Constitution.⁵⁸

2.4.9 *The National Land Policy*

In order to enhance and guarantee women's access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation. However, inheritance of family or clan land will continue to be governed by tradition and custom, provided they are not contrary to the constitutions and doctrine of natural justices.

2.5 Conclusion

Therefore this chapter aimed at providing a comprehensive background to the existing relevant literature and laws in Tanzania in order to reveal and explain the extent of the various problems women come across after the death of their husband because of discriminatory inheritance laws.

The following chapter tackles the research methodologies, methods and theories used to conduct the research and show, for example, women's right to inherit is a human right by using the human rights approach which exposes the highly discriminatory laws and practices surrounding the subject of the inheritance of land in Tanzania. Other approaches (such as the women's law approach and sex and gender analysis) are also used to expose in as much detail as possible the plight faced by these widows.

⁵⁸ Article 16 of the Constitution provides that, 'Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.'

CHAPTER THREE

3.0 RESEARCH METHODOLOGIES, METHODS AND THEORIES

3.1 Introduction

This chapter discusses the methods and methodologies I used in collecting data for the research. The methods and methodologies used to collect and analyse data depended on the data needed to meet the requirements of the research assumptions, questions and objectives.

Citing Harding's work, Meena (1992: 32) explains that the concept of theory is used for the construction of concepts to analyse specific problems or topics, and/or to examine, compare and contrast the connection between observed and imagined phenomena. She says that methods refer to the techniques used to gather evidence or 'collect data'. There are three methods used in research: firstly, questioning and observing; secondly, observing; and, thirdly, reading, re-reading or examining documents of different kinds. Feminists usually use all three methods in their work. According to Harding, methodology is theory and analysis about the kind of methods and general research approach most appropriate for a given body of theory, such as Marxism or critical feminism.

The purpose of these different methods, theories and methodologies is to understand the position of law and women in reality within societies (Bentzon *et al.*, 1998: 81). Using the abovementioned methods and approaches I have looked at the challenges that women face on accessing justice in relation to their right to inherit. In this chapter I describe the specific methodologies I utilized to collect data to identify the gaps that exist in Tanzanian laws in addressing women's right to inherit land.

3.2 METHODOLOGIES

3.2.1 Women's lived experiences in resolving disputes over land inheritance

The women's law approach is based on the reality experienced by widows in inheriting land when they make claims against their deceased husbands' estates through relevant dispute resolution mechanisms. There is an assumption that existing authorities obstruct or undermine women's right to inherit land. Guberman and Wolfe write as follows:

‘The inherited bias of male-dominated institutions contributes to a situation where it is difficult for women to get help’ (1985: 55).

The study took women especially widow as a starting point so as to identify their lived reality and look at the challenges which they face when they make claims to land after the death of their husbands and engage with the procedures of the relevant disputes resolution mechanisms under customary law and Islamic law. Women are not involved in decision making different authorities, including the dispute resolution mechanisms.

Dengu-zvogbo *et al.* confirms Dahl’s observations:

‘The methodology of women’s law is cross disciplinary and pluralistic and calls for a rather free use of the available material wherever it can be found... [T]his term implies that we wish to see law, reality and morality from women’s point of view’ (1994: 21, 22).

Thus, the women’s law approach is associated with grass-root oriented research. The grass-roots approach takes women’s experiences in life as the starting point. This is inspired by gender-neutral legal systems established by the welfare states of the world. In this sense women’s law methodology is a women-centred approach which focuses on the biological, social and cultural differences between women and men. I asked myself, based on women realities in the context of their daily life and the law: Are women following proper procedures when claiming their right to inherit land? Do women believe that they are entitled to inherit the land of their deceased husbands? I adopted this approach when looking at the laws regulating land inheritance under both customary and Islamic laws. I assumed that the laws subordinated women to men through social, economic and cultural status. The structure of the legal system in Tanzania regarding inheritance laws and dispute mechanisms also subordinate women.

The existence of biological, social and cultural differences between women and men are not regarded as the main challenge in women’s lives, but rather how law and societies are organized and how they value female activities as a result of women’s subordination (Dahl, 1987: 13). The subordination of women needs to be addressed within a social and legal order which recognizes that there are biological and cultural differences between women and men. During my research some women expressed their views about their ignorance about the existence of such laws. Others who faced challenges in the legal system expressed their

concerns about the payment of various court fees, the strange court procedures and the laws which they had to follow being written in a foreign language. For instance, I interviewed a widow to find out whether she knew about the procedure she needed to follow to make her land claim in a court of law, and her reply was a strange one. She said she knew the system, but the English language and procedure made her sick. When I inquired further she mentioned other challenges including ignorance of the law and superstitions of witchcraft (i.e., the deceased husband's relatives murdering his widow out of hatred). This made me more interested in the subject. I discovered that while I was correct in focusing my assumption on the legal or technical issues which challenge women, there are also many other factors such as those which obstruct women's efforts to truly realise and make the most of their right to inherit land.

3.2.2 Women's right to inherit land is a human rights

The human rights approach was used in the research in order to determine the extent to which Tanzania as a state party has complied with its international obligations under the various relevant international human rights instruments to which it is bound. One of my assumptions is whether there are laws which give women the right to inherit land under customary and Islamic law. It was important to look at human rights law because it embraces strategies for improving women's enforcement of their right to inherit land through various dispute resolution mechanisms.

Human rights are a set of universal rights that every person is entitled to enjoy without any regard to their sex, gender, colour, religion, custom and status. Such an approach improves women's access to their rights to inherit land. A human rights based analysis of both the laws relevant to women's right to inherit land and the procedures and judicial structures through which such right must be enforced not only reveals the discrimination women face but also offers solutions as to how to eradicate or reduce it. The human rights based approach offers hope to women struggling to make the male-dominated judicial institutions work for them.

Guberman and Wolfe very accurately describe the effects of this hostile environment on women. Essentially, the inherent bias of male-dominated institutions contributes to a situation in which it is difficult for women to get help (1985: 55).

This approach critically examines people's lives especially those of women and then determines whether the government, society and its actors are complying with the requirements of international human rights standards. Therefore, following this approach I analysed the Tanzania Constitution, the laws regulating inheritance, the enforcement of these laws through the land laws and legal system, especially, as it related to women's right to inherit land.

3.2.3 Influence of actors and structures

This approach enabled me to examine how different actors interact with different structures. In this case, women, men, religious leaders and families are involved. I was able to analyse the influence of structures and actors and how they sometimes affect women's choices in economic, social and legal matters. Hellum and Stewart observe:

‘An actor perspective does not imply that women and men are seen totally free to change the rules affecting their social positions which in its turn inform their gender relationship. People's choice of action may be limited by the social or family structure, the legal structure, religious structure or the economic structure they think or act within’ (1998: 102).

In some cases, widows exercise their rights to inherit land because of the nature of the relationship that exists between them and their families. This methodology may be a starting point to help craft strategies which can support the actors and structures within which they operate by reviewing or changing laws in relation to women's right to inherit land under Islamic and customary laws. This is important because widows are not given the proper consideration they legally deserve when it comes to their right to inherit land.

When implementing this approach I needed to interview both men and women, religious leaders, the chairman of land tribunal and magistrates who are responsible for enforcing women's right to inherit land in the justice system and relevant disputes resolution mechanisms. I managed to interview different widows and the people in charge of administering justice within the court system, clans and families. The lower courts always determine customary law. The courts function in a pragmatic, procedural framework in which an interplay between the different actors takes place, and the effectiveness of their combined work depends on how familiar or comfortable they are with and operate within the prescribed procedures (Hellum and Stewart, 1998: 57) as well as their ability to determine what the law

is in a particular case and enforce it. Hellum and Stewart, citing Hamnett, describe this process as follows:

‘...a set of norms which the actors in a social situation abstract from practice and which they invest within binding authority’ (1998: 103).

Using this approach, I discovered that widows face many challenges when trying to enforce their claim to the right to inherit against their families or through local authorities. For example, they are denied legal aid and some authorities even deny that women have the right to inherit land at all. Some magistrates, however, are prepared to interpret relevant laws and grant widows the right to inherit.

3.2.4 *Legal pluralism*

Tanzania is a country where legal pluralism has applied since independence in 1961. This form of pluralism impedes women’s ability to obtain equal rights to inherit land (Sieder and MacNeish, 2013: 182). Hellum and Stewart (1998: 41), who advocate an anthropological conception of legal pluralism, make this statement:

‘Customary law or customs and practices of indigenous people are only applied within the formal legal system when specifically recognized by that system. The extent of recognition may be by high or low but, the governing statutes act as the gateways which permit the admission of customary law in the resolution of disputes that arise for adjudication’ (Hellum and Stewart, 1998: 33).

Thus, the existence of different systems of laws of different kinds may be a barrier to widows securing their inheritance rights. Griffiths states that:

‘That law is and should be the law of the state, uniform applied to all people exclusive of all other law, and administered as single set institutions. That is a circumstances where multiple laws which operate together and recognized by the state’ (1996: 3).

This approach reveals the different legal perspectives that affect women’s rights to inherit land. I found that laws are not restricted to state law but there are other laws which extend to norms and practices of societies. It was not enough just to explore women’s right to inherit land under the three most obvious laws of statutory, customary, Islamic laws; I realised that there are other laws which also govern inheritance issues. Under customary and Islamic

practices which also exist in the structure of the set of principles that guide dispute resolution in family meetings, I needed to know the laws that are applied in the case of a deceased estate and the procedures used in resolving inheritance in land disputes. This approach exposed that what the law, such as customary and Islamic law, provides is different from what the people practise in their lives when it comes to land inheritance matters. I also examined how widows under Islam resolve their disputes on inheritance within the authorities of the Quran.

3.2.5 *Semi-autonomous structures*

Dengu-Zvogbo cites Moore (1979) who defines the term semi-autonomous as follows:

‘The semi-autonomous social field is defined and its boundaries identified not by its organisations (it may be not) but by a procession characteristics, the fact that it can generate rules and coerce or induce compliance to them...[M]any such fields may articulate with others in such a way as to form a complex chain, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains’(1979: 16).

These semi-autonomous fields are important mechanisms. Institutions such as family and clan leaders and legal authorities become a place where regulations generate power beyond the official law in relation to women inheriting land and resolving disputes. Thus, semi-autonomous social fields become a tool that assists in describing and analyzing the rule-generating and rule-upholding processes which affect the position of women and gender relations in a situation where the plurality of normative structures informs human interactions (Bentzon *et al.*, 1998).

In order to grasp the universality and diversity of legal developments it is important to look for gaps and overlaps between the normative practices of the different institutions such as families, workplaces, organizations and courts (Hellum and Stewart, 1999: 65). This methodology helped me to examine the interaction between the statutory provisions and court determinations relevant to women’s right to inherit land. It also explores and explains procedures that are used by the courts of law in determining disputes, structures and other institutions within the legal framework. It explores things that affect the position of widows and gender relations in terms of actions and decisions, for instance, in clan meetings between participating families. However it is also necessary to use this methodology to link the customs, practices, religious laws and laws relating widow’s inheriting land after they have lost their husbands. Most widows suffer economically after the death of their husbands. This

is attributed to many factors, including the loss of entitlement to social benefits from their deceased husband's estates which they lose according to the general laws of the land. Thus, women suffer in situations where they should not because they unfairly forfeit benefits they ought to have received from, e.g., social security which would have assisted in paying their court fees or an advocate to represent them.

3.2.6 Sex and gender analysis

Hellum and Stewart argue that many theories about the role and position of women in law and society are based on notions about sex and gender differences. To quote their words on sex, these authors state:

‘...sex is based on the physical distinctions between men and women; whereas gender is a social and cultural construct’ (1998: 82).

Gender is seen as a concept that involves cultural interpretations of the biological differences between women and men. This approach aids in efforts to help society to turn from their negative attitudes towards women and to help understand the position of women in society as well as improving their position. The data I collected gave me a real insight into the real life of women, the role they play, the people with whom they interact, and influences they come under from various institutions like the family, the court system and religious authorities. In relation to land inheritance and dispute resolution processes, widows should be given a voice for example, at family meetings and knowledge which would give them power to claim their right to inherit land.

I have seen that women do not have a voice or legal knowledge to enforce their right to inherit land. Catherine McKinnon's jurisprudence conceptualises gender in the light of power relations and the disparity of power between men and women, supported by the law and society. Based on this perception, women's role is determined by their socially constructed gender, which ensures her inequality and subordination in relation to law and society which is characterised by male dominance. I agree with McKinnon that laws are used as a tool to subordinate and reinforce the inequality of women, for example, customary law excludes women from land inheritance; women are only permitted to use land. Also I noticed during the research that only a few women participated in decision making at family meetings or in relevant authorities due to the patriarchy which exists within both societies and institutions.

Radical feminists argue that it is the patriarchal system that oppresses women. The system is characterized by power, dominance, hierarchy and competition. The system cannot be reformed but only ripped out root and branch. Mackinnon also states in her sex approach that since sex has dominated politics, law and social perception, equality is equivalence, not a distinction. The legal mandate of equal treatment (which is both a systemic norm and specific legal doctrine) becomes a matter of treating likes alike and unlikes unlike; and the sexes are defined as such by their mutual unlikeness. Patriarchy is far too compliant and flexible to hold by any standard capable of being administered by the courts.

On the other hand, Mackinnon asks judges to determine whether a rule or policy contributes to the equitable distribution of power between men and women. But neither standard would be judicially manageable. Radical feminists, however, state that the exclusion of women from power is no fortunate and easily remedied accident, for the structures and institutions of the state have been made by men and embody their interests rather than those of women. Using this approach, I can see why women do not participate in decision making, especially widows at the family level. Sieder and McNeish quote Kandiyoti, as follows:

‘...patriarchy is continuously bargained with and legal norms within the Shariah are being contested, redefined, and renegotiated’ (2013, 139).

The Islamic construction of gender equity thus challenges dominant ideas of women’s agency suggested by liberal feminists to gender equality.

3.3 DATA COLLECTIONS METHODS

I used several research methods which helped me to collect data on land inheritance and dispute resolution. Both primary and secondary sources were used to collect data in this research, such as in-depth interviews and group discussions with widows, widowers and family members and key informants. I also used observation. These methods gave me a deeper understanding of the processes involved in widows claiming their right to land inheritance and enforcing those rights through the various dispute resolution processes. Secondary sources include books, articles and law books. Statutes, journals and literature were also consulted. Table 1 shows details of all the respondents involved in the research.

Table 1: Showing details of the respondents involved in the research

RESPONDENT	WOMEN	MEN	TOTAL
Individual interviews and focus group discussions	6	3	9
Widows and widowers	10	2	12
Magistrates	2	1	3
Chairman of the Land and Housing Tribunal		1	1
Advocates	1	1	2
Islamic Religious Leaders		6	6
NGOs	3		3
Total			36

3.3.1 In-depth interviews

Most of the data collected in this study come from in-depth interviews with widows, beneficiaries of deceased estates and several other relatives who had played important roles in the inheritance and resolution dispute processes. I managed to conduct five interviews with widows, two of whom were Muslim and three were Christian and I found they followed customary practices and rules in their decision making. They were very helpful and cooperative believing that I was going to solve their problems with the relevant authorities.

These in-depth interviews were held in the community and it was therefore easy for me to identify widows who followed Islamic and customary laws. I asked the widows about their experiences in relation to inheritance, like their personal details, age and tribe, details of what happened after the death of their husbands, what law applied in their situation, how the land was distributed which included what contributions they made, if any, to matrimonial property acquired during the subsistence of the marriage.

I asked other widows where they would go or would prefer to go to solve a dispute if a dispute arose. Would it be settled out of court or between the families? Would they seek legal

advice or not? The aim of in-depth interviews helped me to find out the position of women from their own mouths. This method gave widows the opportunity to express their own opinions about their own experiences once their husbands died and they did so in relation to their rights to inherit land and to the processes of resolving disputes when they tried to enforce their rights. In addition, I also managed to interview two men and two women who were not widows in order to see the situation from a different perspective and to take into account the attitude of men.

3.3.2 Key informants

Interviews with key informants involved people of a professional background, such as legal practitioners, magistrates, legal officers, chairmen and members of the Land and Housing Tribunals, NGOs and Muslim leaders. The interviews with different key informants enabled me to get views and attitudes of people belonging to different socio-economic groupings and living in different places, and also the views of those who handle inheritance cases and dispute resolution processes within the societies at different levels.

The main aim was to find out how inheritance rights, especially land, are handled in both urban and rural areas. The fact is that if land is traditionally owned people only have a right to inherit its rights use only. I managed to interview three magistrates, two Primary Court magistrates and one Resident Court magistrate from Nyamagana. My main intention was to discover how they handle and resolve disputes relating to the rights of widows to inherit land and how they treat widows. I also interviewed the chairman of Land and Housing Tribunal Court, two chairmen from the Village and Ward Tribunal. My aim in this regard was to know more about women and their right to ownership of immovable property (land) inherited from their deceased husbands. I also interviewed religious leaders (Sheikhs) who regulate family matters. They informed me of the procedures involved in distributing an estate and solving a dispute once it had arisen. The main objective of this method was to get the relevant information about the administration of widow's land inheritance and about procedures for claiming their rights and the multiplicity of laws within the legal system.

3.3.3 Focus group discussions

This method of data collection was used for several reasons. I conducted group discussions to obtain the perception of groups about customary law and Islamic law in their own area of jurisdiction. I also asked them about the forms of customs and practices among different

societies. Five group discussions were conducted at Sengabuye Ward in Ilemela District. This method was used in order to get a broad view and different perspectives from both men and women on their rights to inherit land and the processes involved in resolving disputes under customary and Islamic law. The main objective was to gather a broader response about certain issues such as land inheritance, procedures, ways to claim land, the distribution of deceased land, the law applicable, cultural practices, customs and religious beliefs. Group discussions helped me to learn about societies' knowledge, practices and widow inheritance of land. Figure 3 is a photograph showing a group discussion I held with a few Muslim women.



Figure 3: Photograph of a group discussion the researcher held with some Muslim women

3.3.4 Observations

I observed that one needs to be patient in order to obtain information about the treatment widows receive from the courts and its officials in inheritance cases. While it was easier to acquire information in a group discussion of Sheikhs, traditional people and land chairmen, it was difficult to get hold of court information. Although a court record is a public document and should be accessible to the public, I found the court officials to be secretive and uncooperative about such documentation. The same applies to the handling of inheritance cases involving widows. Court practice reveals that an administrator is always appointed to a deceased's estate. This shows the court's attitude towards women and the relationship between court officials and women litigants.

I also observed that most of the widows' litigants withdraw from being appointed as administrators of their late husband's estate. They prefer to nominate an older or younger brother of their deceased husband to administer his estate. From what I observed, there are so many different circumstances and factors surrounding women's inheritance of land that they end up confusing widows and in their exasperation they finally give up enforcing their rights to inherit their deceased husband's land.

3.4 Conclusion

This chapter used different methodologies and methods to analyze, explain and explore the realities of women in relation to their rights to land inheritance the Sukuma tribe and Muslim people in Mwanza region.

The following chapter embraces the findings revealed the research as well as a discussion and analysis of the data within the context of the background already covered in chapter two and three. Factors affecting women's right to inherit land from their deceased husbands and the various processes of dispute resolution mechanisms under customary or Islamic laws are discriminated in detail.

CHAPTER FOUR

4.0 FINDINGS, DISCUSSION AND ANALYSIS

4.1 Introduction

This chapter discusses the research findings and analysis and attempts to answer the research questions. The discussion of the findings is based on the lived reality of women in relation to inheriting land within the context of the relevant laws and theories.

4.2 Social and economic factors

Land inheritance disputes in various areas are concerned with customary laws. Most of these disputes are between widows and their deceased husbands' families. In Tanzania, the rights and status of women is greatly influenced by the socio-economic condition of a particular community, its law enforcers, like magistrates, its culture and norms which are deeply rooted in the community's customs and religion. In addition, the difficulties associated with inheritance are further complicated by the fact that the ownership of property which is subject to an inheritance dispute may itself be under challenge. These challenges arise as a result of the many different laws which apply to the subject of inheritance of land. The legal framework has both informal and formal systems of property ownership. Suggestions have been and are made to change the laws on inheritance of land issues and the process of resolving land disputes. Based on the research findings, it has been realized that there are various types of structures which address both the rights relating to the inheritance in land and land inheritance disputes resolution processes within the family and at the state level.

4.3 Different authorities and their jurisdiction

There are different authorities that resolve land inheritance disputes in Tanzania. This is because there is a multiplicity of laws regulating the subject. Each of the authorities which are about to be mentioned has its own jurisdiction and procedures in determining these disputes.

4.3.1 *Family meetings*

These are family or clan meetings which take place immediately after the burial ceremonies have been completed. They comprise all family members on both sides of the family and

include both men and women. This is the first step in determining the rights of the widow in land matters. These meetings are normally prolonged due to the family's interests in the deceased's land. The relatives on the husband's side, especially all brothers of the deceased, have more powers than anyone else and they play a very important role in the family and at clan meetings. With regard to the right of a widow to inherit her husband's land one of the respondents in Ilemela commented:

‘Clan members prolong meetings for a long time. Instead of the normal three days after burial ceremonies or forty days, it can take three months or more depending on the clan leaders. This is intended to preserve men's interests and undermine the rights of the widow. This causes delays in appointing an administrator or division of land to the widow and other heirs.’⁵⁹

Family meetings are conducted under both customary and Islamic law. They are the court of first instance to determine the distribution of deceased estate. If it occurs that one of the parties is not satisfied with the decision of the family meeting that party can petition the lowest judicial court (i.e., the Primary Court) or Islamic Council of Tanzania (Kadhi). The Primary Court or Muslim leaders (Sheikhs) will decide whether customary or Islamic law applies depending on life style of the deceased person.

The majority of people feel that the customary laws applicable in the clan system are the best way of dealing with land inheritance issues. This is because many husbands fail to make a will during their life time. However, the best way to resolve dispute is if there is a will which determines what each beneficiary is entitled to. The existence of a will does not cause any delay at the clan or family level. This is because their meetings rely on the deceased's wishes which are contained in the written will, unless the will is invalidated for some reason. Some testators state in their will whether Islamic or customary law is to apply to their estate.

Regardless of whether Islamic or customary law applies, fairness might not be observed as most of the customs do not recognize women as part of the group that is entitled to inherit the deceased's land. This is partly due to women's illiteracy and lack of knowledge of the law which prevents them from knowing the proper authorities to approach and procedures to be followed in order to seek redress. An illiterate widow confirmed this when she said:

⁵⁹ 9 November 2015, Buswelu, Ilemela District.

‘I do not know where I should go for assistance to enforce my right from my deceased husband.’⁶⁰

Therefore I found that only a few widows knew the existence of legal mechanisms and provisions within the law which entitled them right to inherit land from their deceased husbands.

4.3.2 Courts

The Primary Court is the lowest ranked court in Tanzania. It has powers to determine matters in relation to inheritance in respect of both registered and unregistered land, provided the law that applies is customary or Islamic law. The court has jurisdiction to appoint an administrator/administratrix or executor/executrix to the deceased’s estate under both customary and Islamic law. Thus, all cases involving inheritance in land are referred to Primary Courts. Appeals from Primary Courts lie to District Courts, thereafter, to the High Court, and finally to the Court of Appeal.

When a widow files an application for the administration of a deceased estate, she is required to produce a certificate of death and minutes of the family meeting. The majority of widows fail to produce these documents within the prescribed period and as a result, the enforcement of their right to inherit of their deceased husband estate is delayed. This was confirmed by Resident Magistrate, Hon. S. Kiama, who said:

‘As a court we cannot proceed without family meeting documents and death certificate as among the important documents for a widow to file any succession application to the court.’⁶¹

The learned magistrate used the legal maxim ‘justice delayed is justice denied’ to describe the effects of the delays on the cases she often deals with in her area of jurisdiction. Another challenge is that of the failure of witnesses to appear before the court to adduce their evidence relating to the appointment of an administrator or executor. In other words, the family members themselves cause delays as some of them fail to appear before the court. This is because most families have argued over their rights to the land. The deceased’s side of the family always attack the widow’s interest in land and therefore refuse to co-operate by

⁶⁰ 20 November 2015, Kayenze Ward, Igombe.

⁶¹ 17 November 2015, in the District Court of Nyamagana at Mwanza.

attending court to give evidence. Magistrates also often fail to help widows and their cases are not given priority in the setting down of the hearing of matters until final judgement. They are not treated properly as human beings who are entitled to enforce their right to inherit land. Sometimes, as a result the unawareness of widows of their rights combined with corrupt courts, magistrates enter judgments in favour of the relatives of late husbands.

At Nyamagana Primary Court, one Primary Court magistrate stated:

‘In practice it does not take a long time to complete probate or administration cases in courts of law, and this is because the laws require 90 days notice to [be given to] the general public before the appointment of an administrator, and if there are any objections it might take some time even nine (9) months before the appointment finalized. And in higher courts, it might take long time because of accumulation of court cases.’⁶²

The majority of people who raise such objections are usually those on the husband’s side of the family because they are interested in inheriting deceased’s land without caring about what will happen to the widow after her husband’s death.

Another respondent who is a widow observed:

‘After death of my husband, we had family meeting then I went to Primary Court to file application of administration of the deceased estate, because my husband left land under Sukuma customary rules. So the judgement was according to Sukuma customary law. As a result I could not manage to inherit that land until today.’⁶³

In order to research the issue further, I interviewed the legal officer and the programmer officer with the Kivulini Women’s Rights Organisation, based in Mwanza. Kivulini noted that economic and social factors play a big role in widows failing to enforce their right to inherit land:

‘Majority of widows are dependant. They do not have any source of income once their husbands are dead. Poor widow who lacks money cannot either hire advocates or to pay fees for legal representation, especially in District Court and higher courts. The same in filling cases, widows have no court fee for

⁶² 24 November 2015, Nyamagana Primary Court.

⁶³ 10 December 2015, Gederu-Buswelu, Ilemela District.

probate and administration of estate cases or bus fare to travel back and forth to the court. Finally, they fail to take legal steps or withdraw their cases.’⁶⁴

Again, in accordance to Magistrate Courts’ Act and Advocates Act, advocates are not allowed to appear and represent clients before Primary Courts. This results in widows representing themselves before these courts. Considering their illiteracy and lack of knowledge of court procedures, widows fail to enforce their rights.

In addition, courts and centres for resolving disputes and legal aid organisations are based in urban areas. This discourages women from following up on their cases due to their lack of economic capacity. However, there is also the problem of corruption among judicial officers within the legal system, including magistrates, judges and clerks of court. Many delays in court cases have been associated with corruption. Practice has shown that there are litigants or beneficiaries who have offered bribes and had their cases determined within a short period of time. The fact is that most decisions have not benefited widows and have undermined their right to inherit their deceased husband’s land.

4.3.3 The Land Tribunal

Land and housing tribunals are bodies that deal with land matters only. These tribunals do not have jurisdiction to hear or determine inheritance matters, whether under customary or Islamic law. There are Village Land Tribunals, District Land Tribunals recognised by the Land Act, Village Land Act and Land Dispute Settlement Act, respectively. Appeals from the District Tribunals lie to the High Court – Land Division that deals with all land, i.e., both registered and unregistered, under customary and Islamic law. Appeals from the High Court lie to the Court of Appeal.

The jurisdiction of Land Tribunals is to decide matters in relation to who is the rightful owner of the land. If it the case that the deceased died intestate (i.e., without a will) and owned land and his right to the land is in dispute these tribunals may intervene and decide the matter. If it so happens that a widow is appointed as the administratrix or executrix or beneficiary of the deceased estate, she has the right to appear before the tribunal to claim her rights to possess the land, and then distribute it according to either religious or customary law, depending on

⁶⁴ 15 December 2015, Kivulini Women’s Rights Organization-Nyamhongolo-Ilemela District.

the deceased's wishes (in terms of a will) or the rules of intestate succession (i.e., where no will exists).

In my interview with the Chairman of District Land and Housing Tribunal, Hon. Lung'wecha, he stated:

'We are deciding any matter related to land inheritance. Our cases are based on the claim of the rightful owner of the disputed land after being appointed administrator or executor/executrix of the deceased estates from the common court, especially Primary Court, who have jurisdiction to determine Islamic and customary matters in relation to inheritance.'⁶⁵

In the legal process of resolving disputes, the Hon. Chairman stated that:

'It depends on the legal sciences and arts. Actually there is no specific time the matter to be decided, it depend on a particular case, but in legal procedure there are specific limitation of time due to the speed track (schedule) under land rules and regulation, like filling application by the applicant and the respondent reply within 21 days and then I schedule date for hearing.'⁶⁶

There are other several factors which prevent a matter from being heard, including adjourning a matter because either party fails to appear, e.g., as a result of illness.

Sometimes widows are not aware that the land is mortgaged land. This means that they have to repay a debt of their deceased husband of which they had no prior knowledge. Village Land Tribunals solve land disputes regardless of whether customary or statutory law applies, but they do not deal with disputed land which is registered with the Registrar of Land. The law requires every village to form a Village Land Tribunal and involve women's participation in its decision-making.

4.3.4 District Muslim Council of Tanzania (Bakwata)

This is another legal mechanism in Tanzania that resolves land inheritance matters and distributes deceased estates in accordance with Islamic laws. This body regulates people of the Islamic faith or those who profess allegiance to Islamic religious writings (i.e., the Holy Quran).

⁶⁵ 16 November 2015 in the District Land and Housing Tribunal for Mwanza at Mwanza.

⁶⁶ 16 November 2015 in the District Land and Housing Tribunal for Mwanza at Mwanza.

The District Muslim Council of Tanzania (BAKWATA) not take a long time to determine inheritance matters. However, there are certain procedures that must be followed by applicants who approach this body. As a result of these procedures, it might take a long time to resolve these disputes. The procedures are as follows:

Firstly, family members should make sure that they give information upon the distribution of the deceased's estate to the Islamic local leader (Imam) including the place where the deceased's funeral is to take place or where the land of deceased person is located which is to be distributed after the family meeting. The Imam then takes the matter to the Ward Islamic Board that contains six members. The members are Ward Islamic Leader, the head of the mosque and four other members from the Ward. All members of the Islamic Board must be Muslim men (women are excluded) and they have the authority to decide the matter according to the provisions of the Quran and Hadith of the Prophet Muhammad. If the heirs are not satisfied with the decision, they can appeal to the District Muslim Council of Tanzania. Three members of the Board have authority to resolve disputes involving women's inheritance to land, provided they abide by the Quran and Hadith. Those who are aggrieved by the District Muslim Council can appeal to the Regional Muslim Board, and, finally, to the National Kadhi. Therefore, decisions which are made are likely to be the same from Imam up to the Regional Kadhi, because all decisions rely on the Holy Quran and Hadith of Prophet (PBUH) and they cannot go against the provisions of the Quran. Although these long procedures delay the enforcement of women's inheritance rights, the Quran is very clear about the distribution of the deceased's estate among the heirs.

Most women cannot afford to pay the filing fee required by BAKWATA because of their low income status or because of the fact that they are usually dependant on their families or relatives. However, in BAKWATA there is no backlog of cases as there are with normal courts of law. For instance, one Muslim leader remarked:

‘It does not take a long time to resolve disputes here as you compare to normal courts of law. We do not have so many cases here. When you register your complaint, it is just a matter of calling all parties concerned, beneficiaries or heirs of the deceased estates. Then we make decision or division of the deceased estates according to Quran that direct us to do so. We do not have

any authorities to delegate or distribute estates apart from implementing the Holy Quran.’⁶⁷

This statement was corroborated by one respondent, an advocate, who observed:

‘The reason which makes the deceased’s properties delayed in distribution is because the majority of Muslims do not know the Quran and Islamic law on the distribution of deceased properties. The Quran has provisions stipulating distribution of the deceased estate...most of time we use Muslim scholars who do not take long time to distribute the deceased estates to the heirs. The problems is that majority of women do not prefer to go the relevant authorities to solve their problems.’⁶⁸

The General Secretary of District Muslim Reconciliation Board agreed with the above statement. In his opinion, the Islamic system of resolving inheritance matters is more accessible and quicker in its decision making. He stated:

‘If the deceased husband left a Wosia (will) to his wife (widow) wishing his widow to inherit land once he died, a widow has a right to inherit that land automatically without any delay and any limitations from husband’s side. We have authority to help her to make deed of transfer to her name from deceased husband through the registrar of titles.’⁶⁹

The Secretary also confirmed that Islam recognises a will, provided it is made according to Islamic law. According to the Secretary, Islam does not recognise a will which is biased or against Islamic laws. Examples are wills that exclude a wife and her children from benefiting at all under a will without a specified and reasonable cause. Such an exclusion violates the essence of the Quran and is not permissible unless such a woman was already divorced from her husband before his death.

Based on this analysis, I discovered that some of the reasons why inheritance cases are delayed include the backlog of cases in the courts, negative attitudes towards women and corruption. This results in widows failing to enforce their right to inherit the land of their deceased husbands. In Muslim communities, there is also the challenge of the Muslim Reconciliation Board. This Board sometimes fails to recognise a will due to the requirement of the Holy Quran that one third (1/3) of the all deceased estates should be seek the consent

⁶⁷ 26 November 2015 at District Muslim Council Office of Tanzania, Ilemela District.

⁶⁸ 11 December 2015, Obeid and Law Chambers Office.

⁶⁹ 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

from the heirs in order to be excluded among the estate which the heirs entitled to be distribute among them. Again, failure on the part of widows to pay the fee to register their cases gives rise to yet a further challenge in seeking to enforce their inheritance rights in land.

4.4 Choices of system of laws: Customary and Islamic laws

There are different systems that apply under customary and Islamic laws in determining ways of distributing the deceased's land. The current Islamic and customary laws are applicable to African communities based on origin and religious beliefs. This causes conflicts over the choice of system of laws to be considered by the courts in determining whether Islamic or customary laws should apply. With regard to the choice of law to be applied, two tests have been employed by the courts of law. These are the 'mode of life' test and 'the intention of the deceased' before his death test.

4.4.1 The 'mode of life' or the life style of the deceased

When applying this test, the court of law has jurisdiction to determine whether to apply either customary law or statutory law based on the mode of life of the deceased person. One of the respondents, who is the Chairman of the District Land Tribunal, observed:

'Customary law should live in a specific time and a person should be conversant with (know) the customs and practices of his or her specific ethnic communities.'⁷⁰

I concur with this respondent because the court should apply the choice of law test in relying on the life style of the deceased person on the basis of the particular practices and customs they observed before they died. The 'mode of life' test of the deceased person is illustrated in the judgment of *Re Innocent Mbilinyi*,⁷¹ in which Georges, C.J held:

'The deceased had abandoned the customary way of life in favour of what may be called a Christian and non-traditional way. There is satisfactory evidence that he was to a large extent alienated from his family and that his children had no connection whatsoever with them.'

In this case statutory law was chosen to apply. The facts of the case, in brief, were as follows: The deceased was a Ngoni married to a Chaga woman under Christian marriage rites. Both

⁷⁰ 16 November 2015 in the District Land and Housing Tribunal for Mwanza at Mwanza.

⁷¹ (1969) HCD 283.

were staying in Dar es Salaam. The deceased had left Songea when he was about seven years old. He was educated outside Songea and Moshi. They had three children of the marriage. He died intestate and the matter was brought before the High Court to determine which laws should apply in the administration of deceased's estate. The widow argued that statutory law should apply so that she could benefit. On the other hand, the brother of the deceased argued that Ngoni customary law applied, in which case the widow would receive nothing from the estate. This case shows us how much 'the deceased's mode of life' test helped a widow to benefit from her deceased husband.

In the matter of *George Kumwenda v Fidelis Nyirenda*,⁷² the deceased's wife wanted to inherit a house under statutory law but the deceased's brother wanted customary law to apply so that the wife could not inherit the house. The Primary Court invoked the application of customary law and on appeal to the District Court it relied on the same decision. In the High Court, Kisanga, J ordered a retrial of the case because the two courts arbitrarily made a choice of law decision without investigating the mode of life of the deceased and Primary Court should exercise original jurisdiction based on small estate, customary and Islamic law only.

In this case we can see how that mode of life of the deceased is taken seriously by the courts in making their decisions. The High Court insisted that original jurisdiction on such matters rests with a Primary Court. Primary Courts have jurisdiction to entertain land matters (whether or not the land is registered) if that inheritance falls under the application of customary or Islamic laws. These few points show that women have less chance of inheriting land under customary law because customary laws exclude widows from inheriting their husband's estate. In Islam, the widow is entitled to inherit 1/8 of her deceased husband's estate.

Confirmation of the jurisdiction of the Primary Court to choose the test to be applied in customary and Islamic law is seen in the case of *Scolastica Benedict v Martin Benedict*,⁷³ where the Court of Appeal held that it is the duty of Primary Courts to determine matters of administration of estates regardless of whether the subject matter is land, which is registered or not, provided the applicable law is customary or Islamic law. In other words, Primary

⁷² (1981) TLR 211.

⁷³ (1993) TLR 1.

Courts have the jurisdiction to determine to decide (and must therefore decide) on issues of registered and unregistered land which form part of deceased estates.

One of the magistrates whom I interviewed explained to me that legislation is not often consulted by the courts which tend to rely only on case law (precedent) in resolving disputes relating to land inheritance. Also explain more customary law developed since in colonial period where the socio-economic condition was too different from the present one, so it will be difficult for us hundred percent to rely on the Acts.

4.4.2 The intention of the deceased

According to the law, Islamic law is applicable to those who profess it and live by it. Muslims must establish satisfactorily that the law applicable to the administration and distribution of the deceased's estate is Islamic law. This can be deduced from the intention of the deceased. Once Islamic law applies it affects the whole estate of the deceased whether the deceased left a will or not. This statement was corroborated by a respondent who stated:

‘Any dispute which is decided in Islam way, should apply Islamic laws. Ways of life and the act of the deceased person before he died is very important.’⁷⁴

In the case of *Estate of the late Salum Omari Mekeremi*,⁷⁵ the deceased was a Hehe Muslim. He was an army officer. He married a member of his own tribe and contracted a civil marriage. He was a practising Muslim. Mfalila, J held that applying the mode of life test (that he was a practising Muslim), the deceased had intended his estate to be administered according to Islamic law and not customary law, as the deceased's manner and way of life were far removed from his tribal customs. Therefore, the intention of the deceased person is seriously taken into consideration in the determination of the administration of an estate.

An advocate said that African Muslim widows suffer many challenges due to the conflict of laws that between customary and Islamic law, and that the application of Islamic law is not automatic, it depends on the intention of the deceased during his life.

⁷⁴ 18 December 2015 at the headquarters of the Foundation of Sheikhs and Islamic Scholars of Tanzania, Dar es salaam.

⁷⁵ (1973) LRT 80.

4.5 Kind of marriage

In some legal systems, the land rights of a widow upon death of her spouse depend upon the kind of marriage she contracted with her deceased husband. Therefore, if the marriage was civil in nature, the succession would be governed by the received laws and if it was a customary marriage it would be governed by customary laws, and if it was an Islamic marriage it would be governed by Islamic law. In practice the issue of marriage affects widows in relation to the deceased relatives. Widows are not recognized as the wives of their deceased husbands nor are their rights to any property which was acquired during their life time together. These factors cause hardship when widows try to claim their rights.

According to customary law, marriages should be registered, but the challenge arises because the majority of women live in rural areas and in unregistered marriages. Therefore, when their husbands die their relatives take advantage of widows by chasing them away because there is no evidence that the parties had contracted a marriage under customary law.

The head of the legal department in Kivulini Women's Rights Organisation also raised this point that unregistered marriages create a lot of difficulties for widows after the death of their husbands. She said that relatives of the deceased act as if they suddenly do not recognise them, and therefore, exclude them from any inheritance.

A Sheikh (a Muslim leader) who is the Coordinator of the Foundation of Sheikhs and Islamic Scholars of Tanzania stated:

‘In Islamic law, for a woman to be recognized as a widow of deceased, and thus to be entitled to inherit from the deceased property, she should not have been divorced from the husband...and their marriage should have been contracted according to Islamic law and procedures.’⁷⁶

The Sheikh also added that if the marriage was not contracted in accordance with Islamic law and procedures, the woman is not considered an heir of the deceased's estate and she is, therefore, not entitled to inherit anything from the estate of the deceased.

⁷⁶ 18 December 2015, headquarters of the Foundation of Sheikhs and Islamic Scholars of Tanzania.

In the case of *Hussen Mbwana vs. Amiri Chongwe*⁷⁷ it was stated that there are two systems of law which may apply to people living in the African Muslims Community. Religious law applies in matters peculiarly personal, such as marriage, and customary law may apply in all other spheres of life. It cannot be held that while the rights of an African Muslim wife at and during her marriage are to be governed by Muslim law, her rights of inheritance upon her husband's death are to be governed by her tribal custom, which may give her no such rights. Spry J, accordingly, held that the law to be applied in the distribution of the deceased's estate was Muslim law. Therefore, even though the division of the deceased estates is governed by the kind of marriage which the parties had contracted during their life time, the court also looked at the intention of the deceased husband.

4.6 Women's inheritance in land: Customary and Islamic laws

This section deals with widows and their inheritance to land under customary and Islamic laws. The inheritance laws in Tanzanian society preserve property, especially land for male heirs under both Islamic and customary law. In practice, intra-family allocations are located in a culture of patriarchy rooted in patrilineal inheritance while Islamic laws are rooted in faith and beliefs.

4.6.1 Islamic law

In the *Al-Mawarith* (inheritance),⁷⁸ God⁷⁹ has explained in detail the ways to distribute the deceased's estate between the beneficiaries and their portions under Islamic succession. Also, God has determined rulings and methods to distribute inheritance among beneficiaries. The aim is to act fairly and justly toward heirs and avoid discrepancies among the beneficiaries. The Islamic law of succession is based on the system of beliefs of the Holy Quran and practices of Prophet Muhammad (PBUH).

Women are not excluded from inheritance only on the basis of their sex. They have equal rights to share the property of the deceased even though it is only small portion. In Islamic law, the belief is governed by the Holy Quran, which comprises different chapters (Sura) and verses which govern the whole inheritance system and cannot be influenced by any changes

⁷⁷ Civil Appeal No. 1 of 1963 (T) (unreported).

⁷⁸ Chapter 4 Verse 11- 12 of the Holy Quran.

⁷⁹ Allah (SW).

in the community because of faith. The District Sheikh of the Islamic Reconciliation Board in Tanzania stated:

‘The Holy Quran and Sunnah are the main fundamental principles which guide us or direct any authority to make distribution of deceased estates according to the fundamental principles.’⁸⁰

The Sheikh continued:

‘God’s (Allah S.W.T) has already distributed the deceased estates according to Quran which set out women’s rights (widow) to inherit under Islamic inheritance upon their husband death. Islamic authorities in resolving disputes we have a duty to implement or enforce Islamic laws as guided by the Holy Book (The Holy Quran).’⁸¹

Apart from that, the Islamic law of inheritance has remained unchanged. No single or separate piece of land is capable of being made into a separate entity. Land and all other property left behind by the deceased are taken together as one indivisible whole. This statement was supported by the Chairperson of the Muslim Reconciliation Board. When I interviewed him, he observed:

‘Islamic laws do not base land inheritance only. They are based on the whole total of the deceased estates. Women have a right to be inherited from that wholesome of their deceased husband’s properties.’⁸²

The General Secretary of the Board concurred with the chairperson and agreed:

‘A widow is entitled to get $\frac{1}{4}$ if the deceased husband does not have any child and $\frac{1}{8}$ if the deceased does have a child.’⁸³

According to Islamic law, a non-Muslim is not entitled to inherit the property of a deceased Muslim. For instance, if a non-Muslim woman is married to a Muslim man, she is not entitled to inherit any property of the deceased Muslim person.⁸⁴ This is because Islamic law states clearly and systematically determines that beneficiaries are entitled to receive a portion of the

⁸⁰ 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

⁸¹ 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

⁸² 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

⁸³ 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

⁸⁴ Under Islam that male Muslim person is not husband because of the provision of the Holy Quran.

inheritance and their respective portions as described by the Holy Quran. The share may include people, such as a wife, the second is residue who were close to the deceased person, such as master and slaves and the last distant kindred who have a blood relationship with deceased.

The Islamic law of inheritance insists on payment of the deceased's debts before the distribution of the deceased estate among the beneficiaries. If deceased has left more than one wife in a polygamous marriage, these wives share equally between them, and each wife is entitled to receive 1/3 instead of 1/8 if she remains.⁸⁵

I interviewed a Hon. Magistrate at Nyamagana Primary Court who stated:

‘Islamic laws do not discriminate (against) women right to own land but the problem is that they have given small portion of land from their deceased husband according to the Holy Quran and practices of Prophet (PBUH).’⁸⁶

Therefore Islamic laws do at least accept women's right to inherit in the distribution of a deceased husband's estate although they cannot inherit land directly because inherited land cannot be partitioned. However, the challenge arises in practice when injustices are committed by different authorities like the family, regardless of their faith and beliefs. Also, they take advantage of most women who are not conversant with Islamic laws of inheritance and/or the intention of the deceased husband during his life time.

4.6.2 Customary law

In Tanzania, there are many customary laws according to ethnic group or communities but all of these customary laws are circumscribed by the Local Customary Law (Declaration) Order No. 4 of 1963 and they apply to different communities and different areas and they vary according to their practices. According to the Order widows have no share in their deceased husband's estates. However, husbands can inherit from their wives' estates if the matrimonial property has been acquired during their life time. In this regard, a respondent from a NGO said:

⁸⁵ Chapter 4:12.

⁸⁶ 27 November 2015 at Nyamagana Primary Court.

‘Customary laws do not give women the right to access, control and own (land); they can only use (land); but they can inherit either by will or gift from her deceased husband before his death.’⁸⁷

The above statement was supported by magistrates who said that in their experience they had noticed that the laws provide different ways for women to inherit land. Yet, new laws are introduced every year and existing ones are amended. The Hon. Magistrate stated further that if a woman sees that customary laws do not favour her right to inherit and own land from the family level, she can file a case with the court to enforce her rights. The court determines the matter on the basis of laws and precedent available and it makes sure that justice is seen to be done, ‘justice should not only be done, but it should be seen to be done.’ The Hon. Magistrate concluded if there is any contradiction between customary law and the Constitution, the Constitution takes precedent.

4.7 Challenges that women face in claiming their right to inheritance of land under customary and Islamic laws

This part sets out the challenges that women face in the context of claiming their rights to inheritance both under customary and Islamic laws in relation to land in Tanzania. This section also identifies the position of women in the context of the laws, customs and practices and the challenges that women face in accessing justice in institutions that regulate inheritance matters. A gender perspective of the subject is used to help examine challenges and strategies pertinent to the right of women to inherit land.

4.7.1 Accessibility to and ownership in land inheritance

Women’s access to land may have its roots in an informal traditional family or communal decision. Women’s ownership or right to use (usufruct right) can only be guaranteed through an enforceable claim to land, and ensure women freedoms to land is given to them through inheritance from their deceased husband. The majority of women in Tanzania have difficulties in accessing and owning land due to different challenges, like customs and practices. These traditional practices treat women as property or minors in society, hence, women are not considered to be heirs. Members of societies which I interviewed, especially members of the Sukuma tribe, said widows are not allowed to inherit clan land. However, women are allowed to use the land, nothing else.

⁸⁷ 15 December 2015, Nyamhongolo, Ilemela District.

One Sukuma respondent stated:

‘Women themselves are property. This is because their husbands have paid them cows as bride price. Thus, women are property of their husbands.’⁸⁸

This statement was supported by the legal officer with Kivulini Women’s Rights Organisation who pointed out:

‘According to customs and practices of Sukuma, women are taken to be minors who are not entitled to inherit land of their husbands, but they can use only for their developments upon death of their husband.’⁸⁹

The Legal Officer added that to be a woman under Sukuma custom and practice is a problem. While bride price is a recognition of the fact that women have some value, according to Sukuma customs, that dowry payment usually means that women are treated as the property of their husbands. This tradition has therefore made women dependant on others in their community and, therefore, they cannot manage to own land themselves. The same applies to widows; they must depend for their support on their husband’s side of the family once their husbands have died.

The status of women in the family remains lower than any position due to the misconception that women are property and inferior to men. This is evidence of gender stereo-typing and reinforces male domination which determines gender status within the societies through custom and practices.

The Islamic point of view is that women are human beings and not pieces of property, since Islamic law points out the rights and duties of both parties within a marriage. However, challenges rest on women themselves to think that men are the major source of authority and have capacity to own land. This has resulted in the subordination of women by men; hence, the challenges women face owning and inheriting land.

⁸⁸ 9 November 2015 at Gederu-Busweru.

⁸⁹ 1 December 2015 at Kivulini Women’s Rights Organisation.

4.7.2 Lack of capacity or knowledge of laws among those who implement them

Knowledge of both Islamic and customary laws in Tanzania and within traditional communities is very poor. Most societies are profoundly rooted in the socio-economic complexities of their customs. As far as Islam is concerned, Muslim communities lack awareness about Quranic Verses, statutory laws and the legal conception of the inheritance of land. In the urban centre of Mwanza city, customs and traditions of the Sukuma tribe have influenced many men. It is possible to say that the majority of men are more knowledgeable about the laws than women. The following partly reveals this phenomenon:

I interviewed the Chairman of the District Land Tribunal who stated:

‘The majority of women do not know the law like the Law of Limitation Act, which sets limits of time to file any claim...the mentioned specific is aimed at limiting litigations out of time...and the court must abide with it. Again, an inferiority complex on the part of women is another stumbling block. Most women believe that the laws give more rights to men over women. So, women tend to leave everything to husbands’ relatives without making any follow up.’⁹⁰

One of the Muslim widows interviewed stated:

‘Islamic laws are already in conformity with the Holy Quran and Hadith (practices of Prophet Muhammad (PBUH)), so the majority of widows cannot challenge the religious (reasons) due to the fact that that is what they believe and fear of Allah (God) (S.W) who is the creator of this world.’⁹¹

This statement is not far from what was stated by the Sheikh of the Islamic Reconciliation Board. To quote his words:

‘The majority of Muslims are unknowledgeable of Islamic law, almost 90%. They do not know their religion. They are unfaithful to Islam and not fearing Allah (S.W) God. They think Islamic Boards have powers to divide deceased’s estates. Quran has already distributed portions for them.’⁹²

The Chairperson of Ward Land Tribunal at Bugogwa stated:

⁹⁰ 16 November 2015 in the Land and Housing Tribunal for Mwanza at Mwanza.

⁹¹ 9 November 2015 at Gederu-Busweru.

⁹² 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

‘The majority of men remain conservative and do not want any changes in practices and customs of widows’ inheritance in land under customary laws even though sometimes customary laws do allow women to inherit land.’⁹³

The above practices and interviews shown depict that male domination is still rampant within Sukuma societies through its practices and customs.

4.7.3 *Witchcraft accusations and the killing of widows*

Ignorance and illiteracy are among the big biggest challenges to the Sukuma tribe of Mwanza. Upon the death of a husband, his wife is the first person to be suspected. Even if the death is due to natural causes, a widow may be accused of causing or contributing to it by witchcraft. This is the first step in denying women the right to inherit the land of her husband. My fifth assumption relied on the challenges faced by widows when they start to claim their rights. Some interviewees said that the deceased’s relatives used false allegations of this nature to deny widows the right to inherit. The legal officer with the Women’s Rights Organisation in Mwanza supported this observation and stated:

‘The deceased relatives do spread rumours that the widow killed her husband in order to inherit properties of the deceased, including land. Sometimes, unknown people may kill the widow to discourage her rights to inheritance. This in a way, discourages other widows to think of claiming their rights once their husbands pass away.’⁹⁴

This situation has created fear among widows of the Sukuma tribe in Mwanza. While the state is taking measures on laws and customs, other dangerous practices emerge. In Mwanza, a lot has to be done for the rights of women to enable them to inherit land belonging to their deceased husbands.

4.7.4 *Property grabbing*

Property grabbing takes various forms. It may include actual physical taking away or eviction of the widow and her children from the matrimonial home which have been acquired together with her deceased husband. One of the widows interviewed at Ilemela District described the behaviour of her brother-in-law after the death of her husband and stated that, ‘a widow is not entitled to deceased husband’s property.’ This was attributed to the inferiority complex of the

⁹³ 18 November 2015 at the Bugogwa Ward Tribunal.

⁹⁴ 15 December 2015 at Kivulini Women’s Rights Organization, Nyamhongolo.

deceased's relatives. These relatives think that a widow remarry another man outside their family and their family will be disadvantaged. This is because her husband's land will be taken by another husband hence, a shift of land from their clan to another clan. The widow interviewed testified that after death of her husband, her brothers-in-law decided to take her husband's land without any care for her or her children.

The tendency of grabbing land is based on the socio-economic status of the deceased and other members of the family. The absence of a will means most widows suffer challenges in the administering of the deceased's estate, including his land. As a result, administrators who are mostly brothers-in-law abuse their powers because of insufficient supervision at the time of the division of the deceased's property. To a greater or larger extent, they use the land for their own benefit or interest and forget the widows and children. In some instances, they transfer the right of occupancy into their own names without considering the widow and her children.

These practices show that any form of land grabbing detrimentally affects widows and their land rights and it causes them psychological torture. In excessive cases of indiscriminate grabbing, the widow's personal land could easily be seized using the common patriarchal pretext that all land in the home belongs to its male members (i.e., the deceased husband's family), especially older or young brothers of the deceased relatives. Depriving widows of their right to matrimonial land amounts to a violation of their rights to shelter and dignity. Therefore, urban and rural area livelihoods are a challenge to women's inheritance to land.

4.7.5 *Widow inheritance*

In the Sukuma tribe, a widow may be inherited like any other property. After the death of her husband, one of the brothers of the deceased may ask the widow to re-marry him. If the widow refuses, she is considered not to be part of the family and therefore cannot be allowed to inherit her husband's land. This practice to re-marry the brother of the deceased husband is called 'wife inheritance'. This system may cause epidemic diseases such as HIV/AIDS and Sexual Transmitted Diseases (STDs). Wife inheritance is an acceptable practice among the Sukuma. However, HIV/ AIDS pandemic and the danger of STD infection causes widows to run away to avoid being inherited after their husband's death. Confirming the above statements, one widow from Buswelu area at Ilemela stated:

‘After my husband’s death the family meeting appointed one of the brothers-in-law to be the administrator of the deceased estate...and asked me to re-marry (inherited) the brother-i- law. So, he wanted to administer me like any other in the family property. The family told me that the intention is to protect and develop the deceased land and prevent it from being transferred to another clan. I agreed and lived with my brother-in-law for almost five years, but later on I decided to separate from him. I then left all properties including land. I therefore did not benefit anything from such other marriage. Finally, my brother-in-law took all properties, including the land until today.’⁹⁵

The widow added that nowadays people do not practice this custom of widow inheritance in order to avoid catching HIV/AIDS and STDs. The motive behind customs and practices initially seemed to be a form for protection to the widow and her children. This ensured that the widow and her children enjoyed continued maintenance and support and easy access to her deceased husband’s land and properties. The brother-in-law becomes responsible for the well-being of the widow and her children. On the other hand, the respondent said that a widow’s refusal to be inherited can cause conflict between the deceased’s relatives and the widow and this may cause them to chase her away.

All key informants reported that widow inheritance is an old tradition that is no longer practised. In Mwanza, where HIV/AIDS is one of the principle causes of death, a widow choosing to re-marry one of her brothers-in-law is risky because it can cause systemic deaths to all family members or the contraction of HIV/AIDS. Tanzania criminalised the deliberate transmission of HIV/AIDS in 1998, but has taken no steps to regulate wife inheritance. Penal legislation is also silent on the subject. However, to infect someone with HIV/AIDS is an offence punishable under the HIV/AIDS legislation.

4.8 Position of the girl child in relation to land inheritance under customary and Islamic laws

The position of a daughter under customary laws is weak. A girl child is not entitled to inherit from her father since she is a girl. If a father wishes to make his daughter his heir, he must do so by means of a written will. Otherwise, in the absence of a will, his family clan members will never include her as an heir. This emerged in a group discussion with widows who stated:

⁹⁵ 9 November 2015 at Gederu-Busweru.

‘With the father’s will, a daughter can be a beneficiary. If there is no will, the clan will never choose her to be part of legal heir under customs and practices.’⁹⁶

Legal representation to administer the estate of the deceased in the case of a girl child is allowed by statutory law. According to Sukuma customary rights, orphans are entitled to a share of the deceased’s property. However, the shares of boys are always larger than those given to the girls. The guardian has the responsibility to look after the deceased’s property (which includes land) before and after distribution to the widow, children or other heirs. One of the widows interviewed said that nowadays these guardians try to claim full powers to the land and later on abuse it without taking care of the deceased’s children.

There is gender inequality in the division of the deceased’s land between sons and daughters, since daughters take second place to all sons. The Hon. Magistrate I interviewed said that nowadays Tanzania has several laws which protect the rights of children, such as the best interests of the child, hence when a guardian is appointed to be an administrator over a child, he should act in the best interest of that child.

According to customary law, the daughter are classed as third degree heirs which is normally smaller than the heirs of the other two degrees, compared to the son who inherits the largest share from their deceased father. In the case of *Clementina Tikengwa and Another v Trases Kabogiw*⁹⁷ the dispute involved the right of women to inherit clan land. Lugakingira, J, (as he then was) applied Rule 20 to deny the daughter and widow of the deceased full inheritance of a portion of clan land held by the deceased.

In the case of children born in or outside wedlock, customary laws are not strictly applied. So long as the child is known to the family members, the child will be recognised and allowed to inherit clan land. Under Islamic laws the position of a daughter is stipulated in the Quran Surat Nisaa⁹⁸ which provides that a daughter is entitled into a ¼ share of the deceased’s estate if the deceased left only one son. Where the deceased has left a son and sister, a daughter is entitled to a 1/8 share and if there are two daughters she is entitled 2/3 of the whole property. Therefore, Islamic law considers that children of both sexes may inherit which is not the case

⁹⁶ 23 November 2015, Sengabuye Ward Executive Office at Sengabuye.

⁹⁷ (1978) LRT 49.

⁹⁸ Chapter 4:12.

under customary law. Islamic laws and practices consider a child who is born inside and outside wedlock differently. One of the Muslim widows interviewed claimed that the Islamic laws do not recognize children who are born out of wedlock. These children may not have any legal right to inherit from their deceased fathers' estates. In practice, relatives normally give the child some share of the estate, but it has been stated by the Sheikhs that such a practice is against Allah's (SW) wishes. The Chairperson of the Muslim Reconciliation Board stated:

'If the deceased father had a child outside of marriage that child is not entitled to inherit because there was no legal marriage between the parties during their life time. This restricts the child to be one of the heirs of the deceased estates. However, she can get a gift from her father during his life time.'⁹⁹

Therefore, under Islamic law for a child to be entitled to inherit, his parents must have contracted an Islamic marriage in accordance with Islamic law and his or her share is stipulated by the Holy Quran.

4.9 Position of women in decision-making in relation to land inheritance

The majority of women are excluded from all decision making processes from the family level, right through to the religious, legal (such as courts of law) and land tribunal level. Family meetings, which are the first point at which a decision is made, the decision makers are men and they have power to distribute the land of a deceased person. In customs and practices, widows are not given the chance to contribute their views in clan meetings. Once the clan meeting decides the matter, a widow cannot oppose it. In support of this statement, a Programmer Office of Kivulini observed:

'The clan meeting decision is a final and last. The meeting has all authority to decide on any family matters. This is a first stage of distributing deceased land and resolving disputes. Since women have no any chance to give their ideas or views in the clan meeting, it is difficult to claim their rights.'¹⁰⁰

Islamic communities are characterized by a class-based male-dominated hierarchy. Authority in Islam belongs to men and not women. The Sheikh from BAKWATA stated:

⁹⁹ 26 November 2015 at the District Muslim Council Office of Tanzania, Ilemela District.

¹⁰⁰ 15 December 2015 at Kivulini Women's Rights Organization, Nyamhongolo.

‘Any Muslim Reconciliation Board should be governed by men and not women. In our Board we are three and all are men not women. Traditions in Islam do not consider women to be part of the Kadhi due to various aspects.’¹⁰¹

The Hadith (practice) of Prophet Muhammad (PBUH) corroborates this statement of Sheikh during his life time.

‘The Prophet (S.A.W), he was not positive when a woman was appointed as a King.’¹⁰²

This justifies the position in Islam. Although Islam and customary laws differ in several respects, the laws share some common characteristics when it comes to decision making. Both systems exclude women from participation and decision-making, even in matters that directly affect their rights.

4.10 Conclusion

This chapter provides the study’s major findings which show that inheritance laws are discriminatory against women, especially in respect of clan and family land. This chapter exposed the challenges women face within the various dispute resolution mechanisms when they claim their right to inherit land, especially land jointly acquired by them and their husband during his lifetime. The following chapter tackles the strategies and dissemination of information programmes that are aimed at empowering women to fight for their rights to inherit land.

¹⁰¹ 26 November 2015 at the District Muslim Council Office of Tanzania – Ilemela District.

¹⁰² 26 November 2015 at the District Muslim Council Office of Tanzania – Ilemela District.

CHAPTER FIVE

5.0 STRATEGIES AND DISSEMINATION OF INFORMATION AS A TECHNIQUE TO EMPOWER WOMEN IN DISPUTE RESOLUTION AND LAND INHERITANCE SYSTEMS

5.1 Introduction

‘Without “power” women’s freedoms amount to very little. The basic tenet of empowerment is that women not only have a right to make decisions concerning the fundamental issues affecting their lives, but they also need to determine the nature of their choices’

Mehdi and Shaheed quote Sobhan (1997: 60).

Several challenges encumber women’s ability to claim their rights to land ownership and inheritance, especially in relation clan land. In Tanzania there is no specific legislation regulating women’s rights, let alone women’s rights to inheritance of land like men. Women are partially regulated by various pieces of legislation. Yet, those pieces of legislation apart from being scattered and confusing, are insufficient, full of inherited discriminatory elements and their enforcement mechanisms are weak. Since the causes which have made women inferior and unequal in gender relations are deeply rooted in history, religion, culture, the legal system and the psychological and social attitudes within society, the solution necessary to resolve these problems need to involve innovative strategies and dissemination of information campaigns.

In Tanzania, since there is still only a few women who have come to own land through purchase, donation or inheritance, most women still face challenges from customary and Islamic laws at different levels, like in their families and clans, courts, tribunals, and the Muslim Reconciliation Boards. Based on the study’s findings, discussion and analysis I have come up with different strategies and dissemination of information methods which can help to improve the condition of widows in claiming their land rights upon the death of their husbands. These include: empowering women through law (both customary and Islamic law): empowering widows to enforce their right to inherit land, especially clan land, a task which has many challenges; empowering the various authorities adjudicating land and inheritance disputes, and empowering other actors in other structures. Women’s empowerment will help widows to claim and enforce their rights more effectively within the relevant authorities.

5.2 Legal rights strategies and empowerment of women

In order to understand legal literacy as a process of self and social empowerment, it is useful to study for a moment the meaning and dynamics of empowerment.

5.2.1 Legislation and reform

There is a general urgent need to review and codify customary law in order to make it consistent with the Constitution and human rights standards. Islamic Conciliation Boards, on the other hand, must interpret the Quran according to God's and not men's will because they tend to use religion to undermine women. In the case of various statutory laws which are insufficient and inadequate to safeguard women, they must be reviewed and amended to protect women's rights. If necessary, specific legislation may need to be enacted and new policies enforced to regulate women's right to inherit land.

5.2.2 Reform and review of customary law

The customary laws on land inheritance are discriminatory against women. The laws are biased against women on the ground of their sex and, as a result, they contravene the provisions of the Constitution and international human rights standards set out in various instruments to which Tanzania is a party. This is corroborated by Hon. Kiama¹⁰³ who said:

‘The Constitution of United Republic of Tanzania should be amended, and provides specific articles which clearly states the right of women to own land and not “any person.” Who is “any person”?’

Thus, Tanzania needs to review and reform its customary laws to protect the rights of daughters and widows to inherit the land of their deceased fathers and husbands.

Reform is needed based on educating and informing the public, especially men, to change their attitudes. The notion of women being inferior and subordinated to men must be eliminated.

Campaigns need to be conducted in order to reach all traditional rulers, Muslim leaders, community leaders and heads of families who are regarded as the gatekeepers of the culture of their people. They need to be consulted about how to amend the laws for the improvement

¹⁰³ 17 November 2015 at Nyamagana Residence Magistrates Court at Mwanza.

of women's rights in their communities. Conferences are necessary to gather the opinions and contributions of prominent traditional leaders of various tribes groups and Muslim leaders. The objective would include making them aware of the challenges and injustices faced by women under customary laws. Informing them of contemporary progressive attitudes towards women and their rights will help them to aspire to international human and women rights standards. Workshops will raise women's awareness about their rights to inherit land. These conferences and workshops may be organized at the state and local levels for the benefit of community leaders and the heads of families. These proposals are inspired by comments such as those of Hon. Magistrate Ndolezi who suggested:

'Customary and traditions which undermine women should be changed, even some provisions or sections which undermine women should be amended so as to give women their rights to inherit land.'¹⁰⁴

The head of legal department and programmer office also agreed:

'The laws which undermine women should be amended in order to give women chances to use, own and inherit land without any challenges or obstacles.'¹⁰⁵

Islamic law allows Muslim scholars (Mujtahid) with knowledge and understanding of Islam interpret (give their legal reasoning) in matters that are not directly covered by the Quran or practices of the Prophet Muhammad (PBUH). In other words, they can interpret the Quran to cover new circumstances, including, e.g., a case in which a widow inherits a 1/8 share of her deceased husband's estates, especially when a husband has left four wives. One of the widows stated:

'Women should fight their own rights in relation to land inheritance for instance Islamic law; in the issue of marriage which allowed men to marry four wives, and all wives are entitled to inherit once their husband died without considered matrimonial properties which acquired during life time among of his wives before he had married another wives. That is challenges facing widow especially Muslims when it become of resolving disputes it will be difficult to be considered.'¹⁰⁶

¹⁰⁴ 27 November 2015 at Nyamagana Primary Court.

¹⁰⁵ 15 December 2015 at the Headquarters of Kivulini Women Organization at Nyamangolo.

¹⁰⁶ 9 November 2015, Buswelu area.

Islamic law should also consider matrimonial land acquired by both a husband and his first wife in the situation before he had not got another marriage which they will be included in the distribution after the death of their husband.

5.2.3 *Statutory laws*

Reform of statutory legislation is important in order to recognize the elements of customary laws that benefit a significant part of women's lives and promote understanding of society in land matters. Statutory laws influence a widow's right to inherit clan land. Since women are entitled to inherit land, their participation in land inheritance issues should be encouraged. Efforts should also be made to link land laws, marriage laws and inheritance laws in order to ensure certainty and consistency in the entire body of inheritance law.

Provisions of statutory laws may also be reformed to correspond with the Constitution and international human rights obligations.

5.2.4 *Enactment of will and administration of estate laws*

Tanzania's parliament should amend its laws pertaining to the law of succession and administration of estates to put in place special protection for widows. It is suggested that once a will is written in favour of a widow, courts of law should avoid unnecessary technical issues and rather interpret and apply them in a less strict or more permissive or lenient way in order to protect widows from discrimination and injustice. The Director of Rehhma Foundation observed:

‘The importance of writing a will is that it can help widows to get their rights without taking long time, without any unreasonable delay within the dispute mechanisms.’¹⁰⁷

Inheritance laws in Tanzania are currently silent on the matter of widows and the administration of their deceased's husbands' estates. Widows are treated just like any other person who administers an estate. It is desirable that widows should be awarded special treatment when it comes to their inheritance of their deceased husband's land. However, the proposed new laws or amendments to current inheritance laws should operate with fairness in

¹⁰⁷ 19 November 2015 at Rehhma head office, Buswelu.

relation to the Islamic law of inheritance that already recognizes widows and their right to a share of their deceased husband's estate.

5.2.5 *Dispute resolution by relevant authorities*

The legal system has a profound impact on the lives of women in Tanzania. Women have little or nothing to do with the decision-making and dispute resolution mechanism in relation to land inheritance. Thus, it is necessary to modify this situation in order to respond to women's needs. A widow stated:

'To provide education both Islamic Law, Customary law and ordinary law, it can help them to enforce their rights and resolve their matter once the dispute arises within the families and choose another which is better for them to get their rights easily without taking long time.'¹⁰⁸

The above statements corroborated the following remarks of the Head Department of Rehma Foundation:

'Eliminate or reduce cost such as filling fee from the authorities which resolve these disputes, it encourage widow to enforce their rights like claiming their land and owned from their deceased husband since their dependant and they have no any source of income.'¹⁰⁹

It is absolutely necessary to enlarge the analytical framework for understanding the Islamic and customary law and structure of the legal system that are most relevant to women's daily lives. This will minimize or remove some of the challenges women face when claiming their rights. In this context, Hon. Kiama stated:

'If a woman sees the laws do not favour her right to inherit and own land from the family level she can file an application before court to seek her rights, because court sometimes rely on precedent and other laws which given women different rights which entitled to get. *Justice should not been done, but it should be seen done.*'¹¹⁰

Respondents insist that the government should take very seriously the resolving of disputes concerning women's right to inherit land in order to prevent corruption and make sure that justice is dispensed within a reasonable time. The government should aim at reducing the

¹⁰⁸ 11 November 2195, Gederi.

¹⁰⁹ 19 November 2015 at Rehma Head Office.

¹¹⁰ 17 November 2015 at Nyamagana Resident Magistrates Court at Mwanza.

corruptibility of all the legal procedures since judicial corruption is one of the challenges women face once they claim their rights to inherit land. One of the widows I interviewed said:

‘Time consideration, it is better to take two months or three because these matter or cases the evidence do not takes long time as well as witnesses are there waiting for summons from the court to come to adduce their evidence, differed from criminal matters which takes more time because of investigations.’¹¹¹

The government authorities have a duty to educate society about the concept of women’s inclusion and full participation in all decision making processes which affect their rights and their lives.

5.2.6 Mass media campaign

Tanzania’s parliament, judiciary and the Ministry of Women and Children’s Affairs can all play a role in providing necessary materials that easily reach women at the lower levels of communities. Information, education and instruction in English, Swahili and traditional (vernacular) languages may be disseminated through pamphlets, posters, theatre productions, the radio and the print media in order to reach a wide range of both illiterate and literate members of the community. The chairman observed:

‘Legal awareness, especially NGOs provides seminars, dialogue which makes people especially women to be aware of the court procedure. NGOs too provide legal aid especially rural areas most people who are affected with procedures of claiming their rights to land inheritance.’¹¹²

The aim is to build understanding on the part of communities about women’s rights to inherit land and how to enforce them under customary and Islamic law. Workshops can also be set up to bring together women, men and professionals to provide various services to women at the community level. One respondent notably observed:

‘Chairman and members of ward tribunal do not have legal education, they resolve land disputes through their knowledge, skills, opinion and reading

¹¹¹ 9 November 2015 at Gederu.

¹¹² 16 November 2015 at the Land and Housing Tribunal Court at Mwanza City.

different laws themselves through seminars, law books and brochures which help us to resolve land disputes.¹¹³

This strategy will help to change the social attitudes of people, particularly men, and encourage them to respect the personality of women and the existing thinking that women are inferior to men and depend on them.

5.2.7 Establishment of Islamic courts

Muslims in Tanzania form the majority of citizens. Therefore, the government must enact specific laws to establish Islamic courts in order to bring the jurisdiction of Islamic courts under one authority. Sheikh Mohamed Yusuph stated:

‘The existing challenge at this moment is that it is very difficult to distinguish Islamic courts from customary courts or ordinary courts. Islamic courts will be manned by Islamic legal professionals and will have jurisdiction over Islamic personal law on succession and matrimonial matters.’¹¹⁴

The court will be bound by the provision of the Quran, and the practice of the Prophet and Constitution of Tanzania. This court will be beneficial to women.

This is because their rights are recognized, it is easy for women to access the court, and it is easy for them to enforce their rights. At present, women go to courts of law with doubts and uncertainty about whether they will succeed in enforcing their rights. They do not know which test is going to apply in their dispute, i.e., whether it will be the ‘mode of life’ test or ‘the intention of the deceased person’ before his death test that will be applied.

5.2.8 Economic empowerment of women

In addition, this research recommends that women should be empowered economically so that they can have capital or income that will make them less dependent on men. This can be done through different forms of poverty lessening programmes, such as those encouraged by women’s associations and non-governmental agencies. Through economic empowerment women will be more likely to pursue their rights before the relevant authorities after the deaths of their husbands. The Director of Rehma Foundation stated:

¹¹³ 19 November 2015 at the Sengabuye Ward Tribunal Office.

¹¹⁴ 17 December 2015 at the BAKWATA head office, Ilemela District.

‘Majority of women are dependant from their relatives and husband and once their husband died they have no any source of income to run their trial and manage to pay advocate fee. So it’s better to empower them by introducing different sources of income such as loan with low penalties so they could manage to run their cases within the relevant authorities.’¹¹⁵

It can also be done through the formation of small co-operative groups which can secure loans from the government. Thus, women will have the capacity to take care of themselves and their children rather than depending on their husbands.

5.3 Conclusion

This chapter provided recommended solutions to help to respondents (widows) economically, socially and legally to improve their efforts to claim their right to land inheritance. The following chapter twill finally deliver the study’s conclusion and recommendations based upon the discussion, analysis and findings of the research.

¹¹⁵ 19 November 2015 at the Rehhma Foundations head office, Buswelu.

CHAPTER SIX

6.0 CONCLUSIONS AND RECCOMENDATIONS

This chapter discusses the conclusions and recommendations reached and based upon the findings of the research. The recommendations include strategies for the amendment of existing laws and the passing of new ones to create a new gender and sex sensitive body of inheritance law which is easy to understand and apply and empowerment strategies for women so that they can easily access this law and enforce their rights to inherit land from their deceased husbands.

6.1 Conclusions

From the assumptions and findings of the research, the following conclusions are drawn:

1. That there are differences between the dispute resolution processes relating to women's right to inherit land under customary law and Islamic law.

The major research finding revealed that there are different authorities that resolve land inheritance disputes in Tanzania. This is attributed to the existence of the multiplicity of laws regulating the subject. Each authority has its own laws, jurisdiction and procedures in determining an inheritance dispute. Under customary and Islamic law, family meetings have no proper formal procedure. Dissatisfied widows under Islamic law have to make their appeal to the District Muslim Council for a further interpretation of Islamic law on land inheritance matters and the distribution of the deceased's estate. On the other hand, widows under customary law, appeal to Primary Courts. They also hear appeals from the District Muslim Council. These courts have powers to determine matters in relation to inheritance in respect of both registered and unregistered land, provided that the laws that apply are customary or Islamic law.

2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women must make their claims through a series of disputes resolution authorities.

Widows who attempt to enforce their rights to inherit their deceased's husbands land in Tanzania are considered trouble makers by their families. It is unfortunate but true that that

attitude extends to the men who are in charge of those relevant authorities. Family interference, cumbersome legal procedures and the high costs involved (transport, court fees and lawyer's fees), corruption and bribery cause widows to give up their rights. Even if they succeed in their claims, the enforcement of court orders is a cumbersome, expensive and lengthy.

3. That there are processes used to determine the choice of law (Customary or Islamic law) should be applied to a women's right to inherit land.

The findings show that there are two tests that are employed by the courts of law. The first is the 'mode of life test' and, secondly, 'the intention of the deceased' before his death. With the 'mode of life' test the court looks at the particular practices and customs of the husband before his death. With the intention of the deceased before his death test the court looks at what exactly was intended by the deceased husband. This is normally based on statutory and Islamic law. It depends on whether the deceased professed and lived by Islamic law before his death, or whether his marriage was contracted under civil, customary or Islamic law. The widow's right to inherit the land of her deceased husband will depend on the above mentioned factors.

4. That there are laws that give women the right to inherit land under both customary and Islamic law.

The Islamic law of succession is based on the system of beliefs set out in the Holy Quran and the practices of Prophet Muhammad (PBUH). A widow is entitled to inherit one-quarter ($\frac{1}{4}$) of her deceased husband's estate if the deceased husband does not have any children and one-eighth ($\frac{1}{8}$) if the deceased does have a child and is in a polygamous marriage (i.e., has other wives). These wives share this $\frac{1}{8}$ share equally between them. Under customary law, widows have no specific share in their deceased husband's estates. In some instances, widows do not inherit anything, let alone land, from their deceased husband's estates.

5. That there are challenges which women face in claiming a right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.

Findings in this respect showed that in Tanzania women face challenges in claiming a right to inherit land under both substantive and procedural law (i.e., various processes). Widows' accessibility to and ownership and inheritance of land are problematic. This is because land is

owned by the clan or family members who consider women as second-class members of the family, minors or pieces of property. So, widows are not entitled to inherit land. Widows lack the knowledge or understanding of relevant laws and the legal systems to enforce their rights. This applies to both Islamic knowledge and understanding and customary law. Again, the duality of the legal system and the lack of a uniform law of succession are further challenges preventing women from accessing their right to inherit land.

6. That there is a need to develop strategies to empower widows effectively to participate in dispute resolution processes to inherit land under Islamic and customary laws.

Based on the research's discussion and analysis, the research found that there is a need for a strategic approach and for the dissemination of information within the communities of Mwanza. This can help to improve the condition of widows in claiming their right to inherit land upon the death of their husbands.

6.2 Recommendations

From the above findings and conclusions, the following recommendations are made:

1. That there are differences between the dispute resolution processes relating to women's right to inherit land under customary law and Islamic law.

Tanzanian courts should be courageous and declare null and void all those customs and traditions that are unconstitutional and in violation of principles of natural justice, equity and fairness. The Judiciary can also create precedents that correspond to international human rights standards. In Islamic law, Islamic leaders need to play a role in interpreting Islamic law in the various settings of modern day Tanzania.

2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of dispute resolution authorities.

It is recommended that courts must give priority to cases involving widows' inheritance to land. This will minimise court costs and reduce the chances of bribery and corruption infecting cases. Cumbersome procedures should be interpreted and applied in such a way as to encourage widows' to access courts with confidence. The Ministry of Constitutional and

Legal Affairs should establish a Legal Aid Council for matters relating to women's rights to land inheritance. This will specifically help women, especially poor widows, to seek remedies in court where their rights have been violated. Education should be provided to both men and women to eradicate attitudes of female inferiority.

3. That there are processes used to determine the choice as to which system of law (Customary and Islamic law) should be applied to a women's right to inherit land.

It is recommended that uniform law be applied and made known. If the 'mode of life test' and/or 'intention of the deceased' before his death are accepted and established principles of law, then a law should be enacted to recognise that. This will eliminate the intra-family misunderstandings that exist when family members of the deceased differ about what system of law should govern the administration and distribution of the deceased's estates. The uniform law must be consistent with the Constitution and international human rights standards.

4. That there are laws which give women the right to inherit land under both customary and Islamic law

It is recommended that the state of Tanzania reviews, amend and reforms its customary laws (rules) to protect the rights of widows and daughters. It should also reform through educating and informing the public, especially men, to change their attitudes towards women. Islamic leaders, on other hand should interpret Islamic laws in accordance to the Holy Quran and sunnah which protect both men and women. Men should be educated and encouraged to write a will to protect their widows and children without any challenge or interference from other family members after their death.

5. That there are challenges which women face in claiming their right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.

It is recommended that communities be educated to eliminate cultural and negative attitudes of treating women as pieces of property or a minor. Women should be given special cultural education to improve their sense of self worth. The government must also provide education and awareness on the inclusion and full participation of both sexes in all decision making and legal processes affecting their rights. Legal education should be provided for magistrates, land tribunal chairpersons and judges as justice providers. Again, education targeting the

understanding of Islamic law and its dispute resolution mechanisms is necessary for justice providers and stakeholders. This will inform leaders and justice providers of substantive Islamic and customary law and thus help them to overcome challenges through engaging in informal dispute resolution processes.

6. That there is a need to develop strategies to empower women effectively to participate in dispute resolution processes to inherit land under customary and Islamic laws.

It is recommended that women should be empowered economically. This will assist them to be more independent. The majority of women in Mwanza are economically poor. Poverty alleviation programmes by government which train both rural and urban women to become independently wealthy are to be encouraged. If their husbands die, it will be easy for economically independent widows to prosecute their rights to inherit land (e.g., pay transport costs, lawyers and court fees). Empowerment can also be done through providing knowledge and understanding of customary and Islamic law, employing women in various authorities which adjudicate land inheritance disputes, such as land chairpersons, magistrates and judges. These personnel are the ultimate justice providers.

6.3 Conclusion

In this final chapter the study's conclusions are summarised and its recommendations are presented. The recommendations focus on the different ways to reform land inheritance laws, especially in relation to clan land. One of them involves enacting a new gender and sex sensitive law of inheritance which will eliminate the existing system which is full of confusing and contradictory pluralist laws.

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