



“Once You Get Out, You Lose Everything”

Women and Matrimonial Property Rights in Kenya





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Summary

Ruth K., a 40-year-old Taita mother of two in Kilifi county, was struggling to support herself financially. In 2016, her husband forced her out of their matrimonial home, and she left with nothing. She said, “When you work on something [marriage] for 10 years and lose it all at the blink of an eye, it’s devastating. I don’t have money. I’m not as rich as he [my husband] is. Where do I start and how do I start?”

Ruth K. did not have her name on any of the property they acquired during the marriage and she explained why,

I don’t have my name on any of the property we acquired even when I took a loan from my *chama* [women’s financial group] to pay for it. He [husband] never allowed me to have my name on the title. He would say ‘I’m the man of the house, what I have you have. If I own it, you own it.’ According to his custom [Kisii] women cannot own anything in their name. Who will support me to get my share? I’m on my own.

According to Ruth K. and other women Human Rights Watch interviewed, in most cases where the husband holds all the power in the marriage, it could be futile for the wife to insist on having her name on property.

Over the last decade Kenya has enacted laws to ensure equality of spouses in marriage and equitable distribution of matrimonial property. Yet, women face many challenges in acquiring property in their own name or jointly with a spouse, and women like Ruth K., at dissolution of their marriage after divorce, or on the death of their husband, still face unimaginable institutional barriers in accessing judicial and traditional dispute resolution mechanisms and face legal ambiguity that impedes their right to matrimonial property, when they do. Myriad cultural, social, and institutional barriers hinder women’s access to justice and a fair share of matrimonial property. Human Rights Watch research found that even when women do seek relief from the courts, they face a judiciary unprepared to adjudicate non-monetary contributions and equitable distribution of property or the

inconsistent interpretation and application of laws that often result in discriminatory distribution of matrimonial property.

Official data from 2008, the most recent year when data on marital status by county in Kenya is available, show that 212,972 people country-wide were divorced and 355,018 were separated. There are no official estimates of applications for division of matrimonial property, but Human Rights Watch research shows that not many are made at the courts. There is no official gender disaggregated data on individual and joint ownership of land and property in Kenya. However, 2018 data from Kenya Land Alliance, a network of nongovernmental organizations (NGOs) that advocates for secure and equitable access to land, shows that land ownership is disproportionately skewed toward men in all the 47 counties in Kenya, with women holding a paltry 1.62 percent of all land titled deeds issued between 2013–2017.

The Federation of Women Lawyers in Kenya (FIDA-Kenya), an NGO that advocates for women’s rights, in 2015 petitioned the Constitutional and Human Rights division of the High Court in Nairobi to secure equal sharing of matrimonial property between spouses. FIDA-Kenya argued that some provisions of the 2013 Matrimonial Property Act contravene the Kenyan constitution’s guarantee of equality during marriage and on divorce. They argued that section 6 and 7 of the 2013 act directly and indirectly discriminates against married women at dissolution of marriage. In June 2018, the High Court dismissed FIDA-Kenya’s petition stating that sharing matrimonial property equally between spouses would “open the door for a party to get into marriage and walk out of it in the event of divorce with more than they deserve.”

In August 2018, the African Commission on Human and Peoples’ Rights (ACHPR) adopted a resolution proposing that states parties to the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) enact legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage. The ACHPR resolution stated that women and men have “the right to an equitable sharing of joint property deriving from the marriage” in circumstances of separation, divorce, or annulment of marriage. The resolution added that the commission was “deeply concerned” that “some countries maintain regressive standards when it comes to defining ‘equitable share,’ such that women are not able to enjoy equal property rights upon separation, divorce or annulment of a marriage.” Based on Human Rights

Watch’s research, Kenyan laws, and how they are implemented, fall short of the standards spelt out in the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Based on interviews with over 64 individuals, including women who are separated, divorced, or widowed, this report examines how the interplay of positive but ambiguous laws, antiquated laws, and discriminatory social and cultural norms impede the claims over matrimonial property of married, divorced, separated, and widowed women in Kenya. Human Rights Watch also reviewed and analyzed data from 56 divorce and matrimonial property division case files with a final judgement between 2014–2019 from courts in Kakamega and Kilifi counties in Western and Coastal regions, respectively. We chose Kakamega and Kilifi counties as our case study because they were ranked in the top five counties with the highest rates of divorce and separation in 2008 by the Kenyan Bureau of Statistics. Both also reflect unique ethnic and religious aspects with similar distinctions such as dowry, custody of children, traditional practices that discriminate against women owning land and property, which reflect the challenges most women face in accessing matrimonial property in Kenya.

This report focuses on Kenya to better understand barriers women face in claiming a share of property even in a ‘gender-responsive’ legal framework like Kenya’s. The report highlights how laws that intended to protect women’s right to property during marriage and at dissolution have instead resulted in discrimination against women. International law on this point requires Kenya to ensure that property distribution at dissolution of marriage comply with the principles of substantive equality in accordance with CEDAW.

Discriminatory Norms Impacting Access to Justice

Discriminatory social and traditional practices on marriage and inheritance within these two counties compromise women’s ability to own, manage, and control land and property. The problem for women begins even before they seek a divorce as they are never able to own, and independently make decisions, over land and property within the context of the traditional marriage in the first place. The problem becomes a crushing reality when the marriage ends. Dickson Kanana, a village elder of Kirao, Malindi explained to Human Rights Watch: “In succession [inheritance], the wife has nothing. Same in divorce. She takes her personal belongings—nothing else and leaves her children. The truth about

culture, once you [woman] get out, you lose everything.”

For most women seeking to leave a marriage, the fear of intimidation from their husband or his relatives and traditional dispute resolution that reinforces discrimination means they leave with little more than a few personal belongings they can physically carry with them. In most cases, according to traditional elders Human Rights Watch interviewed, the elders enable the woman to remove her personal belongings from the home but are very clear that she cannot be given a share of the house or land.

Institutional Barriers to Accessing Matrimonial Property

Aside from discriminatory customary practices, women experience multiple barriers in accessing justice through the courts to claim matrimonial property at dissolution of marriage. Major obstacles such as minimal awareness of rights, inadequate access to relevant information, costs of legal proceedings, and long distances to courts hinder women from claiming their right. On top of this, women face delays related to overlaps or confusion over which court has jurisdiction to hear matrimonial property causes, the challenge of transmitting information across the justice chain including transferring files from the lower (magistrate’s) to the High Court, and difficulties associated with collecting required evidence. Other difficulties, including inadequate human resource capacity in alternative dispute resolution mechanisms, such as mediation mandated by the court, further negatively impact the ability of women to access justice in divorce proceedings.

Legal and Judicial Failings that Prevent Equitable Distribution of Property

In addition to the institutional barriers highlighted above, unclear laws make daunting the allocation of matrimonial property.

Human Rights Watch research found that although the law is clear that monetary and non-monetary contributions should be considered in sharing property at the end of a marriage, it does little to clarify what would constitute proof of contribution, and how such contributions should influence how matrimonial property is shared. As a result of this lack of clarity, some judges have asked spouses to produce receipts as proof of contribution, an implausible request that may discriminate against some women whose principal contribution was non-monetary—not to mention the difficulties of keeping receipts

over years.

Compounding the ambiguity over documentary evidence on contribution is a lack of a consistent system or valuation methodology across any of the courts, for proving and calculating contributions. Some judges recognize women’s unpaid care and domestic work, while others do not, and there is no High Court or Ministry of Justice guidance on which course to follow leaving lower court judges unsure how to proceed. Justus Mulei Mutuku, a magistrate in Kilifi magistrate’s court confirmed that there is no uniformity across the decisions of the High Court and appellate courts: “No clear guideline on indirect contribution. I don’t know how they [Judges in High and Appellate courts] arrive at the percentage distribution. I have no idea how the contributions are weighted.”

Many of the women Human Rights Watch interviewed had no clear sense on how their non-monetary contributions would be calculated, whether they would be able to claim a share of matrimonial property, and if making the claim for equitable share would be worth the heavy financial, time, and energy investment.

Additionally, judicial officials and lawyers have no clarity over which court has jurisdiction to adjudicate cases on sharing of matrimonial property due to expansion of the authority of magistrates’ courts without any explanation on how it would affect cases on matrimonial causes, which leads to considerable delays, additional costs related to multiple and separate petitions for divorce, division of matrimonial property, and other accompanying lawsuits on maintenance and custody.

Government Reforms and Human Rights Obligations

Kenya has come a long way in the last decade in recognizing equality between married women and married men and addressing property equality. Its constitution and laws are more consistent with international interpretations of equality and nondiscrimination and reflects the work of activists to have women’s rights respected in practice and law.

The 2010 constitution provides protections against harmful and discriminatory social and cultural practices and guarantees the equal protection of property rights for women and men—at the time of marriage, during marriage, and at the dissolution of marriage. The 2013 Matrimonial Property Act recognized that married women have the same rights as

married men, a bold step from the previously used colonial English 1882 Married Women's Property Act. The 2013 act provides a clear definition of matrimonial property and ownership across wives and husband in polygamous marriages. Most importantly it recognizes monetary and non-monetary contributions made by both spouses to matrimonial property and assets.

For all the progress the existent legal framework represents on paper, there are implementation challenges as a result of key ambiguities, including those highlighted in this report. The Kenyan government has an obligation to uphold the principles of equality, equity, and nondiscrimination, which are an integral part of the Kenyan constitution as well as regional and international human rights standards. These standards also guarantee women and men equal rights in marriage and during divorce, including taking steps to ensure equality in ownership, control, and distribution of matrimonial property, and ensure equal access to justice to claim these rights.

The current situation in Kenya falls short of regional and international human rights standards, as well as the United Nations Sustainable Development Goals that call for equal rights to land and property between men and women. Ownership of matrimonial property is directly related to women's rights to land and other productive resources, such as access to credit and agricultural inputs. Ensuring a fair division of matrimonial property is a key part of protecting women's rights within the context of marriage and divorce. Such fair division also provides an important lens into how women's economic contributions, including their unpaid domestic and care of children and other family members, are valued in society.

Key Recommendations

To the Office of the Attorney General and Department of Justice, and the Judiciary of Kenya

- Consult with nongovernmental organizations and the Law Society of Kenya to create guidelines for judicial officials on identifying and assessing matrimonial property.
 - The guidelines should clarify that although “property held in trust under customary law” is not considered matrimonial property, other land purchases would be.
 - The value of improvements made on community land owned by a spouse’s family and/or “property held in trust under customary law” should be shared between the spouses. The non-owning spouse should be compensated to the extent of their share of the value of the improvements.

To the Parliament of Kenya

- The Parliament of Kenya and the Judiciary of Kenya should urgently revise and amend:
 - The 2013 Matrimonial Property Act to clarify the phrase “proof of contribution;” include clear provisions on valuing and weighting non-monetary contribution relative to monetary contribution; and expand jurisdiction to adjudicate matrimonial property division to lower courts such as magistrates’ courts.
 - The Law of Succession to clarify the right to matrimonial property during succession and provide for a common means of protection of women’s property rights, and ensure it works in tandem with the Matrimonial Property Act and the Land Registration Act.
 - The Magistrates’ Court Act to expand or clarify jurisdiction to adjudicate in division of matrimonial property matters.

Methodology

This report is based on field research conducted in July, October, and November 2019 in Kakamega and Kilifi, two counties ranked in the top five counties with the highest rates of divorce and separation, according to 2008 data from the Kenyan Bureau of Statistics. Both have unique ethnic and religious distinctions that play out in similar ways for women and that could provide a snapshot of how social and cultural norms influence women's access to land and property at dissolution of marriage in Kenya.

Human Rights Watch partnered with the Federation of Women Lawyers in Kenya (FIDA-Kenya), an NGO that advocates for women's rights, and conducted interviews in Kakamega and Mumias towns in Kakamega county, and Vihiga town in Vihiga county, which is served by Kakamega High Court; and in Malindi, Kilifi, and Mtwapa, towns in Kilifi county; and in Nairobi.

Human Rights Watch researchers and 3 members of FIDA-Kenya conducted 64 interviews: 20 with women who were going through a divorce, were divorced, or separated in both counties; 29 with lawyers and judicial officials, including magistrates and judges; and 15 with NGO representatives who work on women's land and property rights. Lawyers and NGO representatives referred Human Rights Watch researchers to widows and divorced women they represented for further interviews. Most interviews were conducted in English, with a handful in Swahili. Some of the interviewers speak Swahili.

Most interviews were done individually and face-to-face except for five group interviews with lawyers, NGO representatives and traditional leaders comprising two to five people. Two interviews with NGO representatives in Nakuru and Kisumu were conducted via WhatsApp, a free messaging and voice service.

Human Rights Watch did not compensate interviewees, other than reimbursement of transportation costs to and from the interview locations for 11 women. Human Rights Watch informed respondents about the purpose of the research, that participation was voluntary, and that they could decline to answer a question or continue an interview at any time. All respondents verbally consented to being interviewed.

In addition to interviews, Human Rights Watch also reviewed case files, analyzed data from 56 divorce and matrimonial property division case files with a final judgement between 2014–2019 from relevant courts in Kakamega and Kilifi county. Human Rights Watch and FIDA-Kenya obtained approval from the registrar of the High Court of Kenya to access these files and obtained subsequent authorizations from relevant resident judges, senior magistrates, and registrars in courts in Kakamega and Kilifi counties. This data sheds light on how judges made decisions on division of matrimonial property and how non-monetary contributions were considered in these judgements.

Human Rights Watch also reviewed Kenya’s laws related to marriage, inheritance, land and property rights, as well as academic sources, treaty bodies such as the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), and nongovernmental organization (NGO) publications relevant to equality in marriage and division of matrimonial property.

Social stigma such as disapproval of, or discrimination against, women who are going through a divorce or already divorced, coupled with the fact that most women move away after separation or divorce narrowed the pool of women available for interviews. Similarly, most divorce and separation resolutions in Kakamega and Kilifi are done out of court and with no written agreement, limiting the number of case files Human Rights Watch could access and review.

The report does not specifically examine challenges women in polygamous marriages face at the dissolution of marriage either by divorce or death of a spouse, or whether women in polygamous marriages encounter additional challenges in proving contribution to matrimonial property. It only documents the barriers women face at dissolution of marriage, regardless of the type.

In the report, Human Rights Watch uses “clan land” or “family land” interchangeably to denote community land, land that has been passed down from one generation to another, which is managed by the family although individual portions are used by specific members of the family. The 2016 Community Land Act (section 12(b)) categorizes it as community land owned or controlled by a family or clan. The 2013 Matrimonial Property Act uses trust property which “includes property held in trust under customary law.” The report does not analyze how the Community Land Act reinforces the notion of “clan land” or how it

broadens the notion of membership to men and women within the community—hence who has rights to this type of land.

In May 2020, Human Rights Watch sent letters via email to the Office of the Attorney General and Department of Justice, Ministry of Public Service and Gender Affairs, Judiciary of Kenya, National Police Service, and the National Gender and Equality Commission, to share the research findings and request further information on what these government agencies have done to mitigate harm related to women’s right to matrimonial property, with a three-week window to respond. Human Rights Watch also followed up with telephone calls to some relevant officials. At time of writing, Human Rights Watch had received email responses from two institutions, the National Gender and Equality Commission and the National Legal Aid Service.

We anonymized the names of women we interviewed to protect them from social stigma as well as reprisal from their former spouse and in-laws.

Background to the 2013 Matrimonial Property Act

A woman and the cows are a man's property.

—Wilson Tulito Molill, senior chief, Ngong, Kajiado county, October 25, 2002

In 2002, Human Rights Watch documented harrowing experiences of women from various regions, ethnic groups, religions, and social classes in Kenya whose property rights had been violated on account of being women.¹ That report detailed how these women lost access to their home, land, livestock, household goods, money, vehicles, and other property when their marriage ended. One woman, Tipira Kamuye, who was interviewed for that report explained the challenge divorced women faced if they wanted access to matrimonial property after divorce: violence or nothing in terms of payment. She told Human Rights Watch: “[i]t’s hard because you won’t get [family property] back.... If I dare go back [to husband] I would be tortured. My husband would beat me. As a wife, you don’t own any property.”²

The report highlighted how a complex mix of cultural, legal, and social factors undermined women’s right to own, inherit, manage, and dispose of property, including matrimonial property. For example, Kenya’s constitution, which had last been amended in 1998, prohibited discrimination on the basis of sex, but included a “clawback” condoning discrimination under personal and customary laws.³ The 1882 Married Women’s Property Act, a relic of British colonial rule, which at the time of that report governed the division of matrimonial property, was woefully inadequate, as it did not address women’s claims to matrimonial property while the 1981 Law of Succession Act governing inheritance had several discriminatory provisions.⁴

¹ Human Rights Watch, *Double Standards: Women’s Property Rights Violations in Kenya*, March 2003, <https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>.

² Human Rights Watch interview with Tipira Kamuye, Ngong, October 24, 2002.

³ Constitution of Kenya, 2010, art 82(3) and (4), contain ‘clawback’ provisions which exempt certain laws from the discrimination prohibition. It permits discrimination “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” and with respect to “the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.”

⁴ The Law of Succession Act of 1981, to date, still has these discriminatory provisions. The law provides more protections for widowers than to widows since widows lose their “lifetime interest” in property if they remarry. The deceased’s father is prioritized over the mother where there is no surviving spouse or children. And land, crops, and livestock in certain districts are exempt, as are Muslims, with women only inheriting a fraction of what men can under Muslim inheritance norms.

In terms of a legal framework recognizing equality between married women and married men and addressing property equality, Kenya has come a long way in the last 18 years. The 2010 Constitution provides protections against harmful and discriminatory social and cultural practices and guarantees the equal protection of property rights for women and men during marriage and when divorcing.⁵ The 2014 Marriage Act affords spouses equal rights “at the time of the marriage, during the marriage and at the dissolution of the marriage.”⁶ It consolidated various laws governing religious, customary, and civil marriages and divorce, and established key uniform rules applicable across different marriages such as a minimum age of marriage, which is set at 18 for both parties, and registration of marriage.⁷ Similarly, the 2013 Matrimonial Property Act recognized that married women have the same rights as married men, a bold step from the 1882 Married Women’s Property Act .⁸ The law clearly defines matrimonial property and ownership across wives and husband in polygamous marriages.⁹ Most importantly, it recognizes monetary and non-monetary contributions made by both spouses to matrimonial property and assets.¹⁰

This is more consistent with the requirements in regional and international law. The Protocol to the African Charter on Human and People’s Rights on the Rights of Women, better known as the Maputo Protocol, asserts that states should ensure that women and men have the right to an equitable sharing of the joint property deriving from the marriage at its dissolution.¹¹ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) requires states to grant women and men the same rights and

⁵ Constitution of Kenya, 2010, art. 45; Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage. Art. 2(4) states that, “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

⁶ Marriage Act No. 4, 2014, art. 3.

⁷ There is a larger debate on the laws’ recognition of polygamous religious and customary marriages. The law also does not recognize cohabitating couples.

⁸ Married Women’s Property Act, 1882. The previous law did not recognize the equality of spouses in marriage, limiting women’s rights to claim matrimonial property.

⁹ Matrimonial Property Act 2013, arts. 6(1) and 8 address property rights in polygamous marriages.

¹⁰ Ibid., arts. 2 and 7. Contribution includes domestic work and management of the matrimonial home; childcare; companionship; management of family business or property; and farm work.

¹¹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005, art. 7.

responsibilities during marriage and at its dissolution,¹² and to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.” It calls on states to recognize the value of indirect, including non-monetary, contributions made by a spouse to property acquired during a marriage.¹³ Unfortunately, the 2013 law also has serious gaps that we highlight later in this report.¹⁴

Despite important legal strides, women continue to face significant barriers, with the courts also facing challenges in fully implementing the law. According to Human Rights Watch interviews with judicial officials in Kakamega and Kilifi counties, many marriages are not legally registered, very few women are accessing and utilizing courts to obtain a divorce, and even fewer petition for matrimonial property, which requires a separate application. Human Rights Watch’s review of 56 court cases in the 2 counties revealed that some property, for example, cars, household furniture, household appliances, land, and buildings, is mentioned in the applications submitted in 56 of these cases at the courts. However, a petition for matrimonial property division was made by either party in just 10 out of the 56 cases we reviewed, and of these 10, 7 were dismissed either because the parties did not appear before the court, or they settled out of court.¹⁵ This reveals that most matrimonial property cases are not brought to court, which can limit women from accessing their share of property.

¹² Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by Kenya on March 9, 1984. Article 15.2 obliges states to accord women equal legal capacity in civil matters, in particular “equal rights to conclude contracts and to administer property.” Article 16 calls on states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... (c) The same rights and responsibilities during marriage and at its dissolution.”

¹³ *Ibid.*, art. 16.

¹⁴ See section on “Legal and Judicial Failings that Prevent Equitable Distribution of Property.”

¹⁵ These agreements were not submitted to court.

Legal and Judicial Barriers to Equitable Property Distribution

Human Rights Watch research found that though the 2013 law makes provision for considering monetary and non-monetary contributions, it does little to clarify what would constitute proof of contribution, and the weight to influence the decision on share of matrimonial property. Furthermore, some judges base their decision solely on documentary evidence showing contributions, which many women lack. The courts have failed to develop a logical and consistent system of proving and calculating contributions, with some judges recognizing women's unpaid care and domestic work while others do not.

Many women Human Rights Watch interviewed had no clear sense on how their non-monetary contributions would be measured, whether they would be able to claim matrimonial property, what share would be allocated to them, and if the process of doing so is worth the costs, time and energy investment.

The Court System in Kenya

Based on the constitution, courts operate at two levels: superior and subordinate courts. Superior courts have a decentralized system, made up of the Supreme Court, the Court of Appeal, and the High Court. The Supreme Court and Court of Appeals are headed by Presidents while a Principal Judge heads the High Court.¹⁶ Other courts such as the Environment and Land Court and the Employment and Labour Relations Court have equal status as the High Court.¹⁷

The subordinate courts consist of the magistrate courts, Kadhis' courts, court martial, and any other court or local tribunal established by an act of parliament.¹⁸

¹⁶ The Supreme Court, the Court of Appeal, and the High Court are established under articles 163, 164, and 165 of the Constitution of Kenya (amended 2010).

¹⁷ Judiciary of Kenya, "About Us," <https://www.judiciary.go.ke/about-us/overview/> (accessed June 10, 2020).

¹⁸ Subordinate courts are established under article 169 of the Constitution of Kenya.

Courts Not Measuring Non-Monetary Contribution

For all the progress the 2013 law represents on paper, key ambiguities make its implementation a challenge. Primarily, a barrier to true equality centers around the meaning of “non-monetary contributions.” The law is not clear on:

- what qualifies as a non-monetary contribution;
- how it should be valued;
- what evidence is needed to support this valuation; and
- whether or how to weight its value equally to monetary contribution.¹⁹

The foregoing has allowed some judges to continue to rule that matrimonial property belongs to the spouse who has made monetary contributions and has proof of such contribution.²⁰

It is this question of proof of non-monetary contribution that provides the most significant hurdle to women seeking to assert their rights under the law, Human Rights Watch research suggests. Under the 2013 act, spouses’ ownership of matrimonial property is based on their contribution.²¹ The law does not provide for what types of evidence must be submitted to the court by a spouse claiming non-monetary contributions, which in practice, puts women at a considerable disadvantage as their contributions are more often non-monetary.²² It is more challenging to provide concrete evidence of non-monetary contributions, to value them and to justify such valuation, especially since the law does not provide directives on how to do so. The lack of clarity and guidance to the court in the act itself only increases this burden. This means that even with the new law in place, most

¹⁹ Ibid. art. 7, “Subject to section 6(3) [pre-nuptial arrangements], ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

²⁰ Benedeta P. Mutiso, Getting to Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya’s Marital Asset Division, 26 Michigan Journal of Gender and Law 121 (2019) vol. 26, Issue 1. Pg125-127. See, for examples of case law, A.W.N. v. F.M.N. (2018) Matrimonial Case No. 10 of 2016, e.K.L.R. (H.C.K.) (Kenya), (After a 14-year marriage the High Court ruled that the woman had no right to matrimonial property. “She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property.”); M.A.A. v. A.R. (2018) Matrimonial Case No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya) (After a 36-year marriage it was difficult to estimate the efforts of the spouse who did not make financial contribution and give them value, either as a percentage or a lump sum).

²¹ Matrimonial Property Act, 2013, section 7; “Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

²² Ibid., section 18 (1); “The Rules committee established under the Civil Procedure Act has the authority to make rules to regulate any matter of practice or procedure under this Act.”

women face a likelihood of being granted very few assets following a divorce, leaving them unable to provide for themselves and their children and vulnerable to feeling forced to remain in an abusive or unhappy marriage.

Also, there is no clear guidance on how the courts are expected to determine a spouses' share of matrimonial property, including how to measure and value non-monetary contributions. "I must say this is one part of the law that I find very difficult to implement because there is no clarity," Musyoka, a resident judge at Kakamega High Court lamented.²³ The 2013 act defines contribution as both monetary and non-monetary, including:²⁴

- a. domestic work and management of the matrimonial home;
- b. childcare;
- c. companionship;
- d. management of family business or property; and
- e. farm work.

Spouses' share or ownership of matrimonial property is based on the contribution each makes towards its acquisition or improvement, and at dissolution of a marriage the court divides the property based on each spouse's contribution.²⁵ In most cases the courts interpret this to mean that parties must show proof of their contribution. And without proper guidance judicial officials have the discretion of valuing and weighting contributions to determine the sharing of matrimonial property.

Judges who have been involved in sharing matrimonial property pointed at non-monetary contribution as a major challenge. Ochieng, senior principal magistrate at Kakamega High Court, said,

The court looks at contribution. But there is a challenge when there is no evidence especially regarding non-monetary contribution. The Constitution, Matrimonial Property Act, and precedent are all confusing. Division is

²³ Human Rights Watch interview with William Musyoka, Judge, Kakamega High Court, Kakamega, October 25, 2019.

²⁴ Matrimonial Property Act, 2013, art 2.

²⁵ Ibid., art 7, "Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved." Only what is considered matrimonial property is subject to division.

guided by precedence and left to the discretion of judge. That is a grey area. Government can be clearer on valuation.²⁶

All the judges and magistrates Human Rights Watch interviewed for this report raised the issue of conflicting precedent at the appellate court on how matrimonial property should be divided and blamed the lack of clarity around measuring non-monetary contributions.²⁷ Musyoka, a resident judge at Kakamega High Court said, “The court of appeal has not been helpful. If we can get concrete direction from them, it would be good. Even the judges sometimes when they talk, you hear the biases are there.”²⁸

Another judicial official said there is no uniformity across the decisions of the high courts and appellate courts, adding that there is “no clear guideline on indirect contribution. I don’t know how they arrive at the percentage distribution. I have no idea how the contributions are weighted.”²⁹

Although the constitution and the Matrimonial Property Act guarantee women a share of matrimonial property, the application of the laws—requiring that spouses show proof of their contribution—has resulted in discriminatory outcomes for women. This ignores and undervalue the more difficult to measure non-monetary contributions women make in the marriage. Musyoka, the High Court judge in Kakamega said explained,

“I know there are courts where they are still clinging on the issue of contribution. And this is where women are suffering when they are homemakers. If you stick on direct contribution, it means they [women] lose everything. I approach the issue from the Christian view that when man and woman marry, they become one. I believe family law was guided by cardinal law. So I am not comfortable with the issue of proving contribution. But I see lots of decisions from my colleagues insisting on contribution.”³⁰

²⁶ Human Rights Watch interview with Bildad Ochieng, Senior Principal Magistrate, Kakamega Law Courts, Kakamega, October 26, 2019.

²⁷ Human Rights Watch interview with William Musyoka, Judge, Kakamega High Court, Kakamega, October 25, 2019; Bildad Ochieng, October 26, 2019; Reuben Nyakundi, Resident Judge, Malindi Law Courts, Malindi, October 30, 2019

²⁸ Human Rights Watch interview with William Musyoka, October 25, 2019.

²⁹ Human Rights Watch interview with Justus Mulei Mutuku, magistrate, Kilifi magistrate court, Kilifi, November 4, 2019.

³⁰ Human Rights Watch interview with William Musyoka, October 25, 2019.

Lawyers and women Human Rights Watch interviewed said the emphasis and requirement to provide receipts to establish proof of contribution during marriage discourages women from laying claim to matrimonial property. Aside from big purchases such as land, real estate, and vehicles, no one keeps receipts of smaller purchases over the course of their marriage. Furthermore, some women may not have knowledge of how to preserve the integrity of receipts, if they had them. James Namatsi, a lawyer in Mumias, Kakamega county said,

Some property is valuable but not documented e.g. household items such as smart TVs. Some receipts with no name and only the warranty is registered. And don't expect to keep receipts forever. Most receipts are lost.³¹

The women, activists, lawyers, and judicial officials Human Rights Watch interviewed said keeping receipts as evidence of contribution during the union negates the premise of marriage—trust. Reuben Nyakundi, a resident judge at Malindi Law Courts said, “How do you require proof of contribution? How do you say, ‘I will keep these receipts?’ Families are governed by a higher level of trust. The suspicion from keeping receipts eats into the family.”³²

Some judges' expectation of documentary evidence proving contribution in a society where marriage is considered sacred, pre-nuptial agreements are uncommon, and couples function as an economic and domestic unit, is impractical.

Sometimes, women are advised by lawyers and judicial officials to drop suits for division of matrimonial property if they have no receipts to back their claim. Namatsi explained,

In one case I represented the husband. He just denied her entry to the property. The wife was employed. She had counsel. She came with the police and they asked her to produce the receipts before take anything. She had bought most of the household appliances, but she couldn't prove it. She left with only her clothes. She didn't seek property division because

³¹ Human Rights Watch interview with James Namatsi, lawyer, Mumias, October 25, 2019.

³² Human Rights Watch interview with Reuben Nyakundi, October 30, 2019.

she couldn't prove that she had bought anything. Without receipts it's a mammoth task to prove contribution.³³

All women Human Rights Watch interviewed did not have their names on title deeds or other evidence to prove to the courts that they were entitled to a share of their matrimonial property. Discriminatory social and traditional norms and practices regarding gendered use, ownership and transmission of land and property, shape the parameters for women's control and management of these assets.³⁴ Kundu, a lawyer in Kakamega said,

The biggest problem I see is when property is registered in the name of one spouse. The law says it's held in trust for the other. But the main challenge is that they look at the man as the proprietor of the property.³⁵

None of the women we interviewed had their name on title deeds of property they jointly acquired with husbands. In most cases where the husband holds all the power in the relationship it could be futile for the wife to insist on having their name on property. As Ruth K. further explained,

I don't have my name on any of the property we acquired even when I took a loan from my *chama* [women's financial group] to pay for it. He [husband] never allowed me to have my name on the title. He would say 'I'm the man of the house, what I have you have. If I own it, you own it.' According to his custom women cannot own anything in their name. Who will support me to get my share? I'm on my own.³⁶

Disadvantages women suffer at divorce and division of matrimonial property go beyond ambiguous and poorly enforced legal rules. They are also a result of judicial and societal misconceptions regarding women's paid employment opportunities, earnings and the

³³ Human Rights Watch interview with James Namatsi, October 25, 2019.

³⁴ Esther Mwangi, Helen Markelova, and Ruth Suseela Meinzen-Dick, *Collective Action and Property Rights for Poverty Reduction: Insights from Africa and Asia* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2011); Cheryl Doss, Chiara Kovarik, Amber Peterman, Agnes Quisumbing, and Mara van den Bold, "Gender inequalities in ownership and control of land in Africa: Myths versus reality," *Agricultural Economics*, vol. 46, no. 3 (2014): pp. 403-434, accessed January 29, 2020, doi: 10.1111/agec.12171.

³⁵ Human Rights Watch interview with Kundu Nigel, lawyer, Kakamega, October 24, 2019.

³⁶ Human Rights Watch interview with Ruth K., Mtwapa, November 5, 2019.

value of unpaid care and domestic work. There are huge disparities between women and men regarding their participation in wage employment, with less women in formal wage sectors compared to men. In Kenya, women made up only about 36 percent of the workforce in 2018.³⁷ Data across different regions in the world show that being married or in a union and having a young child take a toll on women’s labor force participation.³⁸

More women than men spend most of their time carrying out unpaid household and care work.³⁹ As a result, women are more likely to make non-monetary contributions which are difficult to value or weight relative to monetary contributions. The Committee on the Elimination of Discrimination against Women (CEDAW Committee), underscores the value of non-monetary contributions. It considers that women’s unpaid work is “invaluable for the survival of society” and adding “there can be no justification for applying different and discriminatory laws or customs to them.”⁴⁰ Denying women de jure or de facto equality, and devaluing women’s unpaid household and care work, violates principles of justice and equality contained in CEDAW.⁴¹

Lawyers Human Rights Watch interviewed said they feared judges were left with too much discretion to weight non-monetary contribution. And there is no clear precedent that sets the standard.⁴² Kundu, a lawyer in Kakamega said,

The way some judges make rulings, there is cause for alarm. I had a case where the woman had to go back and get records of how she contributed.

³⁷ Kenya National Bureau of Statistics, “Economic Survey 2019,” 2019, <https://africaopendata.org/dataset/kenya-economic-survey-2019/resource/5b9357a4-6227-4fbf-9e10-ae7043a41ce3> (accessed January 22, 2020), p. 43.

³⁸ UN Women, “Progress of the World’s Women 2019-2020: Families in a Changing World,” 2019, <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women> (accessed January 24, 2020), p. 36.

³⁹ Ibid.; UN Economic and Social Council, “Women’s Economic Empowerment in the Changing World of Work, Report of the Secretary-General, Commission on the Status of Women CSW61,” E/CN.6/2017/3, December 30, 2016, https://www.un.org/ga/search/view_doc.asp?symbol=E/CN.6/2017/3 (accessed January 24, 2020), p. 4; International Labour Organization (ILO), “Women at Work: Trends 2016,” March 8, 2016, https://www.ilo.org/gender/Informationresources/Publications/WCMS_457317/lang--en/index.htm (accessed June 6, 2020).

⁴⁰ Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 21, Equality in Marriage and Family Relations (1994), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38\(SUPP\)_4733_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_E.pdf) (accessed June 10, 2020).

⁴¹ CEDAW, arts. 2, 5, 16, 17, and 24.

⁴² Benedeta P. Mutiso, “Getting to Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya’s Marital Asset Division,” *Michigan Journal of Gender and Law*, vol 26, issue 1 (2019), <https://repository.law.umich.edu/mjgl/vol26/iss1/3> (accessed January 23, 2020).

Burden is on the wife to prove contribution, and no burden on the husband to explain where he got money to purchase property. In similar matters, same circumstances, there are different outcomes. One judge would award 40 percent, another awards 30 percent, another awards zero. Discretion is completely left to the judge.⁴³

A judicial official explains why he believes financial contributions should count higher than non-monetary contributions, “Non-monetary contribution is a thorny issue. I listen to the wife and see how I can accommodate her. If she opted to be a housewife and forfeits her career, I give 30-50 share. It also depends on how long they were married, size of family, and cost of sacrificing a career. I disagree with a 50/50 share because there are situations where the husband fully financed the house. It’s hard to put a value to the non-monetary contribution.”⁴⁴

There are legal precedents, post the 2013 act, that reject to value and undervalue (relative to financial contributions) women’s unpaid domestic and care work as non-monetary contribution.⁴⁵ Some require that the wife prove a causal link between her efforts and the acquisition of the property.⁴⁶

All judicial officials Human Rights Watch interviewed recommended guidelines to be introduced by the Office of the Attorney General and adopted by parliament, to ensure that the procedures in weighing contribution and making the decision on division of matrimonial property is more uniform.⁴⁷ Mysyoka told Human Rights Watch: “We need Parliament to come up with very clear provisions on this issue otherwise you leave it to the

⁴³ Human Rights Watch interview with Kundu Nigel, October 24, 2019.

⁴⁴ Human Rights Watch interview with Bilbad Ochieng, October 26, 2019.

⁴⁵ M.A.A. v. A.R. Matrimonial Case No. 1 of 2017, e.K.L.R. (H.C.K). In a 36-year marriage, the judge held that it was difficult to estimate the efforts by the spouse who did not make financial contributions and give them value, either as a percentage or as a lump sum; F.S. v. E.Z. Matrimonial Cause No. 16 of 2014, e.K.L.R. The judge rejected the equality of spousal contribution in dividing matrimonial property. The judge stated that, “[S]ince the husband made monetary contribution, he is entitled to the bulk of the property while the wife gets a lesser share since she made non-monetary contributions. See also P.A.W.M v C.W.A.M. Civil Appeal No. 104 of 2016, e.K.L.R (C.A.K).

⁴⁶ A.W.N. v. F.M.N. Matrimonial Case No. 10 of 2016, e.K.L.R. (H.C.K.) The judge declined to value the wife’s uncompensated domestic work over fourteen years of marriage because she did not show the efforts made to acquire the property. The judge stated that, “She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property.”

⁴⁷ See for example, interviews with William Musyoka, October 25, 2019; and Reuben Nyakundi, October 30, 2019.

ideology of the courts. Even the court of appeal is not very clear, and you can see them pushing the contribution angle.”⁴⁸ Reuben Nyakundi, a resident judge at Malindi Law Courts said,

The law says I should give a score. What is the score for each parameter? Which parameter carries more weight? Based on arbitrary weights derived from an equation I use to divide [the property]. But that equation could be wrong. How do I ensure that the equation could be tested over time based on the basic principle of jurisprudence? Principles of equity, fairness, and proportion. At the end of the day that distribution is money for money, square meter for square meter. How do you get to where the equation makes sense in dollars and square meters?⁴⁹

Ambiguity of Laws on Jurisdiction

Women do not only endure institutional barriers in accessing justice and claiming matrimonial property, but their situation is also compounded by unclear legal rules that make seeking a division of matrimonial property daunting. Lack of clarity around which court has jurisdiction to adjudicate property division cases, as well as valuing and weighting non-monetary contributions compared to financial contributions makes equitable matrimonial property division difficult.

According to the 2013 Matrimonial Property Act, the High Court has jurisdiction over division of matrimonial property, but changes in other laws have made jurisdiction unclear. Divorce cases are adjudicated at the high courts and magistrate’s courts.⁵⁰ In 2015 the Magistrates’ Court Act was amended, expanding the magistrates’ courts’ jurisdiction and authority to proceed over civil matters with a pecuniary nature of up to 20 million Kenyan shillings (KSh, US\$192,693), depending on the rank of the preceding officer.⁵¹ With this expansion of jurisdiction, judicial officials are left in a quandary about whether magistrates can make decisions on division of matrimonial property or not. Some magistrates and judges Human Rights Watch interviewed said magistrates’ court have

⁴⁸ Human Rights Watch interview with William Musyoka, October 25, 2019.

⁴⁹ Human Rights Watch interview with Reuben Nyakundi, resident judge, Malindi High Court, Malindi, October 30, 2019.

⁵⁰ The Magistrates’ Court Act, 2015, art. 7(3)(b).

⁵¹ *Ibid.*, art. 7(1).

jurisdiction depending on the value of the assets for division.⁵² Other magistrates and judges said magistrates' courts do not have jurisdiction insofar as the 2013 act is not amended.⁵³ The uncertainty on where to submit matters and the added burden in submitting dissolution of marriage and division of property matters in separate courts that could be hundreds of kilometers away compound women's access to matrimonial property.

Some judicial officials Human Rights Watch interviewed said they would adjudicate divorce cases but refuse to make decisions on matrimonial property division, even when the suits are filed together.⁵⁴ Samson Ongeru, senior principal magistrate at Vihiga Law Courts explained:

Magistrates do not have jurisdiction to hear division of matrimonial property cases. The matrimonial property act defines 'Court' as High Court. Though the Magistrates' Act expanded the jurisdiction of magistrates to hear cases up to a pecuniary value of [KSh] 2.5 million [\$23,246] it didn't clarify that this includes matrimonial property. Between 2017 and 2019, I have asked that the High Court take up two cases related to matrimonial property. The High Court could have transferred the cases back to me. It could also transfer these matters back to the court where the parties are resident.⁵⁵

Some judicial officials told Human Rights Watch that in cases that have been filed at the magistrates' courts, lawyers representing one of the spouses have argued that divorce and division of matrimonial property matters be filed separately, with division of matrimonial property transferred to the High Court. Mulei Mutuku, a magistrate at Kilifi law courts explained, "In one case, lawyers representing a party objected to me hearing a matrimonial property division case citing that magistrates do not have jurisdiction over the matter."⁵⁶ Many other magistrates either refuse to hear the matrimonial property division

⁵² Human Rights Watch interviews with Teresa Odera, Magistrate, Mumias Magistrate Court, Mumias, October 25, 2019; Ivy Wasike, Deputy Registrar, Malindi Law Courts, Malindi, October 30, 2019.

⁵³ Human Rights Watch interviews with Bildad Ochieng, October 26, 2019; Samson Ongeru, Senior Principal Magistrate, Vihiga Law Courts, Vihiga, October 28, 2019; and Justus Mulei Mutuku, November 4, 2019.

⁵⁴ Human Rights Watch interviews with Samson Ongeru, 28, 2019; and Justus Mulei Mutuku, November 4, 2019.

⁵⁵ Human Rights Watch interview with Samson Ongeru, October 28, 2019.

⁵⁶ Human Rights Watch interview with Justus Mulei Mutuku, November 4, 2019.

petition or transfer the case to the High Court of the county. Due to the ambiguity in jurisdiction the parties involved in the suit must travel long distance to access High Courts in another town.

Marriages and Property Outside the Act’s Protection for Equitable Distribution

Gaps in the act create challenges for women claiming their share of matrimonial property when their marriage ends. The 2013 act harmonizes matrimonial property division across customary, civil, Christian, and Hindu marriages, but excludes Muslim marriages. It also excludes “trust land” from being considered matrimonial property. These exceptions create room for judges and kadhis to defer to customary and religious norms that privilege men’s right to own land and property over women’s rights.

Islamic Marriages

Kenya has a mix of common law, customary law, and Islamic law systems. Its 2014 Marriage Act unifies previously separate laws on civil, customary, Christian, Muslim, and Hindu laws on marriage.⁵⁷ The promise of equality in marriage and property rights is limited in scope and is not applied across all types of marriages, especially since the constitution, 2014 Marriage Act, 1981 Law of Succession Act, and 2013 Matrimonial Property Act explicitly excludes Muslim marriages.⁵⁸

Different principles govern the issue of division of matrimonial property at dissolution of Islamic marriages.⁵⁹ Islamic law is subject to different schools of jurisprudence and frameworks for interpretation.⁶⁰ Parties to an Islamic marriage can opt to defer to Islamic

⁵⁷ The Marriage Act 2014, art. 6 recognizes Christian, civil, Hindu, Islamic, and customary marriages. Previously there were five separate legal systems for marriage in Kenya: civil (under the Marriage Act), Christian (under the African Christian Marriage and Divorce Act and the Marriage Act), Islamic (under the Mohammedan Marriage, Divorce and Succession Act), Hindu (under the Hindu Marriage and Divorce Act), and customary (under customary laws). The 2014 act repealed all the previous laws.

⁵⁸ Constitution of Kenya, 2010, section 24(4). It upholds principles of equality but “qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

⁵⁹ Matrimonial Property Act, 2013, art. 3, “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property;” Marriage Act 2014, art.3(4).

⁶⁰ See Hamid Khan, “Islamic Law: Practitioner’s Guide,” July 2013, <https://namati.org/resources/practitioners-guide-to-islamic-law/> (accessed June 10, 2020).

law and have their matrimonial property related matters heard by a Kadhi's court, a subordinate court in Kenya's court system that hears matters related to Islamic law.⁶¹ Kadhis, judicial officials who precede over a Kadhi's court, told Human Rights Watch that their decisions on property divisions are influenced by the Islamic School they follow, their ethnic and cultural traditions, and a variety of personal factors. This means there is no clear rulebook on how matrimonial property should be divided in Muslim marriages and the outcome is based on negotiations between the spouses and the kadhi. In addition, women cannot serve as kadhis.

Four Muslim women whose matrimonial matters were heard by kadhis said though their divorces had been finalized, they had lost all their property and their maintenance and child custody suits were still ongoing.⁶² In 2018, when a kadhi asked Halima G., a 21-year-old mother to return her dowry of KSh 60,000 (\$558) and two cows, she refused. She told Human Rights Watch, "I refuse to reconcile with my husband. I refuse to pay back the dowry. I am single-handedly raising our son. Why do my husband and his family get the dowry back, return to how they were before the marriage, when I cannot?"⁶³ The kadhi denied her request to retrieve her personal belongings, including identification documents and school certificates. He ordered her arrest and ordered that she return their son to the father if she did not re-pay the dowry. Halima said she paid KSh 30,000 (\$279) after obtaining a loan from a friend, and she got help from FIDA-Kenya in Mombasa to suspend the arrest warrant.

In the same year, Fatuma M., a 47-year-old Muslim woman and mother of five children in Kilifi, was beaten by her husband and forced out of her home at night. "He beat me and chased me out of the house at night. He took all of the money that was in my wallet as well as the money in my mobile money account."⁶⁴ During their marriage, with loans and their respective salaries, they had amassed considerable real property. They renovated and expanded their matrimonial home from mud to brick, added seven bedrooms, a kitchen,

⁶¹ Constitution of Kenya, 2010, section 170; and Kadhi's Court Act, 1997, Section 5. A kadhi's court has the jurisdiction to "determine questions of Muslim law related to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it." See, for example, A.W.A. v. H.D.D. Marsabit High Court of Kenya, Matrimonial Case No. 1 of 2018 e.K.L.R., <http://kenyalaw.org/caselaw/cases/view/166320/> (accessed January 6, 2020).

⁶² Human Rights Watch telephone interviews with Halima G., Sofia K., Fatuma M., and Noreen K., May 2, 2020.

⁶³ Human Rights Watch telephone interview with Halima G. May 2, 2020.

⁶⁴ Human Rights Watch telephone interview with Fatuma M., Kilifi, May 2, 2020

bathroom, toilet, a dugout well, and pump. They sold water from the well and used it for their crops. They built six shops and four ‘living quarters’ that they rented out, and an additional three-bedroom house. She said that she had asked a religious leader from her local mosque to bless the home and when her husband found out he got furious, got violent and sent her out of the home. She explained, “I lost a lot that night. I became homeless and lost access to income from the property I had developed. And I still must pay back a loan of KSh 1.5 million (\$13,951) that I used to build the house he [ex-husband] now lives in with another woman. All I want is my house.”⁶⁵

Typically, women in Islamic marriages own their dowry outright, they are granted some rights to maintenance depending on the type of divorce and are guaranteed a share of inheritance. But this is not always the case and when implemented these rights do not rise to the level of equality of spouses in marriage.⁶⁶

In 2017, the CEDAW Committee reported that the preservation of multiple legal systems in Kenya is in itself discriminatory against women, expressing concern that the legal framework, including exemptions under article 24 of the constitution and article 49(3) of the 2014 Marriage Act, discriminates against Muslim women, including through the explicit exemption of the Kadhi courts from constitutional equality provisions and the fact that women cannot serve as kadhīs. The committee recommended that Kenya ensure equality between women and men in Muslim marriages and upon divorce by repealing or amending discriminatory provisions under religious and customary laws, codifying Muslim family law in a manner that is compatible with CEDAW, and appointing Muslim women as kadhīs and mediators in the Kadhi court system.⁶⁷ At time of writing, these recommendations had not been implemented.

⁶⁵ Ibid.

⁶⁶ Human Rights Watch, *Unequal and Unprotected: Women’s Rights under Lebanese Personal Status Laws*, January 2015, <https://www.hrw.org/report/2015/01/19/unequal-and-unprotected/womens-rights-under-lebanese-personal-status-laws>; and Human Rights Watch, *“Will I Get My Dues ... Before I Die?”: Harm to Women from Bangladesh’s Discriminatory Laws on Marriage, Separation, and Divorce*, September 2012, <https://www.hrw.org/report/2012/09/17/will-i-get-my-dues-i-die/harm-women-bangladeshs-discriminatory-laws-marriage>.

⁶⁷ CEDAW Committee, “Concluding Observations on the Eighth Periodic Report of Kenya,” November 22, 2017, U.N. Doc. CEDAW/C/KEN/CO/8, <https://undocs.org/CEDAW/C/KEN/CO/8> (accessed June 10, 2020).

Clan Land held in Trust Under Customary Law

The Kenyan constitution recognizes customary law, in so far as it is applicable and not repugnant to justice and morality or inconsistent with any other law.⁶⁸ The constitution also recognizes community land.⁶⁹ This step is important in recognizing customary ownership and use of land, and in protecting the land rights of communities, including indigenous peoples, whose rights over their community land, have never previously been recognized.

However, while the Kenyan constitution and laws do not place limits on the categories of land women can own, customary rules in the vast majority of communities do.⁷⁰ Discriminatory social and traditional practices perpetuate the notion that men own the land, and women and girls should negotiate use of land through male relatives.⁷¹ According to one author, more than 65 percent of land in Kenya is governed by customary laws that discriminate against women, limiting their land and property rights.⁷²

The 2013 act stipulates that the customary law of the communities in question will be taken into account when deciding the division of matrimonial property between and among spouses.⁷³ It also excludes “trust property, including property held in trust under customary law” from being considered matrimonial property.⁷⁴ Customary norms and practices in Kenya and across most of Africa are often anchored in patriarchal traditions denying women the right to own property and in marriage the wife cannot claim a share of matrimonial property—even those acquired by her own efforts.

In many parts of Kenya, marriage, family and property relations are impacted by lineage systems, which serve as a basis for rights, privileges and duties within the family,

⁶⁸ Constitution of Kenya, 2010, section 2 (4).

⁶⁹ Ibid., section 63 says “Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.”

⁷⁰ Ibid., section 60 (f) “elimination of gender discrimination in law, customs and practices related to land and property in land.” See also Reem Gaafar, “Women’s Land and Property Rights in Kenya,” Landesa Center for Women’s Land Rights, October 2014, <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> (accessed June 10, 2020).

⁷¹ George Michuki, “Women’s Land Rights: Culture Dynamism and Decentralized Land Administration in Kenya,” *Global Journal of Interdisciplinary Social Sciences* vol. 4, no. 3 (2015), pp. 131-140.

⁷² Ibid.

⁷³ Matrimonial Property Act, 2013, art. 11(b).

⁷⁴ Ibid., art. 6(2).

including identity, decision-making, property distribution, and decisions about the future of children. Rights to clan land have been passed on through generations. In patrilocal lineage systems, where women migrate from her lineage to join her husband's lineage or place of residence, the wife does not acquire absolute user rights to her husband's lineage land, as he holds it in trust under customary law. The 2013 act excludes lineage land from its definition of matrimonial property and divorcing women cannot lay claim to the land. Even when courts grant women access to their matrimonial home, they might choose not to claim it because it was built on clan land and they fear reprisal from the man, his family, and the community, if wife is from another community. Many women Human Rights Watch interviewed in Kakamega and Kilifi counties said they did not petition for distribution of property in court or using customary mechanisms, because the land was owned by their husband's family and not directly by him.⁷⁵ They believed it would be impossible to get a share of property that was owned by his family. Even more difficult for them was the fixed nature of the property and the few options it presented. Loss of the matrimonial home results in devastating consequences for women. For most families, the matrimonial home is a major asset and loss of the home means women are forced to relocate, often into lesser accommodations.

Data from a report by Kenya Land Alliance, a network of NGOs that advocates for secure and equitable access to land, on ownership of land, reveals that land men have disproportionate ownership of land in the nation's 47 counties, including Kilifi county.⁷⁶ The report revealed that women held 10.3 percent of land title deeds representing 163,253 hectares, a paltry 1.62 percent of all land titled between 2013–2017.⁷⁷ The reality deviates from the objective of Kenya's gender responsive laws, highlighting huge disparities exist between men and women in property ownership across Kenya.

⁷⁵ Human Rights Watch interview with Consolata L., Kakamega, October 27, 2019.

⁷⁶ Anyango Otieno, "Women Still Own Little Land Despite Law Changes," *Standard Media*, October 14, 2019, <https://www.standardmedia.co.ke/article/2001345453/women-still-own-little-land-despite-law-changes> (accessed December 10, 2019).

⁷⁷ Kenya Land Alliance, "Kenya Land Issuance Disaggregated Data Analysis," <http://www.kenyalandalliance.or.ke/download/kenya-land-issuance-disaggregated-data-analysis/> (accessed June 10, 2020), p. 3.

Discordant Laws on Women’s Right to Manage and Control Matrimonial Property in Kenya

Both judicial and non-judicial procedures that determine division of matrimonial property at dissolution of marriage either through divorce or death discriminate against and deter women from claiming a share of matrimonial property, Human Rights Watch has found. Interrelated areas of law such as succession compound the situation for women.

The Matrimonial Property Act provides that spouses have an interest in land that is considered matrimonial property and when registered in the name of only one spouse, “there shall be rebuttable presumption that the property is held in trust for the other spouse.” It also requires that a spouse planning to alienate the property in any form (for example sale, gift, lease, mortgage or otherwise) must obtain consent from other spouse before the transaction. Similarly, the Land Registration Act provides that all spouses have an interest in land acquired during marriage and for the use of both or all spouses.

However, inheritance laws discriminate against women and girls. Contrary to the Matrimonial Property Act and the Land Registration Act, the Succession Act does not automatically observe the prescriptions of matrimonial property, and property is essentially administered as the deceased husband’s property without a clear indication of the wife’s share. The surviving spouse becomes the absolute owner of the deceased’s personal and household items, and a “life interest” (use rights) in other property (such as land and houses) during their lifetime. The surviving spouse cannot dispose of immovable property without permission from the court. The act renders void a widow’s right to use this property if she remarries, with no parallel provision for widowers. The act also exempts agricultural land, crops, and livestock in certain districts from intestate rules. Succession in these cases is under the purview of customary laws, which largely discriminate against women and girls.

Experts on women’s land and property rights say widow inheritance and dispossessions is still widespread in Kenya.⁷⁸ “Between 2009–2016, KELIN Kenya, a human rights NGO in

⁷⁸ Human Rights Watch interviews with Teresa Omondi, former Executive Director of FIDA-Kenya, Nairobi, July 1, 2019; and Michelle Oyuga, Program officer, FIDA-Kenya, Nairobi, July 4, 2019; Human Rights Watch telephone interviews with Winnie Chepkemoi, Program Officer, Women Land Rights, Kenya Land Alliance, November 6, 2019; Jessica Oluoch, Program Manager, Women Land and Property Rights, KELIN Kenya, November 7, 2019.

Kenya, documented 640 succession cases in Kisumu,” Jessica Oluoch, program manager for KELIN Kenya, told Human Rights Watch.⁷⁹ The process of obtaining administrative rights over the property depends on who, between the wife or the deceased husband’s relative, applies for a grant first, who has possession of the deceased’s birth, death certificates and other identification documents, and is supported by the traditional leader. Winnie Chepkemoi told Human Rights Watch that, “In some communities women face massive resistance from traditional elders. When a widow tries to succeed the property after the death of the husband, elders believe they [widow] can’t manage it and need ‘help’ from a brother-in-law.”⁸⁰ Husband’s relatives can argue to the court that they are best positioned to manage the property and will take care of the wife and children, especially where there are multiple wives or children from multiple women, including non-wives. Teresa Odera told Human Rights Watch that “[traditional] Elders believe that only men can inherit. When the chief’s letter comes to me only men are named as next-of-kin. Women and girls are not considered.”⁸¹

Issues around succession and the link to matrimonial property were rife in Kakamega and Kilifi counties. All widows Human Rights Watch interviewed had been dispossessed of matrimonial property by relatives of their husbands after his death. Musyoka told Human Rights Watch, “The courts are beginning to acknowledge matrimonial property under succession... But there needs to be a very clear link between succession and division of matrimonial property [laws]. It’s important to be clear about how the two are linked.”⁸²

⁷⁹ Human Rights Watch telephone interview with Jessica Oluoch, November 7, 2019.

⁸⁰ Human Rights Watch telephone interview with Winnie Chepkemoi, November 6, 2019.

⁸¹ Human Rights Watch interview with Teresa Odera, Magistrate, Mumias, October 25, 2019.

⁸² Human Rights Watch interview with William Musyoka, October 25, 2019.

Barriers to Courts and Access to Justice

Human Rights Watch research found that institutional hurdles to accessing the justice system and discriminatory social norms related to land and property rights undercut the veneer of gender-responsive laws in Kenya.

Many of the women seeking to leave a marriage Human Rights Watch interviewed have had to contend with discriminatory customs, inadequate information on rights, high costs of accessing the justice system, delays in court proceedings, inadequate mediation mechanisms, and limited legal aid service. While the 2013 act is a significant step, in practice, many of the women Human Rights Watch interviewed leave a marriage with little more than the personal belongings they can remove from the home.

Annah H., a 66-year-old woman who was evicted from her matrimonial home and farmland by her husband explained,

I farmed sugarcane and sold cattle. I gave my husband KSh 65,000 [US\$604]. He added the rest to buy land in West Kabras and another in South Kabras. In 1996 he [husband] chased me out of our home. That time the clan intervened and brought me back. The clan demarcated the land and showed me where I will live and farm. In 2009, he [husband] shared the land, including my farmland, to his three children with his second wife. He left nothing for me and my children. He has registered the land in his son's name [with his other wife]. I reported to the clan, but they won't do anything. I reported to two members of Malava Land Board this year and they said now that ownership has changed to his son there is nothing they can do. I have inquired at the court, but I have not submitted a formal suit. Finance will be a problem to get. I need a minimum of KSh 30,000 (\$279) to pay a lawyer. I do small business and take care of my dead son's wife. I don't have money to spare.⁸³

⁸³ Human Rights Watch interview with Annah H., Kakamega, October 27, 2019. Annah was married customarily in 1969 and had a Catholic church wedding in 1979. Her husband married a second wife in 1987. Annah worked as an untrained teacher and had an opportunity to train at Chanzin TTC in Coast, but she was pregnant at the time and the college didn't admit

Institutional Barriers

Aside from discriminatory customary practices, women face other major obstacles such as inadequate access to information about claiming matrimonial property rights, costs of legal proceedings, long distances to courts, inadequate legal aid support, and cumbersome court procedures.

Minimal Awareness of Rights

Almost all judges, lawyers, and NGO staffers working on matrimonial property rights who spoke to Human Rights Watch mentioned a lack of awareness about rights as a key barrier to women seeking a share of their matrimonial property through the courts.

Many of the women we interviewed said inadequate information, financial hardship, and fear of reprisal from their husband, his family, or stigma in the community impeded them from seeking a share of matrimonial property. Ruth K. said,

When you work on something [marriage] for 10 years and lose it all at the blink of an eye, it's devastating. I don't have money. I'm not as rich as he [husband] is. Where do I start and how do I start? I didn't know I can submit all three petitions [divorce, custody, and division of matrimonial property] at the same time. I was told at the court that I can't submit all three in the same court and that I should wait for the custody case to be decided. It's been three years. I'm not sure how he will take it if I make a property claim. I fear he might threaten my life.⁸⁴

Mariam S., a 56-year-old woman told Human Rights Watch that her daughter didn't know what to do after the daughter's husband forced her and their daughter with a disability out of her matrimonial home after seven years of marriage,

She left with nothing. She got the children's office in Nairobi [Department of Children Services in Ministry of Labour and Social Protection] to force him

pregnant girls. When she had their first child her husband ordered her to stop her teaching job. She stopped working as a teacher and started farming.

⁸⁴ Human Rights Watch interview with Ruth K., Mtwapa, November 5, 2019.

to support the child. He paid KSh 6,000 (\$56) one month and then never again. She returned to complain at the same children’s office, and they told her she was a bother. She stopped following up.⁸⁵

The lack of relevant information and awareness of rights coupled with an inability—or unwillingness, for some, to challenge their husbands could result in women not claiming any property. Bildad Ochieng, senior principal magistrate at Kakamega law courts said, “When couples separate the husband usually take[s] the matter to court. Women come to court only after they have been dispossessed of property. Women’s awareness of their legal rights is low.”⁸⁶ Of the 12 divorced, legally separated, and widowed women Human Rights Watch interviewed, none had relevant knowledge on how to claim their share of matrimonial property. Many did not know it was possible.

Lack of information also plays into women’s acceptance of advice not to make a claim to matrimonial property—even when they have the legal standing to do so, from traditional leaders, lawyers, police, and judicial officials.⁸⁷ Some women told Human Rights Watch that their lawyers, or the lawyers of their husband advised them not to seek a claim to matrimonial property because they would not be successful.⁸⁸ Kundu Nigel, a lawyer in Kakamega explained, “My clients face pressure to drop the case for property from their immediate family and sometimes from the judge.”⁸⁹

An NGO representative told Human Rights Watch that women who have been evicted from matrimonial home seek help from the police but are turned away. “Police discourages them from claiming matrimonial property. They [police] ask ‘why are you claiming property when you have left?’⁹⁰ Reuben M, a police officer in Kilifi said that “Men own the land here.

⁸⁵ Human Rights Watch interview with Mariam S., Mumias, October 25, 2019.

⁸⁶ Human Rights Watch interview with Bildad Ochieng, Senior Principal Magistrate, Kakamega Law Courts, Kakamega, October 26, 2019.

⁸⁷ Human Rights Watch interviews with Kundu Nigel, lawyer, Kakamega, October 24, 2019; Vivian Shibanda, lawyer, Kakamega, October 23, 2019; James Namatsi, lawyer, Mumias, October 25, 2019; and William Musyoka, Judge, Kakamega High Court, Kakamega, October 25, 2019.

⁸⁸ Human Rights Watch interviews with Annah H.; Mildred N.; Ruth K., Mtwapa, November 5, 2019.

⁸⁹ Human Rights Watch interview with Kundu Nigel, October 24, 2019.

⁹⁰ Human Rights Watch interview with Biry, Chair, Kilifi MUMS, Kilifi, November 1, 2019.

Issues related to land involve the extended family because the land is usually family land and it hasn't been sub-divided.”⁹¹

According to experts on women's land and property rights we interviewed, the fact that women have inadequate information on their rights and on court procedures serve to dampen most women's drive to use a legal institution they do not understand.⁹² Teresa Odera, a magistrate at Mumias law courts said, “In one divorce case, the couple had set up a hospital and built a house during the marriage. Wife had no legal representation. She did not plead for division of matrimonial property. I advised her to submit a petition [for division of matrimonial property]. Women won't file out of ignorance. The divorce was final in early 2019, she hasn't been back.”⁹³ According to the magistrate, the woman left the marriage without any share of these assets assigned by the court.

The National Gender and Equality Commission, which was established by the government in 2011 and aims to promote gender equality and freedom from discrimination, told Human Rights Watch that the commission has established “gender and equality technical working groups” to raise “awareness on gender equality and inclusivity,” including on property rights, inheritance and marriage laws in 29 out of 47 counties across the country.⁹⁴ And that it continuously monitors “implementation of legal provisions, policy frameworks and initiatives that seek to ensure comprehensive integration of the principles of equality and inclusion in the administration of land as well as land rights for women and girls” in the counties where it has operational working groups.

Limited Access to Information about property rights and court procedures

Access to information about legal rights and how to claim them is integral to access to justice. Yet, according to judges, lawyers, and women we interviewed, most women in

⁹¹ Human Rights Watch interview with Reuben M., police officer, gender desk, and Georgina Dulu, gender officer, Kilifi, November 1, 2019.

⁹² Human Rights Watch interviews with Teresa Omondi, former Executive Director of FIDA-Kenya, Nairobi, July 1, 2019; and Michelle Oyuga, Program officer, FIDA-Kenya, Nairobi, July 4, 2019; Human Rights Watch telephone interviews with Winnie Chepkemoi, Program Officer, Women Land Rights, Kenya Land Alliance, November 6, 2019; Jessica Oluoch, Program Manager, Women Land and Property Rights, KELIN Kenya, November 7, 2019.

⁹³ Human Rights Watch interview with Teresa Odera, Magistrate, Mumias, October 25, 2019.

⁹⁴ Memorandum from the National Gender and Equality Commission (NGEC) to Human Rights Watch, June 7, 2020. The NGEC said it has “standing committee to resolve inequality issues or discrimination arising out of violation of rights of special interest groups [including women, persons with disabilities and youth].” It receives complaints, investigates, and adjudicates.

Kakamega and Kilifi counties have limited relevant information when making a claim for matrimonial property.

In situations when women have the information about their rights and the desire to claim them in court, they need basic information about the property at issue to be able to make the claim in the first place. Lawyers and women who spoke to Human Rights Watch said that this was information many women simply do not have.⁹⁵ For example, while women who make a claim for sharing matrimonial property may be aware that property exists and that it was acquired during the marriage, they often do not have specific information linked to titling information at the land registry such as the property reference number.⁹⁶ Without the specific property information, women are unable to make the argument to the court that the land exists, was acquired during marriage, and is registered in the husband's name.

Vivian Sibanda, a lawyer in Kakamega explained this in more detail: “My client knows there is property, but she has no property number. We won't find it in the land registry since we need to use the property number to search.”⁹⁷ Two other lawyers said they know of cases where husbands intentionally hid property from the court.⁹⁸ Mildred N., a 36-year-old woman in Kakamega with five children explained how she married in 2005 and separated legally in 2019 with no property to her name:

My husband and I own two parcels of land, one in Nairobi has six rental houses on it, and another in Tiriki in Western which is family land. I want a share of the property we acquired. But I don't know where the property is located. We registered the plots in my husband's name. I don't have the finances to hire someone to investigate and get the location and information about the plots.⁹⁹

⁹⁵ Human Rights Watch interview with Vivian Shibanda, October 23, 2019; Kundu Nigel, October 24, 2019 and James Namatsi, October 25, 2019.

⁹⁶ Human Rights Watch interviews with Kundu Nigel, October 24, 2019; Vivian Shibanda, October 23, 2019; James Namatsi, October 25, 2019; William Musyoka, October 25, 2019.

⁹⁷ Human Rights Watch interview with Vivian Shibanda, October 23, 2019.

⁹⁸ Human Rights Watch interview with Kundu Nigel, October 24, 2019 and James Namatsi, Mumias, October 25, 2019.

⁹⁹ Human Rights Watch interview with Mildred N., Kakamega, October 27, 2019.

Judges also seemed to be aware that this practice exists but offered no remedy to the problem. Musyoka, a resident judge at Kakamega High Court said,

I had a case in 2014 or 2015 where the lady [without legal representation] found it really difficult to even present the evidence, identify correct land reference numbers. It was a dispute over property, but she could not prove registration to her husband. We just dismissed the case. I [hear of] land that is not well described, to what extent can I say, “let me summon the land registrar to come and explain.” How far can I go?¹⁰⁰

Two magistrates affirmed that they heard divorce cases where a husband sold property without consent from his spouse while the cases were ongoing.¹⁰¹ Ochieng, senior principal magistrate said, “I have encountered a few cases where husbands sold property without consent of wife during divorce [proceedings]. The burden of proof is on the woman to provide evidence that the property exists, and the husband sold without her consent.”¹⁰² In such cases, women have little recourse to the proceeds of the sale, since they cannot prove the existence of the property or their claim to it in the first place.

Costly Procedures and Women’s Limited Financial Resources

All the women we interviewed who sought relief from the courts said appearing in court for divorce cases took up an excessive amount of time and money, from legal fees to high transportation costs. While both parties likely suffer from the time and financial demands of a divorce proceeding, the women who spoke to us said that delays in court proceedings worsened their precarious financial situation post-separation and left them in a more vulnerable position.

Most of the divorced women Human Rights Watch interviewed were rural women and said they could not pursue matrimonial property division because they had no money to hire a lawyer.¹⁰³ While legal representation is not required to vindicate rights under the law, it

¹⁰⁰ Human Rights Watch interview with William Musyoka, October 25, 2019.

¹⁰¹ Human Rights Watch interview with Teresa Odera, October 25, 2019; and Bildad Ochieng, Senior Principal Magistrate, Kakamega Law Courts, Kakamega, October 26, 2019.

¹⁰² Human Rights Watch interview with Bildad Ochieng, October 26, 2019.

¹⁰³ Human Rights Watch interviews with Zibretta S., Kakamega, October 27, 2019; Annah H., October 27, 2019; Consolata L., Kakamega, October 27, 2019; Mildred N., October 27, 2019; Ruth K., November 5, 2019.

does greatly improve a woman’s ability to navigate the legal system and increase the likelihood of a positive outcome.¹⁰⁴ But the women we interviewed said they used their limited funds for immediate needs for survival after separation such as food and housing rather than prioritize their justice needs.¹⁰⁵

Many of the women Human Rights Watch interviewed said they had left their matrimonial homes with only their personal belongings, had to seek alternate housing arrangements, and were struggling to survive. Securing enough money to pay lawyers’ fees were the least of their worries. Without any legal representation, claiming a share of the matrimonial property is extraordinarily difficult. Kundu, a lawyer in Kakamega said,

[W]omen without legal representation are most disadvantaged. I ask questions, dig into my client’s lives, and make the argument for their share of matrimonial property. Women with no legal representation are not able to bring out all the arguments and evidence that I can. For example, in a case where the woman is educated, has a degree, and sacrificed her career. I say to them, “You sacrificed your career to take care of the home and that is contribution.” These cases are very acrimonious so getting someone to think clearly is always hard. The court will only decide a case on the facts presented.¹⁰⁶

Some women’s rights organizations train women to self-represent during divorce and division of matrimonial property cases.¹⁰⁷ Even with this limited training, women would have to hire an investigator to gather vital information on all property that is classified as matrimonial property, which would require using their meager finances.

According to lawyers we interviewed, some women do contract legal representation when a divorce case is initiated but drop the representation or drop out of the proceedings after a few months because they could not continue to pay the lawyers. Kundu told Human Rights

¹⁰⁴ Human Rights Watch interview with William Musyoka, October 25, 2019.

¹⁰⁵ Human Rights Watch interviews with Zibretta S., October 27, 2019; Annah H., October 27, 2019; Consolata L., October 27, 2019; Mildred N., October 27, 2019; Ruth K., November 5, 2019.

¹⁰⁶ Human Rights Watch interview with Kundu Nigel, October 24, 2019.

¹⁰⁷ Nita Bhalla, “Mistreated Women Turn ‘Lawyers’ to Win Divorce, Child Custody in Kenya’s Courts,” *Reuters*, July 30, 2018, <https://www.reuters.com/article/us-kenya-women-rights/mistreated-women-turn-lawyers-to-win-divorce-child-custody-in-kenyas-courts-idUSKBN1KK1G5> (accessed January 28, 2020).

Watch that he makes allowances for clients to be able to sustain payment for services throughout the process:

The challenge women have is financial. Women invest a lot in marriage and at the end they have nothing. I make special financial arrangements [payment plan] for my clients—how they can pay and when they pay me for my services.¹⁰⁸

This is not an option for many women. Most lawyers do not make these allowance and the cost of retaining a lawyer can be unattainable.¹⁰⁹

Women Human Rights Watch interviewed said they also face difficulties traveling to the High Court for division of matrimonial property cases.¹¹⁰ The High Court, which is found in the capital of the county, services the whole county and the magistrate courts. Litigants must travel long distances, putting on hold their livelihood activities, to access the High Court and petition for matrimonial property to be shared. For example parties who live in Kaloleni in Kilifi county must travel 98 kilometers to the High Court in Malindi whenever their case is being heard.¹¹¹ Justus Mulei Mutuku, magistrate at Kilifi magistrate court said, “The parties might live in Mariakani and have to travel all the way to Malindi to petition for sharing of matrimonial property. The environment is hostile [bad roads]. Most women from that area might not have enough finances to petition as well as travel to the High Court.”¹¹² This puts an added financial burden on the parties to pay for their own transportation, and the transportation and other fees of their lawyers. In cases where women have been thrown out of the matrimonial home they not only have to figure out where to live but they also need to commit their meager finances to pursuing the matrimonial property distribution.

¹⁰⁸ Human Rights Watch interview with Kundu Nigel, October 24, 2019.

¹⁰⁹ Cost of legal representation ranges between KSh 200,000 (\$1,860) and KSh 500,000 (\$4,650) depending on whether it is a rural or urban area, and the type and qualification of the lawyer.

¹¹⁰ Human Rights Watch interviews with Zibretta S., October 27, 2019; Annah H., October 27, 2019; Consolata L., October 27, 2019; Mildred N., October 27, 2019; and Ruth K., November 5, 2019.

¹¹¹ Human Rights Watch interview with Seth Kamanga, Lawyer, Kilifi county, November 1, 2019.

¹¹² Human Rights Watch interview with Justus Mulei Mutuku, magistrate, Kilifi magistrate court, Kilifi, November 4, 2019.

Lack of implementation of Legal Aid Law

Lack of implementation of the 2016 Legal Aid Act have also deepened discrimination against women in matters of matrimonial property related to divorce and succession.¹¹³ The 2016 Legal Aid Act provides for a national legal aid service for most legal matters including civil cases, with legal aid services being provided through accredited individuals and organizations.¹¹⁴ The law also establishes a Legal Aid Fund, which will be used, among other things, to defray the expenses of legal representation, remunerate legal aid providers and the costs they incurred in providing the service.¹¹⁵ The fund should be supported through budgetary allocations from parliament, grants, gifts, donations, loans, and other endowments.¹¹⁶ In reality, its budget is obtained from the Office of the Attorney General and Department of Justice; it has no direct budget under its control.¹¹⁷ In 2017, the Office of the Attorney General launched a National Action Plan on Legal Aid for 2017–2022.¹¹⁸ The action plan mandates the government, through the National Legal Aid Service, to establish funds from the treasury and development partners to finance legal aid activities and programs across the country.¹¹⁹ Three years after the law was enacted, and two years after the action plan, legal aid services have not been prioritized, funding is inadequate and Kenyans still face severe constraints in accessing legal aid services through the national service.

Most NGO representatives in Kakamega and Kilifi counties Human Rights Watch interviewed said they referred women to a women’s advocacy organization, which provides

¹¹³ CEDAW, Concluding observations on the eighth periodic report of Kenya, November 22, 2017, U.N. Doc. CEDAW/C/KEN/CO/8, <https://undocs.org/CEDAW/C/KEN/CO/8> (accessed June 10, 2020). For indigent women, the costs and complex procedures violate women’s right to effective and sufficient judicial remedies.

¹¹⁴ The Legal Aid Act, 2016, section 35(2). “The Service shall provide legal aid services in – (a) civil matters; (b) criminal matters; (c) children matters; (d) constitutional matters; (e) matters of public interest; or (f) any other type of case or type of law that the Service may approve.” See also, Legal Aid Act, 2016, Part VIII – Accreditation of Legal Aid Providers.

¹¹⁵ Legal Aid Act, 2016, Part V – The Legal Aid Fund, section 29 – 34.

¹¹⁶ *Ibid.*, section 29.

¹¹⁷ Office of the Attorney General and Department of Justice, “National Action Plan, Legal Aid 2017-2022, Kenya: Toward Access to Justice for All,” <https://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf> (accessed March 12, 2020), p. 34.

¹¹⁸ International Development Law Organization, “Kenya’s First National Legal Aid Action Plan Formally Launched,” December 21, 2017, <https://www.idlo.int/news/highlights/kenya-first-legal-aid-action-plan-formally-launched> (accessed March 12, 2020).

¹¹⁹ Office of the Attorney General and Department of Justice, “National Action Plan, Legal Aid 2017-2022, Kenya: Toward Access to Justice for All,” p. 52.

pro bono lawyer schemes, legal aid services, and training for self-representation.¹²⁰ But their offices are in urban areas such as in Nairobi, Kisumu, and Mombasa. Most women Human Rights Watch interviewed in Kilifi and Kakamega counties were unable to pay for transportation to Mombasa and Kisumu to access such services. A representative of FIDA-Kenya said that some women who seek their help drop off after a few visits due to the financial burden of paying for transportation and sometimes an overnight stay in these cities.¹²¹ Other NGOs who provide legal aid service are similarly located in larger cities.

The National Legal Aid Service (NLAS) told Human Rights Watch that it “does not offer legal representation. However, plans are underway to ensure the vulnerable groups get representation in the future.”¹²² The NLAS provides legal aid clinics (to provide legal advice), mediation, bi-monthly training on self-representation, counseling, referrals to other actors in the justice sectors, including pro bono lawyers, and awareness raising through its offices in Nairobi, Nakuru, Eldoret, Kisumu, and Mombasa. Between fiscal year 2013 to 2017, it had benefitted 23,651 people, and over 80 percent of their clients are women. NLAS confirmed that it is currently “under the Office of the Attorney General and Department of Justice for coordination purposes” and “is yet to get a comprehensive budget to fully operationalize the 2016 Legal Aid Act.

Frequency of Court Adjournments and Duration of Cases

Delays related to overlaps or gaps in institutional mandate, the challenge of transmitting information across the justice chain, difficulties associated with collecting evidence and inadequate human resource capacity negatively impact women’s access to justice in divorce proceedings.

Kundu, a lawyer in Kakamega explained,

The timeline for court proceedings depends on judge and the court. It could take about 3–6 months to finalize a matrimonial property division case in the court of appeal. Case management rules have changed, and timelines

¹²⁰ FIDA-Kenya has offices in Nairobi, Nairobi county; Kisumu, Kisumu county; and Mombasa, Mombasa county. Their offices work with paralegals in other counties across the country. Women have to travel to one of the main offices to set up a case file and this might require multiple visits.

¹²¹ Human Rights Watch interview with Michelle Oyuga, November 8, 2019.

¹²² Memorandum from the National Legal Aid Service (NLAS) to Human Rights Watch, June 8, 2020.

have improved. In Magistrate courts not so much. The laws are not followed in some courts. The procedures are different from one area court to the next. Parties are only allowed three adjournments, but this is not observed by all judges.¹²³

And while they wait for a court decision, women face severe hardships, especially in cases where the woman has been evicted from the matrimonial home. Zibretta S., a 64-year-old woman who was evicted in 2012 by her husband from their matrimonial home with police officers present and later benefited from legal aid services explained the delay she encountered before the court's final decision, "Even with legal aid from FIDA, the financial implications of pursuing the matter were very high for me. The court has helped. But I filed the case in 2012 and got a decision in 2018. I pursued the case for six years. I was homeless during that time."¹²⁴ Similarly, Ruth K. was also evicted from her matrimonial home. Her husband submitted a child custody petition in 2016 and there is still no decision three years later. "There have been many intervention [court] dates and the matter is adjourned. Sometimes he [husband] is there but most times he is not. Children's matters shouldn't take so long."¹²⁵ While she waits for a decision her husband prevents her from seeing her children and she does not know how much longer it would take before she sees or talks to her children again.

Shibanda, a lawyer in Kakamega said, "There are delays. I have cases from 2011 that are still pending because of several court adjournments."¹²⁶ A community leader and activist, Zena Salim lamented, "If some women start, they end up giving up. The system is slow."¹²⁷ Most of the women Human Rights Watch interviewed said they stopped going to court hearings and instead focused on rebuilding their lives.¹²⁸

¹²³ Human Rights Watch interview with Kundu Nigel, October 24, 2019.

¹²⁴ Human Rights Watch interview with Zibretta S., October 27, 2019. Zibretta and her husband paid for the land (not family or clan land) and built the house together. She did more improvements over the course of 20 years after her husband moved out. Police officers tore down her home and other houses on the plot of land and cut down all trees. The court ordered that she goes back to the parcel of land. But there was not compensation awarded for the destruction of her property.

¹²⁵ Human Rights Watch interview with Ruth K., November 5, 2019.

¹²⁶ Human Rights Watch interview with Vivian Shibanda, October 23, 2019.

¹²⁷ Human Rights Watch interview with Zena Salim, founder of Kesho Kenya, board member of Kilifi Land Control Board and Council Board, Kilifi, November 4, 2019.

¹²⁸ Human Rights Watch interviews with Annah H., October 27, 2019; Consolata L., October 27, 2019; Mildred N., October 27, 2019; Ruth K., November 5, 2019.

In polygamous marriages, it might take even longer to establish the property each wife owns with the husband.¹²⁹ Measuring and valuing non-financial contribution by a spouse in a polygamous marriage create added complexities. Though Doris M.'s case is not a divorce case, it gives insight into how challenging it would be if the marriage is polygamous. A second wife with three children who lost everything when her husband died, Doris M. explained to Human Rights Watch the torment she was going through to claim her share of matrimonial property,

The court process has been very unfair. It has been six years since Prof [husband] died. Every month or so there is a new judge. The new judge starts from zero [the beginning]. I have seen so many judges. They keep restarting the process, postponing [adjourning] and after two months, leave and another restarts the case again. The system is not transparent. Even with my level of education it isn't transparent for me. I have asked many time[s], "what were you two saying?" They speak in English and in low tones. The court should conclude what they are doing so we can go on with our lives. Sometimes I feel like walking away, leaving it all behind and continue with my life of begging.¹³⁰

Court Annexed Mediation—A Wasted Opportunity

Recent piloting of quasi-judicial mechanisms such as court annexed mediation have been recognized as faster, more flexible, and inexpensive alternatives to court proceedings.¹³¹ Court annexed mediation is an alternative dispute resolution process within the court system where parties resolve their disputes with the assistance of a third party called a mediator and not a judge or magistrate. The constitution and the Civil Procedure Act

¹²⁹ The 2013 Matrimonial Property Act has a hiccup related to polygamous marriages; it does not specifically recognize the requirement for spousal consent in polygamous marriages. Art. 12(1) states, "An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise."

¹³⁰ Human Rights Watch interview with Doris M., Kakamega, October 25, 2019.

¹³¹ Reverend Geoffrey Njenga, "A day in a mediator's job: what mediation is and what it's not," Judiciary of Kenya, April 2, 2018, <https://www.judiciary.go.ke/news/a-day-in-a-mediators-job-what-mediation-is-and-what-its-not/> (accessed January 16, 2020); Judiciary of Kenya, "Court Annexed Mediation: Frequently Asked Questions," <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf> (accessed June 10, 2020), p. 7.; World Bank, "Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans," October 5, 2017, <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> (accessed January 16, 2020).

provide for the use of alternative forms of dispute resolution.¹³² The judiciary rolled out the mediation pilot program in April 2016 in the High Court in Nairobi and later extended to other courts including the Environment and Land Court, the Employment and Labor Relations Court, the Chief Magistrate's Court, the Children's Court, as well as the family, commercial, and civil divisions of High Courts, outside of Nairobi.¹³³ The program seems to be largely supported by donor funds, including from the World Bank.¹³⁴

Though considered a positive development, mediation, just as with the legal justice system, can be rendered unfair by the unequal power relationships of the parties. Human Rights Watch interviews with judicial officials suggest that the current court annexed mediation pilot programs are under-resourced and struggle to achieve their objective of speedy resolution of disputes to eliminate a massive backlog of civil cases. There are no guidelines or mechanisms to document and monitor how mediation is done and its outcomes. It is also unclear whether mediators in matrimonial cases consider equality of spouses and equity in ownership of matrimonial property in guiding the process, which is a vital point in mediation or alternative dispute resolution in divorce cases. Courts that pilot court annexed mediation have limited physical space and inadequate human and financial resources.¹³⁵ Josephine Maragia, a mediation deputy registrar who assesses cases for mediation, maintains a mediator list, and files the final mediation report with the court, at Kakamega law courts said, "We don't have adequate resources and space. Mediation can't happen in a court room."¹³⁶ The judiciary has not constructed or made available facilities to meet the expansion of court annexed mediation across the country. Caroline Kendagor, a mediation deputy registrar in Nairobi High Court Family Division in an

¹³² Constitution of Kenya, 2010, section 159(2)(c) allowed the judiciary to explore and promote alternative dispute resolution mechanisms, including mediation; The Mediation (Pilot Project) Rules, 2015; Legal Notice No. 197; The Civil Procedural Act (Cap 21); and Legislative Supplement No. 69.

¹³³ Judiciary of Kenya, "Court Annexed mediation: Frequently Asked Questions," p. 3; Judiciary of Kenya, "Judiciary Rolls Out Court Annexed Mediation to Other Regions," October 23, 2018, <https://www.judiciary.go.ke/judiciary-rolls-out-court-annexed-mediation-to-other-regions/> (accessed January 16, 2020).

¹³⁴ World Bank, "Judicial Performance Improvement: Kenya." <https://projects.worldbank.org/en/projects-operations/project-detail/P105269?lang=en> (accessed January 16, 2020). The total project cost and amount committed was for US\$ 120 million with an end date of October 2020. The program might also benefit from funding from the Programme for Legal Empowerment and Aid Delivery (PLEAD), a joint effort between the UN, EU, and Government of Kenya. See UN Office on Drug and Crime, "PLEAD Partners: The Judiciary," <https://www.unodc.org/easternafrika/plead/the-judiciary.html> (accessed March 2020).

¹³⁵ Human Rights Watch interview with Josephine Maragia, deputy registrar, Kakamega Law Courts, October 28, 2019; and Interview of Caroline Kendagor, mediation registrar, Nairobi Milimani Law Court, in Jillo Kadida, "Mediation is a Viable Method of Dispute Resolution – Registrar," *The Star*, October 28, 2019, <https://www.the-star.co.ke/news/big-read/2019-10-28-mediation-is-a-viable-method-of-dispute-resolution--registrar/> (accessed January 16, 2020).

¹³⁶ Human Rights Watch interview with Josephine Maragia, October 28, 2019.

interview with *The Star* (a local newspaper) explained the challenges in implementing court annexed mediation,

[A] challenge experienced is the scarcity of mediation rooms. There are currently two mediation rooms in use at the Milimani law courts. We project that with the constant growth of mediation, more rooms will be needed. We have partnered with various actors in alternative dispute resolution (ADR) that we may use their amenities for mediation.¹³⁷

The pilots are short-staffed, and tasks are added to already overburdened employees of the judiciary, including the mediation registrars.¹³⁸ To ensure expediency, the mediation deputy registrar screens and assigns cases for mediation, sometimes even when there is a history of violence in the home. This could mean forcing the abused to face their abuser—with underlying power imbalances—and come out with a satisfactory agreement. Maragia, deputy registrar at Kakamega law courts in charge of court annexed mediation cautioned, “I don’t see the people involved, I only have the court papers. My screening is based on court pleadings. There are some things that parties don’t say in court pleadings and it would come up in mediation.”¹³⁹

Lawyers Human Rights Watch interviewed expressed concerns at the outcomes of court annexed mediation processes. Mediators have different professions; most do not have a legal background. Judicial officials responsible for assigning mediators to cases, according to some of those Human Rights Watch interviewed, follow a misguided notion that faith-based and traditional leaders are best suited to family related disputes.¹⁴⁰ James Namatsi, a lawyer in Mumias, Kakamega county said, “Court appointed mediators are not lawyers and will likely use faith-based recommendations. The parties might have an agreement but that might not be what the woman wants and without the full benefit of the law.”¹⁴¹ They fear that mediation inadvertently reinforces customary norms that emphasize

¹³⁷ Jillo Kadida, “Mediation is a Viable Method of Dispute Resolution – Registrar.”

¹³⁸ Human Rights Watch interview with Josephine Maragia, October 28, 2019. See also, Jillo Kadida, “Mediation is a Viable Method of Dispute Resolution – Registrar.”

¹³⁹ Human Rights Watch interview with Josephine Maragia, 28, 2019.

¹⁴⁰ Human Rights Watch interviews with James Namatsi, October 25, 2019; Josephine Maragia, October 28, 2019; Teresa Odera, October 25, 2019.

¹⁴¹ Human Rights Watch interview with James Namatsi, October 25, 2019.

reconciliation and deny women’s right to property.¹⁴² Kendagor, a mediation registrar in Nairobi High Court Family Division countered that lawyers resist mediation because they “prefer the adversarial resolution of cases, which involves having a case resolved by a judge.”¹⁴³ But Human Rights Watch research suggests that it is not a simple matter of resisting change as there are clear challenges in implementing court annexed mediation.

Mediation may also ignore the unequal power relations between women and men and presumes that both parties are on equal standing and can negotiate as such. Mildred N. said,

My husband has all of our property and I have nothing. The court wants us to go to mediation. The magistrate insisted that the case is assigned to mediation. My husband doesn’t even show up, he only came when he was compelled to pay KSh 15,000 [\$140] monthly. There is no mediation, I’m not in my matrimonial home, and all my children are not with me. This is not effective, and I just want closure.¹⁴⁴

Cases handled through mediation do not necessarily ensure just division of matrimonial property, if at all it is negotiated, especially since the objective is usually to reconcile the parties. Teresa Odera, a magistrate at Mumias Court said, “Mediation is good but how do we ensure that the agreement hasn’t been coerced?”¹⁴⁵ The unequal power dynamics within patriarchal society seeps into their mediation negotiations, pressuring women to accept resolutions that do not reflect maximum legal standards. And once parties agree on a solution, even if the solution is unfair to one party, the mediator cannot meddle with the agreement. Musyoka, a judge at Kakamega High Court said:

I know it [court annexed mediation] is working—settlements are being reached and adopted. What I may not know is what is happening on the ground. I may not be able to fully comment on what happens behind the

¹⁴² Human Rights Watch interviews with Vivian Shibanda, lawyer, Kakamega, October 23, 2019; Kundu Nigel, lawyer, Kakamega, October 24, 2019; Winnie Maobe, lawyer, Kakamega, October 24, 2019; James Namatsi, lawyer, Mumias, October 25, 2019.

¹⁴³ Interview of Caroline Kendagor in Jillo Kadida, “Mediation is a Viable Method of Dispute Resolution – Registrar.” The Star.

¹⁴⁴ Human Rights Watch interview with Mildred N., October 27, 2019.

¹⁴⁵ Human Rights Watch interview with Teresa Odera, October 25, 2019.

scenes. Traditionally, women are suppressed and so they may be intimidated. Some of those settlements may not be what ladies may want. I have seen in open court that when [women] gain the confidence to speak for themselves it becomes clear that what is being proposed is not what they want.¹⁴⁶

Most mediation happens in or near a court building and the proximity gives rise to the perception that the court exercises control, which could force weaker and less informed parties with no legal representation to acquiesce even when the agreement does not represent a win-win scenario. The judgement or an order arising from mediation cannot be appealed because it was generated from an agreement between the parties.¹⁴⁷ The case would revert to the courts if the parties cannot reach an agreement.¹⁴⁸ But not all parties involved in mediation might be aware of this.

Tradition and Social Barriers

Kenya has multiple ethnic groups with different cultures and customs. Patriarchal beliefs and attitudes prevail and many traditional and cultural practices harmful to human rights, shape women's lives.¹⁴⁹ A patrilineal lineage system that favors a patriarchal notion of land ownership operates across Kenya's ethnic groups and it perpetuates discrimination against women in the family.¹⁵⁰

The Luhya and the Mijikenda are the predominant inhabitants in Kakamega and Kilifi county, respectively. These ethnic groups rely on customary laws that are mostly unwritten, constantly evolving, and differ from one group to another.

¹⁴⁶ Human Rights Watch interview with William Musyoka, October 25, 2019.

¹⁴⁷ The Mediation (Pilot Project) Rules, 2015, art 16; Judiciary of Kenya, "Court Annexed Mediation: Frequently Asked Questions," p. 6.

¹⁴⁸ *Ibid.*, p. 5.

¹⁴⁹ GROOTS Kenya, "I was forced to give away major share of the farm produce to them leaving my kids and I with barely nothing to sustain us," post to GROOTS Kenya (blog), July 17, 2019. <https://grootskenya.org/women-land-rights/> (accessed June 10, 2020).

¹⁵⁰ Caroline Wambui, "Patriarchal Attitudes Stymie Kenya's Laws to Give Women Land Rights," *Reuters*, November 8, 2016, <https://www.reuters.com/article/us-kenya-landrights-women/patriarchal-attitudes-stymie-kenyas-laws-to-give-women-land-rights-idUSKBN13D1R7> (accessed April 2, 2020).

Individuals Human Rights Watch interviewed for this report, including traditional leaders and judicial officials, said social and cultural practices related to traditional dispute resolution mechanisms, dowry, discriminatory norms on ownership of land and property, and social systems that reinforce these patterns, create insurmountable barriers for women even to claim a share of matrimonial property. Also, the 2013 act is unclear on how to resolve the conflict between clear assignation of equal rights in marriage and limits placed on who owns what property based on traditional practices. Some traditional elders told Human Rights Watch that they allow the woman to remove her personal belongings from the home, but are very clear that they cannot award her a share of the house or land.¹⁵¹ Wilfred Akili Nyrrro, a senior assistant chief in Malindi, Kilifi county, told Human Rights Watch, “If the parties built a house, it belongs to them, but the land belongs to the [husband’s] family. The woman cannot take the house.”¹⁵² Furthermore, ownership of the land itself may be problematic and unclear, making adjudication of ownership of all property on the land extremely difficult.¹⁵³ These factors could contribute to the discrepancy between the number of people who identify as divorced in Kakamega and Kilifi counties and the low number of lawsuits for matrimonial property.

Traditional Dispute Resolution Mechanisms Can Fail Women

Chiefs and traditional elders told Human Rights Watch that their community members come to them to resolve their conflicts through informal negotiations and mediation, with a goal of reconciliation. Though norms are ever changing, traditional dispute resolution mechanisms, which are made up of the chief and clan elders—who are often men, can maintain and enforce norms that are similar across the two counties, even when the norms are discriminatory. In rural Kenya, traditional dispute resolution is more easily accessible and preferred compared to the formal justice system.¹⁵⁴ According to community leaders and NGO representatives who advocate for women’s rights in the two counties, social and

¹⁵¹ Human Rights Watch interview with Wilfred Akili Nyrrro, Senior Assistant Chief, Central Sub-location and Acting Chief Malindi, Malindi, October 30, 2019; Atanas Magero, retired teacher and village elder, and Zachariah Menza, village elder, Malindi, November 2, 2019; and Dickson Kanana, village elder, Kirao, Malindi, November 2, 2019.

¹⁵² Human Rights Interview with Wilfred Akili Nyrrro, October 30, 2019.

¹⁵³ The traditional system within the communities in Kakamega and Kilifi counties are patrilineal and patrilocal, meaning wives move to husband’s home after marriages. Usually the husband and wife move to land that is owned by the husband’s family and build their matrimonial home and other commercial ventures on that land with approval of the husband’s family.

¹⁵⁴ International Commission of Jurists-Kenya Section, “Interface between Formal and Informal Justice Systems in Kenya,” June 2011, https://web.archive.org/web/20140203090936/http://ppi-mande.integrityaction.org/sites/default/files/icj_kenya__tiri_-_research_on_alternative_dispute_resolution_in_kenya-628.pdf (accessed June 10, 2020), pp. 31 and 32.

traditional norms can stigmatize divorce and disadvantage women in accessing land and property, deterring women, especially in rural areas from pursuing legal remedies. In addition, according to judges Human Rights Watch interviewed, many women depend on traditional dispute resolution mechanisms.

According to traditional leaders in Kakamega and Kilifi counties Human Rights Watch interviewed, most marriages in these counties include a traditional ceremony, including dowry, exchange of gifts and other rites based on the custom of the area. Customary marriage ceremonies in Kakamega and Kilifi counties are undertaken in accordance with specific traditional rites and practices, which define the conditions and processes of marriage in Luhya and Mijikenda ethnic groups.¹⁵⁵ In both systems the man and his family provide dowry in cash, livestock and other gifts and traditional rituals promote the notion that children born by the woman “belong” to the man. The problem for women begins before they seek a divorce, they are never able to own and independently make decisions over land and property within the context of the traditional marriage in the first place.¹⁵⁶ “Luhya culture discriminates against women. Our customs and traditions prevent women from pursuing property,” Naphtali Musotso, senior chief in Shinyalu, Kakamega county told Human Rights Watch.¹⁵⁷ Discriminatory social and cultural practices on marriage and inheritance compromise women’s ability to own, manage and control land and property.¹⁵⁸ While certainly a significant problem for women within a marriage, it can become a crushing reality when the marriage ends.

Marriages conducted under customary practices can allow for dissolution of marriage under traditional dispute resolution mechanisms, but Human Rights Watch research shows that for women in Kakamega and Kilifi counties, these mechanisms represent the

¹⁵⁵ Human Rights Watch interviews with Benita Khakasa, village elder, Masiyenze A, and Isaac Khaminwa, village elder, Masiyenze B, Kakamega, October 25, 2019; Naphtali Musotso, senior chief, Savane location, Kakamega, October 25, 2019; and Dickson Kanana, village elder, Kirao, Malindi, November 2, 2019; see also, Eugene Cotran, “Kenya I, The Law of Marriage and Divorce,” *Restatement of African Law*, vol. 1-2 (1968), pp. 15, 27, 39, 52.

¹⁵⁶ Human Rights Watch interviews with Benita Khakasa, Masiyenze A, and Isaac Khaminwa, Masiyenze B, October 25, 2019; Naphtali Musotso, October 25, Wilfred Akili Nyrrro, October 30, 2019; Atanas Magero, retired teacher and village elder, and Zachariah Menza, Malindi, November 2, 2019; Dickson Kanana, November 2, 2019; Reuben Nyakundi, Resident Judge, Malindi Law Courts, Malindi, October 30, 2019.

¹⁵⁷ Human Rights Watch interview with Naphtali Musotso, October 25, 2019.

¹⁵⁸ Mariaflavia Harari, “Women’s inheritance rights and bargaining power: evidence from Kenya,” *Economic Development and Cultural Change*, vol 68 (October 2019), p. 189-238; Andrew Harrington And Tanja Chopra, *Arguing Traditions: Denying Kenya’s Women Access to Land Rights*, Report No. 2/2010, (Washington DC: The World Bank, June 2010).

least favorable measures related to division of matrimonial property. A village elder of Kirao, Malindi explained how socio-cultural practices and legal rights can become challenging for women seeking divorce: “In succession, the wife has nothing. Same in divorce. She takes her personal belongings—nothing else and leaves her children. The truth about culture, once you [woman] get out, you lose everything.”¹⁵⁹

Elders in both counties where Human Rights Watch conducted research play a critical role in officiating customary marriages but also in resolving conflict during marriage.¹⁶⁰ Married couples in Kakamega and Kilifi county rely heavily on their customary norms and practices on marriage and traditional conflict resolution mechanisms. In these systems, divorce is severely discouraged even when the parties have irreconcilable differences, and traditional norms around women’s rights to property in marriage and divorce reflect that.¹⁶¹

However, according to judicial officers, most couples who are married based on customary norms and practices do not turn to the courts when there is trouble, but to the elders and chiefs during separation. Accessing the court system is usually a last resort. Bildad Ochieng, senior principal magistrate at Kakamega Law Courts told Human Rights Watch: “I have worked in the judiciary for over 20 years. Not a lot of petitions are filed for division of matrimonial property. This is dealt using customary law with elders.”¹⁶²

Often couples in peri-urban and rural areas prefer traditional conflict resolution systems because they are less expensive, and matters are solved quickly.¹⁶³ Unfortunately, this does not always bode well for wives who face difficulties claiming property and also encounter the financial obligation to refund the dowry. In the Mijikenda and Luhya customs, two of the ethnic groups in Kilifi and Kakamega counties, women are not entitled to matrimonial property mainly due to the lineage system, which again is patrilineal and patrilocal. Atana Magero, a retired teacher, village elder, and older man in Malindi said,

¹⁵⁹ Human Rights Watch interview with Dickson Kanana, November 2, 2019.

¹⁶⁰ Human Rights Watch interview with William Musyoka, October 25, 2019; Wilfred Akili Nyro, October 30, 2019; Dickson Kanana, November 2, 2019; Reuben Nyakundi, October 30, 2019

¹⁶¹ Carmen D, Deere and Cheryl R. Doss, “The Gender Asset Gap: What Do We Know and Why Does It Matter?”, *Feminist Economics*, vol 12:1-2 (2006), pp. 1-50.

¹⁶² Human Rights Watch interview with Bildad Ochieng, October 26, 2019.

¹⁶³ Harrington and Chopra, *Arguing Traditions: Denying Kenya’s Women Access to Land Rights*.

We are not at the level where we can give the woman the house, it is not the culture. If a woman in this community invests a lot into the marriage, she goes at a loss. There is no division of property when it comes to divorce. Someone always loses and it is the woman.¹⁶⁴

Women trapped in abusive marriages or those who are unhappy in their marriage often know that they face a zero sum if they seek to end the marriage through customary means. Consolata L., a 48-year-old Kakamega woman who said she left her matrimonial home when her husband became physically and emotionally abusive told Human Rights Watch how financially devastating this choice can be:

We [husband and her] built two houses on family land. The land is in his great grandparent's name. Transferring and dividing the land will be problematic. I applied for a divorce, but I won't demand for property. I have kids with him, and they will inherit the houses. I just want peace.¹⁶⁵

For many, receiving a share of the home they built together but unable to sell is no better than staying in the marriage. Women seeking to end a marriage do not want to live so close to their former husband or his family because they fear reprisals and being ostracized by their community. Zena Salim, a community leader in Kilifi town and a member of the Kilifi Land Control Board said, "women are scared. If I challenge a man, the whole community looks at me as a bad person."¹⁶⁶

For most women seeking to leave a marriage, the fear of intimidation and the system of enforcing customs means they leave with little more than the personal belongings they can remove from the home. Elders suggest that if the woman wants the matrimonial property divided equitably, she will have to take the matter to court. As Akili Nyrrro, senior assistant chief and acting chief, Malindi, told Human Rights Watch:

¹⁶⁴ Human Rights Watch Interview with Atanas Magero and Zachariah Menza, November 2, 2019.

¹⁶⁵ Human Rights Watch interview with Consolata L, October 27, 2019.

¹⁶⁶ Human Rights Watch interview with Zena Salim, November 4, 2019.

If there is a lot of property that is usually a bone of contention. There are some men who say “no, when we married you came with nothing.” If they refuse to share the property, I refer them to court to find legal ways.¹⁶⁷

However, social norms and practices which discriminate against women in respect of their rights to own land and property renders impossible the idea of acting in a contradictory manner—such as, by taking the matter to court. “In Nairobi, spouses fight to the very end. In rural areas there are challenges. It’s easier to intimidate the women,” William Musyoka, resident judge at Kakamega High Court said.¹⁶⁸ In cases where the customary union was formally registered with the Registrar of Marriages, most women will not make a claim for a share of the matrimonial property in court. “Women who are not strong enough are pressured to withdraw or abandon. Here [Kakamega] it’s difficult to pursue these cases to conclusion.”¹⁶⁹

A senior assistant chief in Kakamega said, “This is my 18th year serving as a chief, I have never seen instances where women from this locality have gone to court to lay claim for matrimonial property. I have also never been given a court order to enforce in respect to division of matrimonial property.”¹⁷⁰ This is a missed opportunity since both CEDAW and the Maputo Protocol require Kenya to reform and address traditional practices that discriminate against women.¹⁷¹

Dowry and Kajamas: Practices that Hold Women Back from Exiting Marriages and Claiming Matrimonial Property

Traditional marriage ceremonies usually include the payment of dowry and other gifts from the groom and his family to the bride’s family.¹⁷² Dowry in this context could include money, livestock, and other gifts negotiated between the bride’s and groom’s families, and given to the family of the bride. Women in Kakamega and Kilifi counties told Human Rights Watch their dowry was a cash payment or a mix of cash and livestock given to their

¹⁶⁷ Human Rights Interview with Wilfred Akili Nyrrro, October 30, 2019.

¹⁶⁸ Human Rights Watch interview with William Musyoka, October 25, 2019.

¹⁶⁹ Ibid.

¹⁷⁰ Human Rights Interview with Naphtali Musotso, October 25, 2019.

¹⁷¹ See section titled “Applicable Regional and International Standards.”

¹⁷² The Marriage Act No.4, 2014, art. 2 defines dowry as “any token of stock, goods, moneys or other property given or promised in consideration of an intended marriage.”

family. The 2014 Marriage Act provides that where dowry is required it would represent proof of a customary marriage.¹⁷³ Oftentimes, custom prescribes that the wife and her family must return the dowry to the husband in the case of divorce.¹⁷⁴ Zacharia Menza, a village elder in Malindi said, “If there is conflict and the woman leaves and she wants to set herself free then her family has to return the dowry to the man. According to Mijikenda culture a woman has no right to property.”¹⁷⁵

Many of the women we interviewed could barely meet their needs after separation and were unable to return the dowry where customs prescribe that they do.¹⁷⁶ Traditional leaders told Human Rights Watch that if the wife has not returned the dowry, she cannot request a share of matrimonial property in the context of the traditional dispute resolution mechanism.¹⁷⁷ For example, Akili Nyrrro, an assistant chief in Malindi, Kilifi county, said he would share matrimonial property in a case where the woman or her family returns the dowry, because that is a requisite step to end the marriage. He explained that,

Based on customary law, if the woman does not return the dowry, she remains the wife of the husband. Returning the dowry is like being issued a divorce decree. If dowry is not returned that means the marriage is still valid and the woman can’t complain to get share of property if she is still married.¹⁷⁸

Discriminatory practices that restrict women from exiting a marriage exacerbate women’s already weak position in accessing matrimonial property through either the customary or court systems. A woman could try to seek a divorce decree through the courts, which would nullify dowry repayment, but the costs and time commitment of doing this can

¹⁷³ Ibid., art. 43(2) states “Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

¹⁷⁴ Cotran, “Kenya I, The Law of Marriage and Divorce”; and Mary Kimani, “Taking on Violence Against Women in Africa,” *Africa Renewal*, July 2007, <https://www.un.org/africarenewal/magazine/july-2007/taking-violence-against-women-africa> (accessed June 10, 2020).

¹⁷⁵ Human Rights Watch Interviews with Zachariah Menza and Atanas Magero, November 2, 2019.

¹⁷⁶ See for example, Human Rights Watch interview with Ruth K., Mtwapa, November 5, 2019.

¹⁷⁷ See for example, Human Rights Watch interviews with Atanas Magero and Zachariah Menza, November 2, 2019; Dickson Kanana, November 2, 2019; Wilfred Akili Nyrrro, October 30, 2019.

¹⁷⁸ Human Rights Interview with Wilfred Akili Nyrrro, October 30, 2019.

sometimes be greater than repaying the dowry outright.¹⁷⁹ In a few cases that Human Rights Watch reviewed, husbands counter-sued requesting re-payment of dowry.¹⁸⁰ Perhaps in an effort to lessen the financial burden in some customary systems, the woman is not required to immediately payback the full amount of the dowry upon separation. Akili Nyrro told Human Rights Watch: “Most women take time and pay back the dowry, it doesn’t have to be immediate.”¹⁸¹

However, the delay carries an added burden since any property she acquires or children she bears during separation are still governed by the customary system which prescribes they “belong” to the husband. This is based on an enduring discriminatory belief by some that in a marriage, the woman herself is property of the husband.¹⁸² Therefore, it only follows that anything she acquires is by extension his property as well. Atanas Magero, a retired teacher and village elder in Malindi, Kilifi county, put it very bluntly, “In the Mijikenda culture if you [wife] want to leave, you must pay me [husband] to set you free. You are mine. If you buy a shop [even after separation] it is mine. You are mine.”¹⁸³

This provides a partial explanation for why practices concerning children after divorce also impede women from claiming a share of matrimonial property. In some ethnic groups such as the Mijikendas the groom’s family must give *kajama* (alcoholic drinks), to the bride’s family, which culturally represents the children the wife will bear.¹⁸⁴ The exchange of kajamas during customary marriage between the bride’s and groom’s families means that all children from that union “belong” to the husband.¹⁸⁵ Dickson Kanana, village elder of

¹⁷⁹ John Makeni, “Kenya Divorce Rate Soars but High Legal Fees Keeps Couples in Check,” *The Nation*, April 23, 2010, <https://allafrica.com/stories/201004230962.html> (accessed January 14, 2020); In 2010, the Daily Mail, a Kenya-based online news source reported that the cost of filing a divorce case could range from a minimum of KSh 200,000 to KSh 500,000, and the case could drag on in court for years; “The Cost of Divorce in Kenya,” *Kenyan Price*, January 1, 2019, <https://kenyanprice.com/cost-of-divorce-in-kenya/> (accessed January 14, 2020). The website reported that the cost of filing a divorce case ranges between KSh 200,000 (\$1,860) and KSh 500,000 (\$4,650).

¹⁸⁰ In two cases on file with Human Rights Watch husbands counter-sued requesting repayment of dowry. At the time of writing there was no final judgement.

¹⁸¹ Human Rights Interview with Wilfred Akili Nyrro, October 30, 2019.

¹⁸² Human Rights Watch, *Double Standards: Women’s Property Rights Violations in Kenya*, March 2003, <https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>, pp. 25–29.

¹⁸³ Human Rights Watch Interview with Atanas Magero, November 2, 2019.

¹⁸⁴ Edward Karuku, “Rabai Wedding,” post to “Elimu Asilia, Kenya’s Indigenous Knowledge, Culture” (blog), <https://www.elimuasilia.org/index.php/culture-blog/72-culture/172-rabai-wedding> (accessed January 14, 2020). In Mijikenda culture, Kajama also refers to palm wine and tokens, including cash offered to the elders for a service rendered.

¹⁸⁵ In Mijikenda culture the groom and his family give 24 kajamas to the bride’s family, a customary rite establishing the groom as father to all children the bride delivers during the marriage.

Kirao, Malindi, said “Children are for the father. The 24 kajamas [24 containers of alcoholic brew] in Mijikenda tradition is payment for the children.”¹⁸⁶ Luyha in Kakamega County and Mijikenda in Kilifi County customs prohibit estranged women from seeking custody of children.¹⁸⁷ The pressure and precedent created by custom mean that although women could claim matrimonial property under the law, they often do not because they hope to ensure that their children do not suffer any retaliation from their father or his family.¹⁸⁸ James Namatsi, a lawyer in Mumias, Kakamega county said, “We have a patriarchal society... it looks awkward for a woman to demand part of what they [spouses] have acquired together. The woman is told ‘you go, leave the man and children to enjoy the property’. They look at her like ‘who are you to claim this property?’”¹⁸⁹ As Josephine Maragai, deputy registrar at Kakamega High Court explained, “If a woman separates from [her] husband, the children remain with the husband. If she wants property this could expose the children to reprisal.”¹⁹⁰

Children do not “belong” to anyone as they are not property. CEDAW, in article 5(b), requires states to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”¹⁹¹

¹⁸⁶ Human Rights Watch interview with Dickson Kanana, November 2, 2019.

¹⁸⁷ Human Rights Watch interviews with Atanas Magero; Zachariah Menza; and Dickson Kanana, November 2, 2019; and Wilfred Akili Nyro, October 30, 2019.

¹⁸⁸ Human Rights Watch interview with Josephine Maragia, October 28, 2019. For further reading see, UN Women, “Progress of the World’s Women 2019-2020: Families in a Changing World,” 2019, p. 36. <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women> (accessed January 24, 2020); Frances Raday, “Gender Equality and Women’s Rights in the Context of Child Custody and Child Maintenance: An International and Comparative Analysis,” UN Women Discussion Paper Series, 2018.

¹⁸⁹ Human Rights Watch interview with James Namatsi, October 25, 2019.

¹⁹⁰ Human Rights Watch interview with Josephine Maragia, October 28, 2019.

¹⁹¹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by Kenya on March 9, 1984, art. 5(b).

Applicable Regional and International Standards

The Right to Equality and Nondiscrimination

The Kenyan government has human rights obligations to ensure women's equal rights in marriage and during divorce. This includes ensuring a fair division and ownership of matrimonial property, a critical pillar to protecting women's rights within the context of marriage and divorce.

International human rights law guarantees a fundamental right to equality and prohibits unjustified differential treatment of people on the basis of prohibited grounds, including sex.¹⁹² It upholds women's equal rights in all matters including property, housing, and land.¹⁹³ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits discrimination against women in all spheres, including in family law and property law.¹⁹⁴ It obliges states to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." This means that both partners in a marriage must have equal legal rights and a woman cannot lose any fundamental rights by marrying or divorcing.¹⁹⁵

The obligation of the Kenyan government includes ensuring equality in ownership, control, and distribution of matrimonial property. Kenya must ensure that property distribution at dissolution of marriage comply with the principles of substantive equality in accordance

¹⁹² Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), arts. 2 and 7; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, arts. 2(1), 26 and 14(1); and International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, arts. 2(2) and 3; and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by Kenya on March 9, 1984.

¹⁹³ UN Committee on Economic, Social and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights," General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights) U.N. Doc. E/C.12/2005/3 (2005), para. 28; CEDAW Committee, General Recommendation No. 21, Equality in marriage and family relations, U.N. Doc. A/49/38 at 1 (1994), para. 26.

¹⁹⁴ CEDAW.

¹⁹⁵ *Ibid.*, arts. 9(1) and 11(2)

with CEDAW.

The African Charter on Human and Peoples' Rights (African Charter) also guarantees the right to equality and nondiscrimination.¹⁹⁶ It mandates states to eliminate every discrimination against women and to protect women's rights, including right to property.¹⁹⁷ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) complements the African Commission on Human and Peoples' Rights (ACHPR) by expanding the substantive protection of women's rights in Africa.¹⁹⁸ It requires states to explicitly provide for women's equal rights in marriage as well as rights to land and property, including the right to an equitable sharing of the joint property deriving from the marriage.¹⁹⁹

In a resolution in November 2013, the ACHPR urged states to comply with their obligations and commitments to ensure, protect, and promote women's right to land and property, and encouraged states to repeal discriminatory laws and adopt legislative measures to sanction customary practices that limit or have a negative impact on women's access to, use of, and control over land and other productive resources.²⁰⁰

In August 2018, the ACHPR adopted a resolution proposing a general comment on article 7(d) of the Maputo Protocol, which requires states parties to enact legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage, and that women and men have "the right to an equitable sharing of joint property deriving from the marriage" in such circumstances.²⁰¹ The ACHPR is deeply concerned that "some countries maintain regressive standards when it comes to defining

¹⁹⁶ African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986., arts. 2, 3, 14, and 18(3).

¹⁹⁷ *Ibid.* art. 18(3)

¹⁹⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005, art. 7.

¹⁹⁹ *Ibid.* Art. 7 (Separation, Divorce and Annulment of Marriage) of the Maputo Protocol calls for states parties to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage, including having the right to an equitable sharing of the joint property deriving from the marriage.

²⁰⁰ ACHPR, 262 Resolution on Women's Right to Land and Productive Resources, ACHPR/Res.262(LIV)2013, <https://www.achpr.org/sessions/resolutions?id=282> (accessed June 11, 2020).

²⁰¹ ACHPR, Final Communiqué of the 24th Extraordinary Session of the African Commission on Human and Peoples' Rights. Resolution on the development of General Comments on art. 7 (d) of the Protocol to the African Charter on the Rights of Women in Africa, ACHPR/Res. 401 (EXT.OS/ XXIV) (2018), https://www.achpr.org/public/Document/file/English/actrep44_2018_eng.pdf (accessed June 10, 2020).

‘equitable share,’ such that women are not able to enjoy equal property rights upon separation, divorce or annulment of a marriage.”²⁰²

Justice institutions that deal with marriage, family, and property rights should adhere to international standards of competence, efficiency, independence, and impartiality. The Kenyan government should ensure its laws governing matrimonial property are harmonized and in line with the 2010 constitution and with the Maputo Protocol, providing a fair and equitable system of division of property that would provide security for all parties during the dissolution of a marriage.

Both CEDAW and the Maputo Protocol require states to act against discriminatory customary practices. CEDAW in article 5(a) requires states “take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”²⁰³ Similarly, article 2(2) of the Maputo Protocol obliges states to commit to eliminating harmful cultural and traditional practices through appropriate legislative, institutional and other measures, as well as public education, information, education and communication strategies.²⁰⁴ This means Kenya’s government should ensure that women’s rights are protected within the legal framework, as well as customary, traditional, and religious laws in Kenya’s plural legal system.

Right to Property

The Universal Declaration of Human Rights refers to the right to property, stating, “[e]veryone has the right to own property, alone as well as in association with others and no one shall be arbitrarily deprived of his or her property.”²⁰⁵ The African Charter requires states parties to ensure the protection of the right to property²⁰⁶ Several human rights conventions also protect against discrimination with respect to property (including on the

²⁰² Ibid.

²⁰³ CEDAW, art. 5(a).

²⁰⁴ Maputo Protocol, art. 2(2).

²⁰⁵ UDHR, art. 17.

²⁰⁶ African Charter, art. 14.

basis of sex).²⁰⁷ Even with some progressive laws, the social and cultural reality in Kenya that create barriers to women claiming their share of matrimonial property, is quite different from international standards.

Right to Effective Remedy

States must provide an effective remedy if human rights are violated and enforce such remedies.²⁰⁸ The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights require states to ensure that all people, irrespective of economic status, have effective and equal access to legal representation.²⁰⁹ Failure to provide adequate legal aid violates the international law obligations to ensure equality before the law. The Kenyan government must create an enabling environment for women's access to justice; create effective, accountable and gender-responsive justice institutions; and legally empower women to claim matrimonial property or any beneficial interest that might accrue to them as a result of their contributions during marriage.

²⁰⁷ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969., art. 5(d)(v); CEDAW, arts. 15 and 16. Indonesia ratified ICERD in 1999 and CEDAW in 1984.

²⁰⁸ ICCPR, art. 2(3).

²⁰⁹ ICCPR, arts. 2, 3, 26, and 14(1); ICESCR, art 2(2); CEDAW, art. 2. See also; UN General Assembly, 56/161 Human rights in the administration of justice, U.N. Doc. A/RES/56/161 (2002). The UNGA called on governments to "...allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice."

Recommendations

To the Government of Kenya, including Parliament, the Office of the Attorney General, State Law Office and Department of Justice, the Judiciary of Kenya, Ministry of Public Service and Gender Affairs, and the National Police Service

The Parliament of Kenya and the Judiciary of Kenya

- The Parliament of Kenya and the Judiciary of Kenya should urgently revise and amend:
 - The Matrimonial Property Act to clarify the phrase “proof of contribution;” include clear provisions on valuing and weighting non-monetary contribution relative to monetary contribution; and expand jurisdiction to adjudicate matrimonial property division to lower courts.
 - The Law of Succession to ensure it works in tandem with the Constitutional provision on equality in marriage, the Matrimonial Property Act and the Land Registration Act, to clarify the right to matrimonial property during succession and provides for a common means of protection of women’s property rights.
 - The Magistrates’ Court Act to expand or clarify jurisdiction to adjudicate in the sharing of matrimonial property.
 - The Marriage Act to clarify that though dowry can be used to establish that a marriage existed, it is not a requirement of marriage and forced repayment of dowry during divorce is prohibited.
- The Parliament of Kenya and the Judiciary of Kenya should repeal or amend discriminatory provisions under religious and customary law in order to harmonize them with article 16 of CEDAW, which “provides for the elimination of discrimination against women at the inception of marriage, during marriage and at its dissolution by divorce or death.”
- The Parliament of Kenya and the Judiciary of Kenya should codify Muslim family law in a manner that is compatible with the equality and freedom of discrimination provisions, including equality regardless of gender or religion (article 27 of the constitution) and provisions of CEDAW especially articles 1, 2, and 16.

- The Parliament of Kenya and the Judiciary of Kenya should appoint Muslim women as kadhis and alternative dispute resolution mediators in the Kadhi court system.
- The Parliament of Kenya and the Judiciary of Kenya should facilitate rural women’s access to land by eliminating all discrimination in customs and traditional practices that impede their equal access to land and establish a clear legislative framework to protect their rights to matrimonial property and inheritance.
- The Parliament of Kenya and the Judiciary of Kenya should ensure that women’s rights are protected within customary, traditional, and religious laws in Kenya. Traditional mechanisms should adapt and protect equality of women and men.
- The Parliament of Kenya and the Judiciary of Kenya should ensure that the practice of dowry does not curtail women’s fundamental human right to freely exit a marriage.
- The Parliament of Kenya and the Judiciary of Kenya should enhance mutually reinforcing linkages between justice and security sectors (the police) to support the protection of women’s rights to matrimonial property.

The Office of the Attorney General and Department of Justice

- The Office of the Attorney General should consult with NGOs and the Law Society of Kenya to:
 - Establish guidelines for judicial officials on identifying and assessing matrimonial property. The guidelines should clarify that though clan, or family land is not considered matrimonial property, the value of improvements made on it is and must be shared between the spouses. The non-owning spouse must be compensated to the extent of their share of the value of the improvements.
 - Develop practice guidelines on division of matrimonial property at dissolution of marriage.
 - The criteria to assess contribution should include the duration of the relationship; the impact of childcare and household responsibilities on the education and earning capacity of the dependent spouse; current and likely future income of each spouse; the dependent spouse’s capacity to support him or herself; the health and age of the spouses; the dependent spouse’s need and standard of living; other means of support; and contributions made by the dependent spouse to realize the other’s career potential.

- The Office of the Attorney General should review and propose revisions to the following laws:
 - Law of Succession to ensure equal rights between women and men regarding inheritance and property laws.
 - Magistrates' Court Act to expand jurisdiction of the Magistrates' Court to hear division of matrimonial property matters.
 - Matrimonial Property Act to reflect that other courts including magistrates' and Kadhis' courts have jurisdiction to adjudicate matrimonial property division matters. This revision would expedite joint petitions for divorce and division of matrimonial property, and limit the necessity of frequent court trips, particularly where distance or financial constraints make such trips a burden.
- The Office of the Attorney General should assess implementation of its circular on mandatory registration of marriages and make public the results.
- The Department of Justice and the National Legal Aid Service should expand the National Legal Aid and Awareness Programme to ensure that disadvantaged women and marginalized individuals in rural and urban areas can access legal representation to realize their right to equality and justice.

The Judiciary of Kenya

- The Judiciary should ensure that Court Annexed Mediation and other quasi-judicial mechanisms are adequately resourced, including with convenient and appropriate facilities, trained and responsible staff.
 - Mediation should be gender-sensitive and mediators should be aware of the power imbalances that could disfavour women when dealing with issues related to land and property.
 - Mediators should be versed with applicable laws related to the dispute they arbitrate. They should adhere to a basic requirement to follow the law.
 - Adopt a national alternative dispute resolution policy that provides clear cut rules for mediators, as well as protections for people participating in mediation.
- The Judicial Training Institute and the Law Society of Kenya should provide training to judicial officials and lawyers to raise awareness of the body of laws that protect women's matrimonial property rights.

- These trainings should be extended to include traditional leaders and other non-judicial actors whose mandate bear on women’s property rights such as agencies responsible for housing, land titling, and land administration.
- The Judiciary, and especially the Supreme Court, should provide an advisory opinion on what constitutes non-monetary contribution and the value of such non-monetary contribution.
- The Judiciary should have open days to specifically address marriage, divorce, and succession matters. There should be clarity on process, documentation, and management of expectations.

The Ministry of Public Service and Gender Affairs

- The Ministry of Public Service and Gender Affairs should promote education and awareness of laws related to family and property, including during marriage, divorce, and death, and avenues for accessing justice.

The National Police Service

- The National Police Service should train and provide guidance to police officers on how to deal with issues related to matrimonial property such as forced eviction of a spouse from the matrimonial home, arrangements concerning their children, and referrals.

To the African Union and African Commission on Human and Peoples’ Rights

- The African Union Women, Gender and Development Directorate, in collaboration with African civil society organizations, should produce Kenya’s score card and status report on matrimonial property rights in Kenya.
- The ACHPR should elaborate a general comment on article 7(d) of the Maputo Protocol on equitable sharing of joint property deriving from a marriage.

To Donor Institutions and Governments

- The European Union should continue to support the government of Kenya to expand the Programme for Legal Empowerment and Aid Delivery (PLEAD) to

enhance women's ability to access justice for violations that occur across varying contexts within the country.

- The World Bank should direct funding specifically to develop infrastructure to improve delivery of Court Annexed Mediation.

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“Once You Get Out, You Lose Everything”

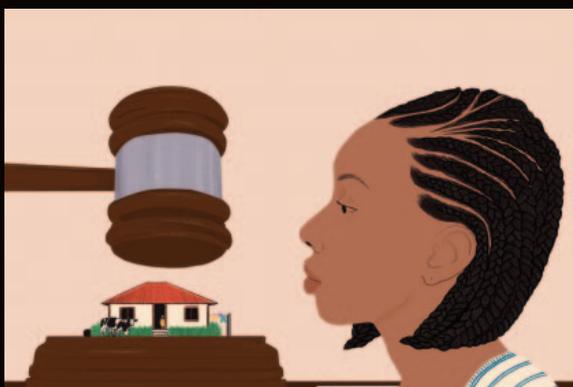
Women and Matrimonial Property Rights in Kenya

Kenya has come a long way in recognizing equality between married women and married men, and in addressing equal property rights through extensive legal reforms. But, for all the relative progress its laws represent on paper, challenges in implementation abound, leaving many women without the protection of the law to claim their matrimonial property.

“Once You Get Out, You Lose Everything” documents the limits of these legal protections. The report shows how a confluence of ambiguous and antiquated laws, and discriminatory social and cultural norms undermine equal rights to matrimonial property for married, divorced, separated, and widowed women in Kakamega and Kilifi counties.

Based on interviews with over 60 individuals, including women who are separated, divorced, or widowed, and analyzed data from 56 divorce and matrimonial property division cases with a final judgement between 2014–2019 from courts in Kakamega and Kilifi counties, the report examines the multiple barriers women face in claiming a share of property even in a “gender-responsive” legal framework like Kenya’s. The report documents legal and judicial barriers women encounter in claiming their share of property. It also describes social and traditional practices in marriage, inheritance, and women’s land ownership that compound the challenges most women face in accessing matrimonial property in Kenya.

Human Rights Watch and the Federation of Women Lawyers in Kenya (FIDA-Kenya) call on the Kenyan government to uphold principles of equality, equity, and nondiscrimination, which are an integral part of its constitution as well as regional and international human rights standards.



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