



The Global Initiative
for Economic, Social and Cultural Rights



**JOINT SHADOW REPORT TO THE UNITED NATIONS
COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Kenya, 57th Session (22 Feb 2016 - 04 Mar 2016)

Submitted by:

HAKI JAMII

Federation of Women Lawyers (FIDA) Kenya

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

Addresses:

Haki Jamii

53 Park Building, Along Ring Rd, off Ngong Rd

P.O. Box 11356-00100

Nairobi, Kenya

Email: pauline@hakijamii.com, Website: <http://www.hakijamii.com/>

FIDA-Kenya

Amboseli Road off Gitanga Road, Lavington

Nairobi, Kenya

Email: info@fidakenya.org, Website: <http://www.fidakenya.org/dr7/>

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

8 North 2nd Ave. East, #208

Duluth, MN 55802, USA

Phone/Fax: +1 218 733 1370

Email: Mayra@globalinitiative-escr.org, Website: www.globalinitiative-escr.org

1.0 PROFILES OF SUBMITTING ORGANIZATIONS

Haki Jamii

Hakijamii is a national human rights organization founded in 2004 and registered in Kenya in 2007 as a non-governmental organization (NGO). Its core agenda is to support and work with marginalized groups, especially in urban areas, to advocate for their economic and social rights. The organization exists specifically to amplify the voice of the over 8 million residents of informal settlements in urban areas in Kenya to effectively and meaningfully participate in and influence public policy decisions and allocation of resources in order to improve their access to basic services. It works with over 100 grassroots community networks with total membership of about 500,000 in 15 towns in Kenya as well as with key national and international civil society organizations and state organs

FIDA-Kenya

The Federation of Women Lawyers (FIDA) – Kenya is the premier women’s rights organization in Kenya and has in 30 years offered direct FREE legal aid services to over 300,000 women and positively impacted in structural, institutional, and legal reforms within Kenya to ensure gender sensitivity and responsiveness. Established in 1985 during the 3rd UN Conference on women held in Nairobi, FIDA Kenya which is a membership organization of over 1,000 women lawyers and law student is committed to the creation of a society that is free from all forms of discrimination against women in Kenya. As a result of the commendable work in advocating for women’s rights at the community, national, regional and international level, the organization has attained recognition as a critical partner for community, government, civil society, development partners and UN agencies in ensuring structural, institutional and legislative reforms on women rights.

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

The Global Initiative for Economic, Social and Cultural Rights is a 501(c)(3) non-profit, non-governmental organization registered in the United States in 2010. It seeks to implement a concerted strategy for economic, social and cultural (ESC) rights advocacy aimed at improving the lives of the world's poor. The GI-ESCR has a special interest in advancing women's land and property rights, and has designated this area of work as one of its strategic priorities. These rights have a special transformative potential for women, who represent the poorest of the world's poor, and who globally have the least access to productive resources. Not only are these rights key to ensuring that women's immediate material needs are met, but they help to fundamentally reshape unequal gender power relationships. Indeed, for women, advancement on these critical issues is more than about poverty alleviation, it is about uplifting women's status in a fundamental way and about ending women's inequality on the basis of gender.

2.0 Women's Rights to Land and Property in Kenya

2.1 Background:

While women's rights to land and property are protected under the Constitution of Kenya (2010) and various national legislations, in practice, women remain disadvantaged. The main restriction is customary law and practices, which prohibit women from owning or inheriting land and other forms of property. These customary laws and practices are enhanced by stereotypical practices and socialization of women in believing they are not meant to own or inherit land or any other property. Customary practices in Kenya generally grant women secondary rights to land, namely through their relationships to a male relative, and women are rarely able to inherit land in their own right. In addition, women face serious obstacles in claiming their property rights either because they are unaware of their rights or they are unable to lay claim to this right.

According to the Food and Agriculture Organisation (FAO), women in Kenya are only 5% of registered landholders in Kenya. This situation is a major driver of poverty and

gender inequality, and merits special consideration by the Committee as it reviews Kenya's implementation of the International Covenant on Economic, Social and Cultural Rights.

In 2011, the CEDAW Committee called upon Kenya to establish a clear legislative framework to protect women's rights to inheritance and ownership of land, and introduce measures to address negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to property by women (UN Doc.CEDAW/C/KEN/CO/7, at para. 42).

In its own previous Concluding Observations (2008) the Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/KEN/CO/1, at para. 14) recommended that the State party repeal article 82 (4) of the Constitution and ensure that the new Constitution guarantees equal rights of women to matrimonial property during marriage and at its dissolution. The committee also recommended that Kenya raises public awareness of the need to abolish laws and customs which discriminate against women and adopt the Marriage, Matrimonial Property and Gender Equality and Affirmative Action Bills.

Since that time, several legislative advancements have been made. Specifically, the National Land Policy was adopted in 2009. The policy provides for a systematic framework for the management and administration of land and its resources in Kenya. The policy, among other things, provides for the recognition of marginalized groups, informal settlements and small communities, the harmonization of land laws to ensure better and more effective land administration; the repossession of public land that had hitherto been allocated to private individuals and the development of a land use master plan to guide the optimal utilization of land resources.

In 2010, Kenyans overwhelmingly voted for a new Constitution which provides for several gains for women on their land and property rights including;

- Article 2(4) that provides 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.”*
- Article 27 (4) prohibits discrimination on any ground including sex and marital status and expressly states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres (Article 27(3)).
- Article 40 provides that every person has a right either individually and or in association with others, to acquire and own property in Kenya of any description and in any part of Kenya.
- Article 61 provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. 61 (c) provides that parliament *“shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular matrimonial home during and on termination of marriage...to protect the dependants of the deceased person holding interest in the land including interests of spouses in actual occupation of the land”*.

In 2012, three laws aimed at harmonizing various land laws were adopted; National Land Commission Act No. 5 of 2012¹, Land Act, No. 6 of 2012² and Land Registration Act No. 3 of 2012³. These laws entrench principles of gender equality in access to land. The legislations give breath to Article 68 of the Constitution and overall Chapter Five on land and environment. A significant gain is that the Land Act creates statutory rights to spouses and any other persons who seek to carry out land transaction. The provisions specifically provide that before any land transaction is approved spousal consent must be

¹ The National Land Commission is the central organ in the implementation of the Chapter Five of the Constitution and generally land reforms in the country.

² An Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes

³ An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes

given. This has saved a number of women who woke up in the morning and their matrimonial home and/or property had been sold by their husbands without the women knowledge. This law also gives room for women to be consulted in case of property transactions. Other legislative reforms, including Community Land and Evictions and Resettlement Bills, are currently under development and debate.⁴

Kenya has equally implemented the Concluding Observations (2008) the Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/KEN/CO/1, at para. 14 on Matrimonial Property by enacting the Marriage Act No. 4 of 2014⁵, The Matrimonial Act No. 49 of 2013⁶ and Protection from Domestic Violence Act No. 2 of 2015⁷. These legislations are famously referred to as family Laws and they have provided great gains for women in Kenya. Example the Marriage Act now legislates on Customary Marriages (Section 6 and Part V) that previously were not effectively regulated exposing many women to a high chance of being denounced as wives after staying for years and having raised children in that union. Being denounced as a wife also had negative impact on access to property acquired and/or developed during the union.

Definition of contribution to matrimonial property is a big win for women in Kenya. The Matrimonial Property Act Section 2 defines Contribution to include domestic work, child care, companionship, management of family business and farm work. These were roles that ordinarily were not considered as contribution towards acquisition of matrimonial property. This law also defines matrimonial property to include the matrimonial home which prior to the law was excluded (Section 6).

⁴ Reem Gaafar, 'Women's Land and Property Rights in Kenya,' Resource Equity, October 2015.

⁵ An Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes in Kenya. Previous Kenya had 4 different laws governing marriages in Kenya. This Act consolidates all forms of marriages in Kenya giving common grounds governing all marriages in Kenya including definition, minimum age and types of marriages.

⁶ An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes

⁷ An Act of Parliament to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto

Violence against women is known to grossly impact on women acquisition and ownership of land. The Protection from Domestic Violence provides for protection of spouses and children. This law clearly defines what comprises of domestic violence including economic violence and damage to property (Section 3). This definition is one of the key gains for women. Others include provision of access to protection orders by courts and police being held accountable to prevent Domestic Violence (Section 7 to 8).

These new Acts if properly implemented will ensure the respect of women's rights in land ownership.

2.0 Legal Gaps and Continuing Challenges:

Despite a the above discussed progressive legal framework, Kenyan women's land rights continue to lag behind those of men for reasons including the following:

Lack of Political Will: Upon adoption of the new Constitution, Parliament and leadership at hand had the obligation to enact enabling legislation to ensure the people of Kenya fully enjoy all rights bestowed in the Constitution. Unfortunately, parliament has continuously defied the Constitution. Of relevance herein is the inclusion of Section 7 to the Matrimonial Act which section negates the benefits of Article 45 of the Constitution. Article 45 provides that parties to a marriage are entitled to equal rights at the time of the marriage, during and at the dissolution of the marriage. Section 7 however provides that... *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.* This section takes back the nation to generations where judicial decisions undervalued and dismissed women contribution in their families and household. Women will once again be exposed to the struggle of trying to give monetary value of their farm work, child care, companionship and taking care of family business in proving contribution to matrimonial property.

The United Nations human rights experts urged Kenya to repeal Section 7 of the Matrimonial Property Act since it effectively denies women the right to marital property upon divorce or death of their spouse, unless they can prove they made a contribution to the acquisition of the property during their marriage.⁸ There are significant problems from the standpoint of women's rights to equality when it comes to the distribution of marital property in cases of divorce, and Kenyan courts have a great deal of discretion in determining how property is actually divided in cases of divorce.⁹

The lack of political will to enact the right laws takes back the country to times when several laws were not gender friendly. This also provides room for cultural barriers to flourish.

Cultural Barriers: A complex mix of cultural, legal and social factors and obstacles stand in the way of women realising equal property rights in Kenya. The deep rooted cultural beliefs continue to give precedence to male ownership of land as opposed to women¹⁰. The guise of men "protection" actually strips off women their right to property and asserts control over women's autonomy. This cultural discrimination influences the service by some public officers. Some government officials ignore the law and rights of women and instead apply the prevailing cultural beliefs and make decisions that favour men¹¹, some officers simply say they do not want to interfere with culture.

Lack of Knowledge and poor literacy levels¹²: Majority of women in Kenya have little awareness of their rights and seldom have the means to enforce them, women have 67% literacy level as compared to men 78%¹³. Majority are also ignorant of laws generally relating to purchase and acquisition of the land or land registration processes. Example

⁸ See: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14254&>

⁹ Reem Gaafar, "Women's Land and Property Rights in Kenya," Resource Equity, October 2015.

¹⁰ Federation of Women Lawyers "Women Land and Property Rights in Kenya – Training Handbook (2013).

¹¹ Ibid.

¹² World Bank Definition: Percentage of the population age 15 and above who can, with understanding, read and write a short, simple statement on their everyday life. Generally, 'literacy' also encompasses 'numeracy', the ability to make simple arithmetic calculations. wdi.worldbank.org/table/2.13

¹³ The World Bank IBRD-IDA wdi.worldbank.org/table/2.13

when widowed they do not know how to engage with the intricate succession procedures hence left vulnerable and often duped off property left by their husbands or fathers.

Deficiency in legal system: also contributes to women not enjoying their land rights. This includes technical language that locks out women in engaging the legal process, expenses for travel, court fees and witness costs. Even where a judgement is achieved it is almost impossible to enforce in a community hostile to women. Women who have tried to fight culture have faced great hostility including physical and emotional violence and some ostracized.

Under-representation of women in Decision Making: Lack of and/or poor representation of women in institutions that deal with land violates their Constitutional right. In both elected and appointed land bodies, women are either missing or vastly outnumbered by men¹⁴. The Constitution under Article 27 (8) provides that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective and appointive bodies shall be of the same gender. Currently Kenyan women are vastly underrepresented in national and local institutions that adjudicate land disputes and therefore their interests are not adequately protected by these bodies. Women have particular crucial stake in decisions based on their greater contribution to agricultural workforce.

3.0 Recommendations:

The law reforms in Kenya provides for formal equality, there is however need for substantive equality for women as a sustainable way of improving women's enjoyment of their rights.

The Government of Kenya should clearly demonstrate good will to support women rights and repeal any sections of enabling laws that do not comply with the Constitution case in point Section 7 of the Matrimonial Property. The Government needs to appreciate the

¹⁴ The National Gender and Development Policy (2000)

contribution made by women not only at household level but also at national level. The judiciary should equally be advised by International Laws and practises in providing verdicts in division of matrimonial property.

There equally has to be good will in enacting legislation to implement the principle that not more than two thirds of any appointive or elective position shall be of same gender. This will ensure inclusion of women in decision making on land matters. The government should also ensure gender equality in land administration bodies, and ensure that these institutions are trained on women's equal rights to land and property and how to protect them.

One of the questions for women rights activists in Kenya is the acknowledgement of polygamy in the Marriage Act (Customary Marriages – Part V). The Law of Succession Cap 160 section 26, equally recognises polygamy and provides for co-wives and their children. This type of union has an impact on ownership and management of property in marriage and upon death of the husband. Women in such unions face extra barriers to keeping their matrimonial property amidst sharing with another wife.

If polygamy remains legal, the government must enact legislation in enforcing equitable arrangement for all wives involved. To emulate the South Africa Law Commission's approach "*Although customary marriages should be recognised on the basis of Constitutional right to culture, it is necessary to distinguish areas where human rights prevail*"¹⁵ Kenya must be committed to advocating a view of women that transcends stereotypical gender roles and advocates for equal rights. Registration of polygamous unions is necessary to protect the women involved. The registration should meet stringent requirements such as written consent by each prior wife and the future wife and a property distribution agreement which outlines the matrimonial property interest that each wife enjoys.

¹⁵ South African Law Commission, harmonization of the Common Law and Indigeneous law, Issue paper 3, (Customary marriages) 31 October 1996.

The Government should have deliberate steps to raise awareness amongst women, local communities, judiciary, traditional authorities, local chiefs, land administrative bodies, and other relevant actors about the land and property rights of women, so as to support their equal rights to land and resources. The activities would include government funded refresher courses for government officials tasked with land matters including land adjudicating bodies, Judicial officers and use of community media to educate members of the public on these rights. This will equally increase the knowledge of women on their land rights and empower them to pursue their rights.

To hasten the pace of development, it is important for Kenya government also ensure that women's human rights and gender issues are integrated in planning and budgeting, in order to strengthen the relationship between men and women, which is the main core in development. KSh 0.5 billion was allocated for the FY 2015/16 for the Women Enterprise Fund this fund does not touch on pertinent issues such as addressing other women related issues such as property and inheritance rights but only on the economic model of the women.

There is need to document and avail disaggregated data on women land ownership in order to secure and entrench access to land. Data collection and establishment of the national bureau of statistics needed for positive intervention has been brought to a halt, such that to date there is no central national bureau of statistics to accurately provide data on gender disparity. The newly formed Ministry of Public Service, Youth and Gender should have a sufficient data bank this will be easier to measure the government's commitment in addressing women's problems.

Lastly there are two upcoming laws the Community Land and Evictions and Resettlement Bills. This is a further opportunity for the Government to enhance gender equality. Specific recommendations include;

- The government should ensure addition to the general principle the principle of non discrimination....that no one shall be discriminated directly or indirectly on any ground, including sex, race, pregnancy, marital status, health status, ethnic or

social origin colour, age, disability, religion, conscience, belief, culture, language or birth.

- Regarding the application of alternative dispute resolution, the Bill should include a provision requiring the community to employ mechanisms that will deliberately involve women and other marginalized groups.
- The Bill allows evictions without a court order and does not capture humane treatment of evictees to address the issue of harassment, physical and verbal abuse among others which women and children bear the heavy repercussion. There is need to have a more humane process.