

**THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA**



**REPORT OF THE COMMISSION ON THE
LAW OF SUCCESSION/INHERITANCE**

**PRESENTED TO THE MINISTER FOR JUSTICE
AND CONSTITUTIONAL AFFAIRS,**

**MINISTRY OF JUSTICE AND CONSTITUTIONAL
AFFAIRS DAR ES SALAAM, TANZANIA**

MARCH, 1995

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THE COMMISSION

The Law Reform Commission of Tanzania was established under section 3 of the Law Reform Commission of Tanzania Act, 1980, to take and keep under review all the Law of the United Republic with a view to its systematic development and reform.

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Mr. Damian Saleka Meela - Full Time Commissioner

Ms. Julie Catherine Manning - Full Time Commissioner

Hon. Mr. Pius Msekwa (MP) - Part Time Commissioner
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DAR ESSALAAM

10th March, 1995

Hon. Samuel Sitta MP,
Minister for Justice and Constitutional Affairs,
P.O. Box 9050,
DAR ES SALAAM.

REPORT ON THE LAW OF SUCCESSION/INHERITANCE:

It was in January 1987 that the Attorney-General and Minister for Justice referred the Project on Law of Succession to the Law Reform Commission of Tanzania on inter-alia the following:

1. To study and determine weaknesses in the present system of Laws of Succession.
2. Make recommendations with a view to the institution of a system of succession with a law which is uniformly applicable as in the regime of the Law of Marriage; and
3. In making its report the Commission shall have regard to:
 - (a) The principles of equality,
 - (b) Freedom of worship and conscience.

The Commission has accomplished the task assigned to it in accordance with the Terms of Reference. The research on the Project has taken quite a long period of time due to various reasons, including the need to make consultations as extensively as possible; inadequate finances to carry out the research etc.

In accordance with Section 14(1) of the Law Reform Commission of Tanzania Act, 1980 we have the honour to submit the final Report on the Law of Succession Project.

.....
Hon. Raymond J.A. Mwaikasu
CHAIRMAN

D.S. Meela
FULL TIME COMMISSIONER

Julie C. Manning
FULL TIME COMMISSIONER

Hon. Pius Msekwa
PART TIME COMMISSIONER

Mohamed Ismail
PART TIME COMMISSIONER

Ms. Stella Longway
PART TIME COMMISSIONER

Harold R. Nsekela
PART TIME COMMISSIONER

LETTER CONTAINING THE REFERENCE

JC/J.10/35/100
January, 1987

27th

The Honourable Mr. Justice H.A. Msumi,
Chairman,
Law Reform Commission of Tanzania,
P.O. Box 3580,
DAR ES SALAAM.

Ndugu Chairman,

1. You might recall that when in 1971 Parliament passed the Marriage Act which introduced, a uniform law of marriage a request was made that the law of succession should also be made uniform. The Government agreed with this proposal and it is now its intention to see how best it can be effected.
2. You will note that so far in this country, there are three main systems of succession in operation i.e. the customary law of succession system which governs Africans; the Islamic law of succession system which governs Muslims and the Hindu law of succession system which governs Hindus. This set up certainly has the negative effect of reinforcing and perpetuating racial and tribal divisions amongst citizens. In addition, some features of the said systems are inconsistent with the principle of equality, which is the cornerstone of our policy of Ujamaa, while others are repugnant to our morality and sense of justice. The Government is therefore of the mind that this set up should be replaced by one under which a uniform law applicable to all citizens could be operated.
3. Accordingly I am referring this matter to you so that you study and determine weaknesses in the present system of laws of succession and make recommendations with a view to the institution of a system of succession with a law which is uniformly applicable as in the regime of the Law of marriage.
4. In making its report the Commission shall have regard the principle of equality; freedom of worship and conscience.

Yours sincerely,

sgd.

D.S. Meela

ACTING ATTORNEY-GENERAL

DSM / ha

N.O.O

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File: JC/P. 80/3

ACKNOWLEDGEMENTS

The Commission is grateful to the committee charged with the duty to prepare the first draft Report on the Law of Succession and expresses its sincere appreciation for the effort, diligence and many hours placed at the disposal of carrying out this assignment.

At this juncture the commission would like to place on record its indebtedness to the following:

1. Co-opted members from the University of Dar es Salaam, and the Ministry of Justice and Constitutional Affairs who worked hand in hand with the sub-committee of the Commission in preparing the Discussion paper, questionnaires, and undertaking tours to Regions and neighbouring countries.
2. All the Donors to the Project. These include:
 - i. The Canadian High Commission
 - ii. The Royal Netherlands Embassy
 - iii. The Centre for Human Rights, Geneva
 - iv. The Ministry of Higher Education, Science Technology and
 - v. The Ministry of Community Development, Women and Children Affairs.

The Commission would also wish to record its appreciation to everyone who made its task easy including those who might have had invariably contributed somehow e.g. the Secretaries, those who made the coffee and tea e.t.c as well as those who had contributed unnoticeably.

The Commission, however, bears full collective responsibility for both the form and contents of the report.

“Man is mortal, but the objects of this property do not disappear with him. They are left behind him in this World and community must see to it that they are allotted to new owner. Such definite allotment is indispensable lest society be shaken quarrel, fight or scuffle whenever one of its members departs life leaving property behind him.”

Max Rheinstein, Cases on Decedent's Estates pp 1-220 and extract from Njenga, F.X: law of Succession in East Africa, Faculty of Law, The University College of Dar es salaam 1966 (mimeo) pg. 1.

CHAPTER ONE

LAW OF SUCCESSION PROJECT

INTRODUCTION:

1. HISTORICAL PERSPECTIVE:

- 1.1 From time immemorial, here in Tanzania Mainland and others parts of the world, most women have been denied their basic rights.
- 1.2 In Tanzania Mainland, for example, under closed tradition of tribal communities and in accordance with the existing traditions, customs, customary rule, and cultures, most women were denied the full enjoyment of socio – economic, educational and political rights on equal footing with male members of their respective societies
- 1.3 Nevertheless, such discriminatory traditional regimes did not succeed to totally quell the sentiments of discontent among the womenfolk the world over. It is for years now that such discontent by the womenfolk for failure their rightful realize long denied to status that ought to be enjoyed on equal terms with men in various human societies, has been made manifest the world over, at various stages.
- 1.4 It was in the year 1888 that for the first time such women’s struggle came to assume an international magnitude. It is during such year, when in Washington DC, USA, upon the influence of a group of American women worked towards the derogation of the status of women was formed as federation uniting National Councils of Women from a number of European countries. By the year 1912, the L.C.W. had drawn membership form 24 countries.
- 1.5 The great impact which such women’s struggle has been brought to bear on the International Community has been made possible by the increasing unity, advancement in educational, economic and political standing among women, from various corners of the world, coupled with ever increasing efforts of the United Nations Organizations through the U.N. General Assembly and the relevant U.N Institutions and Agencies, such as the Economic and Social Council, the International Labour Organization, e.t.c. It is for instance, through the U.N that the Universal Declaration of Human Rights was adopted in 1948, it is the Economic and social Council which, by its resolutions of 1953 through 1955, on the Status of Women in Private Law, on Matrimonial Regimes, on the Rights of Women to engage in independent work, on Parental rights and Duties and on Domicile of married women, that laid the foundation for current reforms in marriage laws, the world over. It is also the ILO, that brought about improved equal working conditions for men and women throughout the world. Furthermore, the observance by the international community of the year 1985, as the U.N Women’s Year, has had a special impetus in awakening women the more and uniting them through out the world in their fight for the realization of their rights that has long been denied to them.

- 1.6 In our view, among major factors that have greatly worked towards the derogation of the status of women not only in Africa, but also the world over, for years has been the following:
- Family laws i.e. the laws of marriage and Succession / Inheritance,
 - Denial of equal educational and political opportunities,
 - Want of economic power;
 - Wrong attitudes of minds her boured by both men and women, as culturally and, at times, religiously, moulded in respect of female children i.e. daughters being lowly regarded by parents as compared to sons;
 - Self – centeredness and selfishness on the part of men;
 - Superiority complex of men and inferiority complex of women, as culturally, educational, and religiously moulded by our respective families and larger communities.
- 1.7.1 With regard to African customary laws relating to marriage and inheritance/succession, patrilineal societies which do constitute the largest part of the people of Tanzania, all of which have established the institution of marriage through the payment of bride wealth of some sort such as, implements of agriculture, goats or cows, **most of the husbands have been entertaining, wrongly that wives become their property. Thus the husband claimed and to-date some continue to claim to own the wife and her labour. Consequently, in the event of divorce or death of the husband the wife was left without any share out of the wealth created through her joint effort with her husband.**
- 1.7.2 As we very well know, until recently, most women were also generally regarded as minors. They could not enter any business contract, sue or be sued on their own behalf. In all such transactions they had to be represented either by their husbands, fathers or other male relatives. Customary practices further rendered them incapable of owning immovable property on their own rights.
- 1.7.3 Similarly, it is also to be noted that in the case of matrilineal societies, for want of bride wealth, the male partner’s marital rights are not respected and customary marital relationships do not generally have a strong bondage. For instance, among the Makonde and Yao of southern part of Tanzania Mainland, who, in the past and still to a great extent today, hold such customary marital relationships even where they had lasted for ten years or more and blesses with children, as mere “uchumba” (betrothail). The man would continue to stay at the residence of the woman’s uncle at the pleasure of the woman and her maternal family. He would thus stand the risk of being kicked out at anytime, without any share of the wealth he might have assisted in creating.
- 1.7.4 In this regard it is now gratifying to note that the thinking or attitude of our people in Tanzania Mainland is rapidly changing, thanks to the current socio-economic, political and cultural changes through the influence of modern education and mobility among our people, which has brought about cultural cross fertilization, resulting into the hybrid of cultures among the people within the urban areas. For in the course of our public hearings in respect of our law reform project on the law of succession, most of the people interviewed seemed to appreciate that really the main objectives for the payment of bride wealth are: first, to demonstrate the man’s commitment or seriousness to take the woman as his partner in life

on permanent terms; and second, to provide a mechanism for establishing the lineage and attachment of the child to the father's clan. As the Uganda's Kalema Commission report at p.40, para 200, puts it:

“Marriage in all societies and allover the world is associated with the giving of presents by the would-be husband or his relations to the would be bride or her relations. But with us these presents are described as “Brideprice” “bride wealth” etc. An English or American girl may be given an engagement ring made of diamonds worth thousands of pounds, “demanded subtly.” A Karamajong may be given a hundred heads of cattle “demanded openly,” and a Munyankole may be given only a hoe. It is not sale. It is not a purchase.”

1. 7.5 That bride wealth serves also as a mechanism for the lineage and affiliation of a child to the father, comes out clearly from KUPER in Radcliffe-Brown and Forde at p.88, who had this to observe in the case of the Swazi people:

“The indisputable but by no means sole evidence of a legal marriage is the acceptance of the bride's people of a number of cattle known as emabeka. Ukulobola under the customs of Ukulobola. Is specifically connected with the woman's fertility and with rights over children. In cases where the woman is sterile and cattle have already been paid a substitute must be sent to bear for her.” (Emphasis supplied) .

1. 7.6 Thus bride wealth is not a price for a wife. It follows, therefore, that upon payment of bride wealth the wife is not thereby purchased and the property of the husband. The two do, instead, ought to be taken to become equal partners; though, for leadership purposes and management of the home, the husband becomes the head of the family, the wife being second in command.
2. **Tanzania Mainland's concern for and endeavors to promote and protect women's rights.**
 - 2.1 Tanzania Mainland's concern for and endeavors to promote and protect women's rights has had as its documented birth date, the birth of TANU Party on 7/7/1954. For the Constitution of the Party then clearly stipulated among its cardinal principles, the belief in equality of all men in dignity as human beings and against discrimination of any kind.
 - 2.2 Such Party Constitution and subsequent ones, together with the Independence and subsequent Republican Constitutions had as their strong pillars, the U.N instruments and instruments of Un Agencies, such as the U.N Charter; the Universal Declaration of Human Rights, U.N Conventions together with Resolutions of the UN General Assembly, and those of the U.N Agencies, such the ILO, UNICEF, WHO and the as Economic and Social Council.
 - 2.3 Hence forth, through independence period, it is through TANU and now CCM Party, in close collaboration with the Tanzania Women Organization (UWT) which has all along been an affiliate of the Party, that women in this country, began to actively participate in the political affairs of the country and get a platform to openly air their grievances against their disadvantaged position in our society in respect of both social, educational, economic, political

and cultural spheres, and demonstrate their political, prowess, leadership potential and the magnitude of the steam of consequence, the women's discontent. In several measure both administrative, political and legislative have been taken to institute a mechanism to help promote and protect women's rights in this country.

3.0 THE NEED FOR CHANGE

- 3.1 In an endeavour to promote and protect women's rights arising out of marital relationships as governed by the laws of marriage and Succession/Inheritance, the Government's efforts' make improvements in existing laws realize to the desired promotion and protection of such rights, began late in the sixties, starting with the Chief Amri Dodo's Commission in 1968 which did not bear any fruit. But subsequently however, A WHITE PAPER ON THE LAW MARRIAGE in 1969 was published and later enacted into law¹
- 3.2 With the changing socio-economic situation, from closed subsistence to a monetary and economy commercial one, and the ever increasingly aggressive participation by women in the creation of wealth in their families, in Tanzania Mainland many parents and married men and prospective husbands, have come to realize the injustice committed to the wives and daughters in denying them a share out of the matrimonial property acquired during the marriage through joint efforts of the spouses, particularly when the husband dies intestate.
- 3.3 Consequent upon the enactment of the Law of Marriage Act. 1971, itself founded principally upon the Resolutions of the UN Economic and Social Council of 1953 - 1955, a married woman is, under S.114 of the act now entitled, upon divorce, to an equal share out of the matrimonial property jointly acquired with her husband during the marriage. She is also conferred with full capacity as a legal person, capable of entering into contracts; of suing and being sued; to all kinds of property in her own name²
- 3.4 It is, however, to be noted that the provision under S.114 of the Law of Marriage Act. referred to above, does protect the wife's property interest over wealth acquired with her husband through their joint efforts during their marriage, only when such marriage ceases by divorce and not by death.
- 3.5 While it was hoped by the recorders of such customary law that the children of the widow would adequately take care of her, experience shows that the children could be hostile to their mother or be wasteful of the estate left thereby by their deceased father, rendering the widow desperate and or destitute.
- 3.6 Besides, according to the current position of our law in practice in probate and administration matters, it is only when the husband dies and not when the wife dies, that letters of administration of the deceased's estate are applied for. That presupposes that it is only the

¹ The Law of marriage Act No. 5 1971

² Sections 65 and 68 of the Law of marriage Act.

husband who had personal property interest in the property so jointly acquired by the couple during their marriage. The wife is thereby notionally taken to have had no property interest in such wealth for which she might have greatly laboured in its acquisition. No doubt, that proceeds from the old notion prevalent among patrilineal communities, as pointed out earlier that on payment of bride-wealth by the husband upon marriage, the wife is thereby purchased and becomes the “property” of the husband, and therefore even the fruits of her labour belong to the husband as well. We submit that is one of the causes of the gross injustice committed by our society to the womenfolk in this regard.

- 3.7 For, as human beings, women are not and cannot be treated as chattels to be owned by husbands. To accept such notion would, in fact, be tantamount to regarding wives as slaves, a status that has long been abolished under international norms as laid down under U.N Convention on Slavery and is in conflict with our Constitution.
- 3.8 One of the questions that the proposed reform in the law of succession seeks to answer is what should happen to such property interest of the wife when the husband dies or when she dies.
- 3.9 There is the gender-based inequality in the share of deceased’s estate among sons and daughters of a deceased person and between the senior-most and other junior children of the deceased. As a result there has been a long standing outcry in the country that daughters are generally discriminated as against sons when it comes succession over the estate of their deceased parent. Daughters take second place to all the sons (if there is such right to inherit) irrespective of seniority in their birth, and that in most communities a daughter cannot have an absolute title to an immovable property, such as land, if the deceased has been survived by male relatives.

The main reasons that seem to have been common to almost all tribes for such discrimination, harboured by both fathers and mothers, and leading most couples to lament when they have not been blessed with a son, has been the apprehension that, first, upon marriage daughters would go to and become part of the family of their respective husbands; second, that upon becoming of age it is the sons who would look after and provide for the aged parents.

- 3.10 With the changes in the socio-economic, educational and political advancement of our young women, several parents have now come to realize, as our public hearings on the law of Succession Project have revealed through most of the regions, that such apprehension is no longer tenable. For it is realized that nowadays, daughters who happen to be in good socio-economic standing, be they married or unmarried, appear to play a more leading role in caring for their aging parents than is the case with sons. Accordingly several parents are now more willing to ensure that when it comes to succession, children of all sexes should be entitled to have equal share out of the their estates when they die survived by their children.
- 3.11 In this regard, there have been isolated High Court decisions which had the effect of modifying such customary law rule limiting the right of daughters to inherit immovable estate from deceased parents absolutely as opposed to usufructuary right only. The first of such court’s endeavours to accord women in Tanzania Mainland, an equal status to men in matter of inheritance in respect of immovable property, such as clan lands, was made in the

case of NDEWAWIOSIA d/o NDEAMTZO VS IMMANUEL MALASIA (1968) H.C.D.127. In that case, the appellant was a Chaga by tribe and the youngest daughter of her deceased father, out of five daughters surviving him. She was claiming recovery of the land from the Respondent, who was the nephew of her deceased father who had then inherited such land, on the ground that females are not entitled to inherit clan land and on the assertion that prior to his death the deceased had asked the Respondent to take charge of the land.

- 3.12 Rule 20 of the Local Customary Law (Declaration) (No.4) Order 1963, GN. 436 of 1963, provides thus: "Women can inherit, except for clan land, which they may receive in usufruct but not sell. " With regard to this provision of Rule 20, Saidi J, as he then was, made a progressive decision in the following terms:

"It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equity daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality"...

- 3.13 This decision of the Court, however, does not appear to have had much support. For a decade later another decision by the same court gave support to the stand that was the decision of Lugakingira J. of Rule 20 in the case of CLEMENTINA TIKENGWA and ANOTHER VS TRASEAS KABOGI.³ The dispute involved again on the right of women to inherit clan land. The learned Judge applied Rule 20 to deny the daughter and widow of the deceased full inheritance of a portion of clan land held by the deceased.
- 3.14 On the other hand, the enactment of the Bill of Rights in the Constitution in 1984, has given new impetus to our courts, to declare null and void for being laws, unconstitutional any provision of any other written or un-written that appear to conflict with or undermine any of the constitutional provisions relating to the declared human rights which are the rights of equality of all men and against any aspect of discrimination.
- 3.15 Further in the case of BERNADO EFRAIM VS HOLARIA PASTORY AND GERVAZI KAIZILEGE, H/C (PC) No. 70/89, (MZ)) (Unreported) the Civil Appeal High Court, of G.N 436 (Mwalusanya, J. declared Rule 20 unconstitutional for being inconsistent with Article 13(4) of our Constitution which bars discrimination on account of sex. His Lordship then declared that under section.5(10) of Act No. 16/1984, Rule 20 of the Rules of inheritance, G.N 436/1963 had been qualified, such that male and females have now equal rights to inherit and sell clan land. It was further declared that Rules governing the inheritance of Holding by Female Heirs (1944) made by the Bukoba Native Authority which in rules 4 and 8, entitle a female who inherit self acquired land of her father to have usufructuary rights with no power to sell that land, to be void and of no effect.
- 3.16 It is to be observed that by the time this report is being written the case is on appeal and ,still to be determined by the Tanzania Court of Appeal. Nevertheless, by the very nature of court decisions and their dissemination, coupled with the problem of communication and

³ (1978) LRT

⁴ Act No. 16 of 1984

level of literacy among the majority of our people, such decisions cannot reach the majority of our people and promote their awareness of the same within a short span of time; nor can such decisions cover every aspect of the problem at one time. For courts do not, by their very mode of operation, search for people's problems or disputes for resolution. They have always to be moved by the aggrieved party on a particular issue. Hence the need for a legislative measure.

- 3.17 No doubt, such practice of vesting the whole estate in the hands of the heir was appropriate during the era of tribal close communities.

For then the heir held the in trust for the other members of the estate family - his juniors - on the presumption that upon his death the next senior-most son would inherit the same and such order of succession would continue until all the- junior brothers have died, after which the succession would then fall upon their sons, starting with the son of the senior-most of such brothers. But we have now broken such barriers. We no longer have such close tribal communities, Tanzanians are now migrating from tribe to tribe, and, tribal, religious mixed marriages mixed marriages are on the increase. And so is urbanization.

- 3.18 With mixed marriages being on the increase, and matters of inheritance being essentially banded upon marriage, or family relationships, the question to be asked is which law should apply to do justice to the deserving heirs? For instance, under Islamic rules of inheritance where a non-Moslem woman is married to a Moslem man, on the death of the husband, the wife, unlike where she is also a Moslem, is denied any right to inherit anything out of not only the estate that belonged to her deceased husband but also the property that had been jointly acquired with her during the marriage. That, we think calls for a legislative measure to rectify the same, in order to protect the property interest of such non-Moslem wife. To leave that unchanged would be to promote and condone discrimination on religious grounds. We are happy to note that almost all the Moslem leaders we met and spoke to did appreciate the need for such legislative measure, as it would not conflict with the Quranic rules. This is so because in the eyes of most Moslems, such a mixed religious marriage is not recognized at all; and the Moslem husband falls in the category of a rebel in that he casts himself outside their jurisdiction. Hence the need for legislative intervention.

- 3.19 There is also succession for an age-old problem of status in children begotten out of wedlock. These fall into two categories: there are those who are known and live with the other members of the family of the lawful marriage, and those who are kept secret but remain known only to the father and the mother of the child so begotten out of wedlock, who then turn up and get introduced by their respective mothers at the funeral of the putative father.

- 3.20 Besides, there is the problem of the status of adopted children in the succession to the estate of the deceased adopter.

- 3.21 Another problem in the administration of deceased's estate is delay in effecting payment to the beneficiaries. This is due to centralized deposit accounts. As a result all payments of money from estates have to be effected by the Judiciary's Head Office. Due to the problem of records keeping, and incompetence of some court clerks in the lower courts, payments of such funds have at times, been delayed up to ten years! Thus in some cases some

beneficiaries die before receiving and enjoying such inheritance benefits. Another cause of delay in disposal of probate and administration cases is the clearance of estate duty.

3.22 Where the deceased leaves behind a will, much of the injustice so far experienced by some surviving wives and children is avoided, but unfortunately most of our people do not know how to draw up a will that could be honoured in a court of Law. For many of them are not aware of the requirements of the law and there has been lack of initiative to educate them on such important basic socio-legal obligation in our society. This, therefore, is another area that calls for an appropriate legislative measure to facilitate the making wills.

3.23 It is worth pointing out at this juncture that while Tanzania Mainland has led the way in the reform of Marriage laws in Sub-Saharan Africa, it has lagged behind in the reform of the laws of Succession. In this regard, Kenya, Uganda and Zambia have paved the way in this part of the World. It is imperative that Tanzania should strive to therefore catch up with her neighbours, to bring about a really just society for her people.

It is with such background that it is strongly considered that Reform of the law of succession in the various aspects highlighted above is now ripe. It is with this in mind that the Law Reform Project on the Law of Succession the subject of this report was commissioned by the Government early in January 1987, to be undertaken by the law Reform Commission subject should be considered appropriate for action by the Government.

CHAPTER TWO

1.0 THE LAW OF SUCCESSION REFORM PROJECT:

1.1 Reform of the Law of Succession/Inheritance in Tanzania has been on the Government's agenda for quite along time. The first attempt was in 1968 when the Government appointed Chief Amri Dodo (MP) as Chairman of a Committee charged with the duty to look into problems encountered in the administration of deceased person's estates. The Committee came out with two proposals to the Government to:

- (i) Enact a Unified Law of Succession which would do away with differences among the various customary rules Succession the Inheritance in the country.
- (ii) Give powers/jurisdiction to the Administrator General to deal with all causes/cases regardless of size of the estate.

1.2 Records available show that although a White Paper followed by a Cabinet Paper on the Amri Dodo Committee Report were prepared, the matter was shelved before final action was taken by the Government of the day. It was not until 27th January, 1987 that the Attorney General referred the matter to the Law Reform Commission of Tanzania, with a mandate to study the problems in the present law of succession and recommend its reforms to the Government.

2.0 TERMS OF REFERENCE:

2.1 The Terms of Reference of the current Project were as follows:-

"..... so far in this country, there are three main systems of success in operation that is, the customary law of succession system which governs Africans; the Islamic Law system of succession which governs Hindus. This set up certainly has the negative effect of reinforcing and perpetuating racial and tribal divisions amongst citizens. In addition, some features of the said systems are inconsistent with the principle of equality, which is the cornerstone of our policy of Ujamaa, while others are repugnant to our morality and sense of justice. The Government is therefore of the mind that, this set up should be replaced by one system of law under which a Uniform law applicable to all citizens could be operated."

- i) To study and determine weaknesses in the present system of laws of succession, and
- ii) Make recommendations with a view to the institution of a system of succession with a law which is uniformly applicable as in the regime of the Law of Marriage.
- iii) In making its report the commission shall have regard to:
 - a) The principle of equality, and
 - b) Freedom of Worship and Conscience."

3.0 THE WORKING COMMITTEE:

On receiving the above Terms of Reference the commission constituted a Committee whose membership was drawn from various sectors of the community as follows:-

- i) The Law Reform Commission of Tanzania itself,
- ii) The Administrator General's Office,
- iii) The Ministry of Lands,
- iv) The Faculty of Law, University of Dar es salaam,
- v) Baraza Kuu la Waislam Tanzania (BAKWATA)

3.2 The Committee studied the Terms of Reference and formulated the following issues:

- (i) Whether there was a need for the unification of customary law and Statutory law of inheritance in Tanzania
- (ii) Whether or not illegitimate children should be allowed to inherit from their natural fathers;
- (iii) Whether or not all children of the deceased person should inherit equally with disregard of sex or age of the children;
- (iv) Whether new rules should guarantee family provision or statutory legacy;
- (v) Whether it is desirable to introduce a single system of rules on Wills different from rules for Islamic, customary or statutory Wills;
- (vi) How should the freedom of testation be entertained in our law of Wills?

3.3 But, even after the establishment of the Committee and consequent determination of the above issues it took the Commission a long time before the preparation of a Working Paper and actual carrying out of the research. The main problems hindering the implementation of Project on the Law of Succession/Inheritance were:

- (i) Lack or absence of Consultants knowledgeable and interested in the subject;
- (ii) Lack of sufficient funds to undertake the project;
- (iii) Difficulty in convening meetings of consultants and researchers for purposes of charting out convenient research strategies;
- (iv) The need to carefully examine the multifarious interests centred on religion, customs, traditions and the law;

Notwithstanding the above difficulties a Discussion Paper was finally prepared and publicly launched in May 1992, that is approximately six years after the Terms of Reference had been drawn by the Government.

3.4 The main thrust of the Discussion Paper was:

- (i) To highlight the salient features of the law of succession in both its substantive and procedural aspects;
- (ii) To put across to members of the public, the Commission's intended proposals.

While undertaking the examination of the Reference, Commission had to take note of the concern of the Government on the sensitivity of the subject to observe and take into account:

- (a) The principles of equality; and
- (b) Freedom of worship and Conscience.

4.0 METHODOLOGY USED

- 4.1 Between 12th September, 1992 and at the time of writing the Report, the Commission has employed the following strategies:
- (i) Conducted Library and field research;
 - (ii) Prepared and distributed a Working Paper and Questionnaires;
 - (iii) Issued Press Releases,
 - (iv) Visited all the Mainland regions in the country and four neighbouring countries (i.e. Kenya, Zambia, Zimbabwe and Uganda).
- 4.2 During the visits members of the Commission, Consultants and Researchers conducted public meetings, discussed with targeted groups (such as religious leaders, women, government officials, traditional leaders e.t.c.) The main purpose was to gather information, views and opinions relating to the problems arising from the existing laws of Succession/ Inheritance in the country. Visits to neighbouring countries were conducted with a view to making comparative studies on similar problems.

5.0 GENERAL POLICY CONSIDERATIONS:

In the process of compiling this report based on research findings and recommendations, the Commission has been guided by the following Considerations:

- (i) The proposed Law to be recommended must be compatible with the way of life based on Tanzanian's conditions and experiences. At the same time such a law must to a great extent recognise the existence of a diversity of communities in Tanzania Mainland, the rapid political, social, economic changes taking place both in rural and urban areas and the need for national unity and equality.
- (ii) The proposed law should aim at equitable distribution of deceased person's estate amongst the beneficiaries without discrimination on basis of age or sex.

6.0 CONSTITUTIONAL PROVISIONS:

- 6.1 (i) Protection of Freedom of Conscience or Religion: The proposed law must take into consideration Provisions of the Constitution of the United Republic of Tanzania 1977 (as Amended by Act No. 15 of 1984, Articles-12-28 and especially Article 19 (1) and read together with Articles 29 and 30. Article 19 and (2) deal with protection of freedom of conscience or religion:

Article 19(1)

Every person is entitled to freedom of thought, conscience and option in matters of religion

Article 19 (2) :

Subject to the relevant laws of , the United, Republic, the profession, practice, worship and propagation of religion shall be free and private affair of an individual; and the conduct and management of religious communities shall not be part of the function of the state.

6.2 The purposes of these Articles is to demonstrate validity or otherwise of the argument by the Muslim community on the sanctity of their laws of Succession/Inheritance and that Parliament or the State has no mandate on the basis of the above provisions to interfere with their law; for to do so would be tantamount to infringing on their rights to freedom of conscience and worship.⁴

This view was unanimous almost in all areas of the country where Islam has a stronghold on the community.

6.3 The Commission believes that the laws of succession, though intimately bound with religion in the case of Muslims and others, are proper matters for state legislation. There is no difference between Muslims and Christians, in that the Law of the state may regulate matters relating to personal law even if such state laws are different from the Muslim and ecclesiastical laws and the same is true with Hindus.⁵

(ii) Discriminatory Laws:

6.4 It is provided in Article 13 of the Constitution that:

13 (1) All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.

13(2) Subject to this Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory of itself or in its effect.

13 (5) For the purposes of this section the expression different “discriminatory” means affording treatment to different persons attributable only mainly to their respective descriptions by race, place of origin, political opinions, colour, occupation or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

From the foregoing provisions it is clear that Parliament is not expected to enact laws which will discriminate one group of person from the other.

4 Article by Sheikh Amrani Kilemile, “Islamic Rules of Inheritance”, in vol. 9 Mizani, 26th July, 1991, Swali Na. 1469 Bungeni; msimamo wa Waislamu Morogoro Juu ya Uamuzi wa Serikali wa Kutunga Sheria moja ya Mirathi” using Art. 19 910 and (2) of the Constitution (97) see also Kenya Commission Report on the Law of Succession

5 Thrust of the argument borrowed from Commission on the Law of Succession Report Kenya (paras 19 - 23)

CHAPTER THREE

A: EXISTING LAWS

1.0 THE STATE OF LAW:

- 1.1 The Law governing succession in Tanzania (Mainland) is diverse as are the communities making up our society. There are four competing legal systems with which a deceased's estate may be administered especially when one dies without leaving a will. These systems' of laws are Statute Law, Customary Law, Islamic Law and Hindu Law. The connecting factor to any of these legal systems gives rise to a problem to internal conflict of laws leading to the question of choice of law in the distribution of a particular deceased person's estate.
- 1.2 It is noted, when reference is made by writers to statute law in Tanzania Mainland this implies a discussion on the Indian Acts (Application) Ordinance, Cap. 2 which made applicable to Tanzania (Mainland) the Indian Succession Act, 1865 and the Hindu Wills Act 1870. In fact there are many pieces of legislation in Tanzania (Mainland) which regulate the question of succession/inheritance at a procedural level¹⁴ and it is important to take note of their existence and what they provide before a detailed examination of the weaknesses arising therefrom.

2. STATUTE LAW:

- 2.1 The relevant law is the Indian Succession Act of 1865 which was made applicable to Tanzania by the Indian Acts (Application) Ordinance, Cap.2. Under section 24, a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

There are two types of intestacy:

- (i) Total Intestacy
- (a) Where a person dies without leaving a Will at all; or
 - (b) A person dies leaving a defective Will, for example, where the said Will is not attested according to the law; or
 - (c) May occur by a Will becoming in - operative for example where a legatee predecease the executor (intestacy on the beneficial interest but not as to a legal estate).
- (ii) Partial Intestacy - this may occur where only a part of the beneficial interest is disposed of.
- 2.2 It is provided in section 26 of the Indian Succession Act that where a person dies intestate such property devolves upon a wife or husband or upon those who are of the kindred of the deceased. Succession to such an estate is effected according to the following basic rules prescribed by the Indian Succession Act, 1865:

Sections on Probate and Administration chapter V

- (a) Section 27 provides that:
 “Where the intestate has left a widow, if he has also left any lineal descendants, one-third of his property shall belong to his widow and the remaining two-thirds shall go to his lineal descendants: ... if he has left no lineal descendants, but has left persons, who are of kindred to him, one half of his property shall belong to his widow, and the other shall belong to those who are of kindred to him... and if he left none who are of kindred to him the whole of his property shall belong to his widow”.
- (b) Section 28 provides that:
 “Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are kindred to him but not being lineal descendants, according to the rules herein contained; and where he has left none who are of kindred to him, it shall go to the Crown (State)”.
- (c) Section 29 and 30 provide that:
 “The rules for the distribution of the intestate’s property after deducting the widow’s share (if he has left a widow) amongst his lineal descendants, are; where the intestate has left surviving him a child or children, but no more remote lineal descendants through a deceased’s child, the property shall belong to his surviving child. Equally If there be only one, or more shall be divided all his surviving among children”. The above rule also applies where the intestate is survived by no children but grandchildren and great grandchildren. The deceased’s father, mother, brothers and sisters, inherit only where there lineal descendants are no surviving him. They share half of the estate where there is a widow surviving. The husband surviving his wife has the same rights in respect of her property, if she dies intestate, as the widow has in respect of her husband’s property, if he dies intestate.⁵
- 2.4 The Indian Succession Act 1865 does not apply to, the estate of a deceased moslem. It applies to Christians and all those of European origin. Illegitimate children are excluded from inheriting their fathers’ estate, but they may only inherit from the estate of their deceased mothers.
- 2.5 The main consideration in this Law is the welfare of the deceased’s immediate family members and dependants. The Law is more inclined towards equality of division among the heirs of the same degree. It does away with the distinction between male and female children of the deceased. They inherit equal shares.
- 2.6 The law does not make any distinction, as regards succession to movable and immovable property provided that the said properties are situated in the territory.
- 3. CUSTOMARY LAW:**
- 3.1 A number of pieces of legislation listed below provide for the application of Customary Law in matters of Succession/Inheritance. Customary Law may be defined to mean that which or is either written, law declared unwritten but is recognized by the community as having the force of law. It is applicable to African members of the Community irrespective of their religious affiliation.

- 3.2 In Tanzania (Mainland) there are as many Customary Laws as there are tribal groupings. The Customary rules of testate and intestate Succession are embodied in the Local Customary Law (Declaration) Order (No.4) of 1963 and they apply to all local Communities in the Districts where the declaration was specifically extended.⁷ It is noted that these rules apply only to patrilineal communities which are 80% while matrilineal communities which are 20% in Tanzania (Mainland) are excluded
- 3.3 Very little is known in relation to Customary Law rules of Inheritance/Succession with regards to the –Matrilineal Communities,⁸ to the extent they remain disadvantaged because the Customary Law applicable in those communities remain to be proved in the court of law as a question of fact whenever they are invoked.
- 3.4 The main heirs of the deceased estate are 10 in number; children grand children, brothers, (sons and daughters), sisters their uncle and children, father, paternal and aunts, husband or wife. Where the deceased leaves a son or sons and daughters, they will inherit all of his property exclusively.
- 3.5 Inheritance is in three degrees:
- (i) First degree heirs inherit first and get the biggest share of inheritance. Normally the first son from the first house is the heir in the first degree.
 - (ii) second degree heirs include all other sons and they inherit a bigger share than daughters who are normally heirs in third degree.
 - (iii) third degree heirs are normally the daughters of the deceased. Their share of inheritance is normally smaller than the heirs in the other two degrees. Where the deceased leaves no sons than the daughter of the first house, will be the heir in the first degree.
- 3.6 Rules 27 and 28 provide that a widow has no share in her husband's estate if there are issues of the union and the husband cannot inherit from his wife who dies intestate, unless the wife left no children or any member of her own family.
- 3.7 Distribution of property among heirs in the second and third degree is effected according to their ages. The older one gets more than the young ones. Males get bigger share than females irrespective of their age.
- 3.8 Illegitimate children are excluded from inheriting their father's estate, but they will inherit from the estate of their mother who dies intestate. Furthermore illegitimate children will only inherit if legitimized in the second degree if they are males and in the third degree if they are females. However illegitimate children will also inherit where there is a will of the deceased father.
- 3.9 Where the deceased left no children or grand children his full brothers and sisters will inherit in the first degree, second brother in the second degree and all the sisters will inherit

⁷ Volume 2 No. 2 December 1988 Tanzania Law Reform Bulletin, p.56. The Declaration set out in the First, Second and third schedules ...the areas subject to the jurisdiction of Chunya, Dodoma, Kasulu, kibondo, Kigoma, Kondo, Manyoni, Maswa, Mbeya, Mpwapwa, Ngara, Njombe, Shinyanga, Singida, Songea, Ufipa, and ukerewe District Councils and to be binbding upon Africans, to whom the local customary law relates. It was extended to many more areas.

⁸ Decision by said, J. (as he then was) in Donald s/o musa V. Tutito s/o Yonathan, (1967) HCD No. 118.

in the third degree.

3.10 Under the Local Customary Law Declaration Order, No.4(1963) males inherit movable and immovable properties absolutely, but females inherit immovable property only for their use during their life time. They cannot sell such immovable property unless there are no male members in the family. However, the High Court of Tanzania in the case of BERNADO EPHRAHIM VS. HOLARIA PASTORY AND GERVAZI KAIZIREGE(PCC) Civil Appeal No.70 of 1989 (unreported) Mwalusanya J. declared this custom as being discriminatory and unconstitutional. It is noted that the situation now obtained in urban areas is different because of the existence of acquired property (leases).

3.11 Rule 24 provides that where the deceased person has distributed part of his estate inter-vivos (While he is living) this portion will be taken into account during distribution after his death. The Local Customary Law (Declaration) Order, 1963 (Law of Persons) GN.179 of 1963 provide that the widow is asked to choose whether she wishes to live as a wife with one of the deceased husband's relatives. If she refuses the offer, no bride wealth is to be paid back and she is free to return to her relatives. On the other hand Rule 77 (1) (Law of Persons) provides that a childless widow is entitled to of the property acquire during her married life with the deceased after the debts of the deceased have been repaid. In practice this is never put into effect.

4. ISLAMIC LAW:

4.1 A number of pieces of legislation provide for the application of Islamic Law in Tanzania (Mainland) in matters relating to Succession/Inheritance where parties are members to the Islamic faith. The following are the pieces of legislation:

- (i) The Succession (Non-Christian Asiatic) Ordinance (Cap. 112) Section 6(1).
- (ii) The Administration (Small Estate) Ordinance (Cap. 30) Section 19(1)(a)
- (iii) The Judicature and Application of Laws Ordinance (Cap. 453) Section 9.
- (iv) The Magistrates Courts Act No.2 of 1984 section 18.
- (v) The Law of Marriage Act No.5 of 1971.
- (vi) The Mohamedan Estate (Benevolent Payments) Ordinance, Cap. 25.
- (vii) The Re-statement of Islamic Law, GN.22 of 1967
- (viii) The Wakf Commissioners Act, Cap. 109.

4.2 In the case of small estates, in terms of S.19(a) of the Administration (Small Estates) Ord. Cap.30, in the case of the administration of the estate of an African Muslim, it is not Islamic Law which will apply in all cases. For Islamic Law will not apply in the following circumstances:

- (a) Where the deceased person had through written or oral declaration provided that Customary Law should apply; or
- (b) Where the deceased person's acts or manner of life show an intention that his estate should wholly or in part be administered in accordance with Customary Law.

5. HINDU LAW:

Hindu Law of Succession / Inheritance, that is the Hindu wills Act, 1870 was imported to

Tanzania (Mainland) through the Indian Laws (Application) Ordinance (Cap. 2) and made to apply to the Hindu Community. However, the paramount difficulty in the application of Hindu Law of Succession / Inheritance is its limited applicability within the Hindu Community. so far there are no known court cases on the subject in the country.

B: INADEQUACIES IN THE EXISTING LAWS:

1.0 General Criticism:

1.1 The main criticism of the system in the existing laws of Succession/Inheritance in Tanzania (Mainland) is the co-existence of a variety of system of laws in one territorial jurisdiction. In such systems of laws their applicability depends on the tribe, race, religion or way of life and this gives rise to a number of problems relating to conflict and choice laws between the different laws.

1.2 It is noted that the problems of internal conflicts and choice of laws was much less during the Colonial period as is the case with post-independence period and as is the case today. As found by the Kenya Commission of Enquiry on the Law of Succession where the people have much in common with the people of this country in their socio-economic changes, this Commission is of the view that interrelation of conflicts has arisen because of the gradual intermixture of Tanzania people, both on intertribal and inter-communal basis, with urbanization and intermarriages, women involvement in economic ventures along side with their spouses outside clan, ethnic or religions affiliation, the integration of Courts, etc. Apart from the above general criticisms, there are defects within each system of law of Succession/Inheritance as shown below:

(a) Statute Law:

1.3 The Indian Succession Act, 1865 is basically codified English law. It is an old piece of legislation which was imported to Tanzania (Mainland) from India as it was in India in 1907. While in India, the Indian Succession Act, 1865 has undergone a number of amendments and modifications, this has not been the case with the one in Tanzania.

1.4 The provisions of the Indian Succession Act 1865 differ from those under the English law today. The Act provides for freedom of testamentary disposition to the extent that the testator/testatrix may dispose of all his/her property by will without providing anything to his/her dependents. It does not give recognition to illegitimate children and makes no distinction between movable and immovable property. It does not apply to Muslims though it may apply to Christians and those of European origin resident in Tanzania (mainland). On the whole the Act is not often resorted to by the Parties, just as is the position in Kenya.

(b) Customary Law:

1.5 Customary law is a branch of law most complained of in matters of Inheritance/Succession. Most of it is unwritten and its existence has to be proved. A lot of concern has been expressed that customary law is inequitable and more often than not leads to injustice in particular to women and children.

1.6 There are as many Customary laws as there are tribes and modes of Succession/Inheritance despite the codification by Local Customary Law (Declaration) Order, (No.4) of 1963 which codified rules of inheritance and wills of the patrilineal tribes of Tanzania (Mainland).

1.7 The resumption by the present laws on the applicability of Customary Law is that all members of the African tribal Communities apply customary rules of Succession/Inheritance irrespective of where they happen to be, places of origin and their religious beliefs. More often than not this has given rise to conflict and therefore choice of law applicable.

1.8 As regards the question of choice of law, two tests have been established. These are:

- (i) The mode of life test; and
- (ii) The intention of the deceased.

1.9 When the question is to choose between application of state law or Customary law, courts have been employing the mode of life test to make that choice. This test finds its root in the Judicature and Application of Laws Ordinance, Cap.453. Section 9 (1) (b) provides that:

“Customary Law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith, in matters of Civil nature - “relating to any matter or status or succession to a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted; ... except in any case where it is apparent, from the nature of any relevant act or transaction, manner of life or business, that there is or was to be regulated otherwise than by customary law.

1.10 The case of RE INNOCENT MBILINYI, [1969] HCD No.283 illustrates how this test is applied by courts. The deceased was a Ngoni married to a Chagga woman under Christian marriage rites. Both were staying in Dar es Salaam. The deceased had left Songea when he was still of tender age, about 7 years. He was educated outside Songea till he graduated with Bachelor of Arts Degree. Both rarely visited Songea or Moshi. They had three children of the marriage. Innocent died intestate and the matter was brought before the High Court to determine which law was to apply in the administration of deceased’s estate. The widow argued that statutory law should apply in administration of the deceased estate so that she could benefit. On the other hand the brother of the deceased argued against application of the statutory law instead advocated for the application of Ngoni customary law in which case the widow would get nothing out of the estate. In the High Court, Georges, C.J. (as he then was) held that: “the deceased had abandoned the customary way of life in favour of what may be called a Christian and non traditional way. There is satisfactory evidence that he was to a large extent alienated from his family and that his children had no connection whatsoever with them.” Therefore statutory law was held to apply.

1.11 In another case of GEORGE S/O KUMWENDA VS. FIDELIS NYIRENDA [1981] TLR 211, the deceased Martin Kumwenda was a Malawian national living in Dar es Salaam and at his death he left a house. The deceased’s wife wanted to inherit a house under statutory law but the deceased’s brother wanted customary law to apply so that the wife should not inherit the house, but that it should be sold and the proceeds be distributed among

the children. The Primary Court invoked the application of customary law and on appeal the District Court overruled the Primary Court and opted for the application of statutory law. In the High Court Kisanga J. (as he then was) ordered a retrial because the two courts below had arbitrarily made a choice of law without first investigating the mode of life of the deceased. Hence in terms of section 89 (2) of the Probate and Administration Ordinance Cap.445, the records were sent back to the Primary Court, for administration and directed that the Primary Court should exercise original jurisdiction in accordance with provisions of the Administration (small Estate) Ordinance, Cap. 30.

1.12 However in the case of ABDALLA SHAMTE VS. MUSSA [1972] HCD N.9, a presumption is made to the effect that in the case of an African living in the villages or rural areas, the law applicable to the administration of his estates is Customary Law rather than Statutory Law.

(ii) **The intention of the deceased test:**

1.13 When an African is also a moslem, there is a problem as to which law is applicable between Customary Law and Islamic Law. The tests which used in making the choices are the written, oral declarations acts, intention or manner of life of the deceased. This test is basically founded in the Administration (Small Estate) Ordinance, Cap.30 (and judicial precedents). Section 129(1)(a) provides inter alia that:-

“the estate of a member of a native tribe shall be administered according to the law of that tribe unless the deceased at any time he professed the Mohamedan religion and the court exercising jurisdiction over his estate is satisfied from the written or oral declarations of the deceased or his acts or manner of life that the deceased intended his estate to be administered according to Customary law.”

Therefore the thinking that, when one dies professing Islam, then Islamic Law will automatically apply in the administration of his estate is erroneous. For African Muslims preference will be given to Islamic Law, unless the deceased is a Swahili. A Swahili is defined to mean, the Bantu people inhabiting Zanzibar and adjacent Coasts, Kiswahili being their language.

1.14 This test under section 19(1) (a) of the Administration (Small Estates) Ordinance Cap. 30 will only apply to small estates where Probate and Administration Ordinance, Cap. 445 also applies. Even if an estate in question does not fall under the ambit of this provision the same test will be applied through judicial precedents and the Judicature Application of Laws Ordinance. This was the position in the landmark case of RE ESTATE OF THE LATE SULEMAN KUSUNDWA [1965] E.A. 247.

1.15 In this case the deceased was a Nyamwezi by tribe and married the applicant in this suit (one of the four wives of the deceased) according to Islamic Law rites. The applicant was excluded from the “Will” of the deceased who purported to leave the entire estate to his nephew. For the applicant to inherit from the deceased’s estate entirely depended upon which law was applicable in the circumstances. The wife was contending that Islamic law did apply an the Administrator General was contending that it was Nyamwezi Customary

Law that was applicable.

Sir Ralph Windham, C.J. found it as a fact that this case did not fall under the ambit of section of the Administration (Small Ordinance Cap.30 and so he resorted to Estates) judicial authorities on choice of law. In this exercise he came to an agreement with the conclusion of Spry, J. in the case of HUSSEN MBWANA VS. AMIRI CHONGWE, Civil Appeal No.1 of 1963 (T) (unreported) where he stated that:

“I hold therefore there are two systems of law which may apply in African Muslims Community, religious law in matters peculiarly personal such as marriage, and customary law which may apply in all spheres of life.”

Sir Ralph Windham added that, it cannot be held that while the rights of an African Moslem wife at and during her marriage are to be governed by Muslim law, her rights of inheritance upon her husband's death are to be governed by her tribal custom, which may give her no such rights.

- 1.16 The status and rights of a wife after her husband's death must be governed by the same corpus of law as governed then before his death. Her rights of inheritance are bound up with her right, or the comparative lack of them, during the matrimony, and are in the nature of counter-balance or safe-guard to her when she loses her protector. He held that law to be applied in the distribution of the deceased's estate is a Muslim law.
- 1.17 In another case, in the matter of THE ESTATE OF THE LATE SALUM OMARI MEREMI [1973] LRT No.80, the deceased was Hehe Moslem. He was an army Officer. He married a member of his own tribe and contracted a Civil marriage. He was a practicing moslem - Justice Mfalila held that applying mode of life test (that he was a practicing moslem) the deceased had intended his estate to be administered according to Islamic Law and not Hehe Customary Law, as the deceased's manner and way of life was far removed from his tribal customs.
- 1.18 At the level of inheritance to the deceased person's estate the apportionment of the said estate is in three degrees as it was discussed earlier. The males are accorded bigger shares when compared to female counterparts irrespective of their age and ability to care for the family. When compared to female counterparts irrespective of their age and ability to care for the family. In fact, in some tribes, where, besides the daughters, there are also sons surviving the deceased, the daughters are denied in toto such right of inheritance. Further, in other tribes it is only the senior-most son who would inherit the whole estate supposedly in trust for the other children.
- 1.19 Thus in terms of the administration of the estate priority is generally given to male heirs and not female heirs. The two Major reasons have been advanced for such differences. First, there is the most common notion that the property (especially land or immovable property) belongs to the clan. In this aspect given the fact that females are likely to get married and join their husbands else where, it is considered necessary that landed property must be left in the care of male members of a given clan. Secondly, there has been the age old common notion that upon parents becoming of age it is the male child who would provide for them.

1.20 The rights of female heirs to landed property under Customary Law are limited to use for life¹² and not disposition. This position is not in accordance with the provisions of the Constitution of the United Republic of Tanzania, 1977 (as amended by Act 15 of 1984) nor the provisions of the Law of Marriage Act, No.5 of 1971 which recognizes equality of right to acquisition, ownership and, disposition of property irrespective of gender.¹³

1.21 Under Customary Law the inheritable property may refer to clan land usually situated in rural areas. This law has been extended to apply to movable and immovable properties obtainable in urban areas whose acquisition might have involved the joint efforts of the spouses in their joint life time.

8. Islamic Law;

1.22 Islamic Law is linked with the Mohamedan beliefs in that it is embodied in the Quran Surat-I-Baqaro (S. II) , Surat Nisaa (S.iv) and Surat-I-Maida (S.V) and is in no way influenced by changes in the society. Majority of Muslims in this country are Sunni of Shafii School of thought Islamic Law is often equated or confused with Customary law, consequently giving rise to conflict of laws (HUSSEN MBWANA VS. AMIRI CHONGWE [1963] 10 DALC 4; RE ESTATE OF THE LATE SULEMAN KUSUNDWA [1965] EA 247; IN E.A. THE MATTER OF THE LATE SALUM OMAR MKEREMI [1973] L.R.T. NO.80; TATU ABDALLAH VS. WAZIRI MUSSA [1975] L.R.T. NO.7; SHARIFA SAID VS. RAJABU SAID [1976] L.R.T. No.52).

1.23 There are conditions imposed by Statutory provisions in-order to determine at what point Islamic Law should be applicable for a given deceased person's estate. Those conditions include marriage, way of life, (what one professed and practiced at the date of his/her death) and the intention of the deceased person at the time of his/her death as to the law to be applied in the administration of his/her estate.

1.24 Under Islamic Law, a non-moslem is not entitled to inherit the estate of a deceased moslem even where for example a moslem is married to a non-moslem wife. A moslem cannot inherit from a non-moslem by birth. Illegitimate children have no entitlement to inheritance.

1.25 There are fixed and unfixed shares of inheritance which are gender based (that is while daughters are entitled to half sons would get one whole and widows are entitled to a share of the total estate of the deceased irrespective of their contribution or number). Where the degree of relationship is equal then the male member takes double the share of the female member. There are various schools of thought within Islamic Law for example Shiite, Sunni e.t.c.

(d) Hindu Law:

Hindu Law is the law applicable mainly to Wills of persons who profess the Hindu religion. However the law applies in certain cases to those of such descendants who have not abjured that religion.¹ By virtue of the Indian Acts (Application) Ordinance (Cap.2) Hindu Law is applicable in Tanzania, as is the case in Kenya.² The Hindu Succession Act of

¹²On a widow's right of residence see *Scholastica Benedict v. Martin Benedict* Civil Appeal No. 26 of 1988 C.A. (unreported).

¹³Section 56-60 of the Law of Marriage Act and Report by the Kenya Commission on the Law of Succession - the Commission of Inquiry Act (Cap 102) page 12

Kenya defines the term HINDU LAW as “the law relating to Succession adopted by any school or sub-school of Hindu Law.”

The Commission has noted as a matter of fact that the tribal communities in Tanzania and Kenya have much common in their socio-cultural outlook in particular with regard to the marriage and Succession laws fortified further by the case of CHARAN. This position is the case of SINGH CHADHA and Another versus MOHINDER SINGH CHADHA AND OTHERS 1961 E.A.C.A. 637 where the Court of Appeal held inter-alia:

- (i) The Indian Succession Act, 1865, was originally applied to the East African Protectorate by the East African Order in Council, 1897, without any exception for testamentary succession to the property of Hindus, Mohamedans or Buddhists, and S.50 of the Act requiring attestation continued to apply by virtue of the application to the Protectorate of the Hindu Wills Act 1870,
- (ii) The effect of the application of the Hindu Wills Act, 1870, to the Protectorate was, on the one hand, to apply to the Wills of Hindus, Jains, Sikhs and Buddhists in East Africa the rules for the execution, attestation, revocation, revival, interpretation and probate contained the Indian in those sections of Succession Act, 1865, which were enumerated in S.2 of the Hindu Wills Act, 1870, while, on the other hand, exempting intestate or testamentary succession to the property of any Hindu, Mohamedan or Buddhist in East Africa wills intestacies occurring (and made and before January 1866 from other provisions of the 1865 Act.
- (iii) in accordance with S.50 of the 1865 Act attestation of the Will of a Sikh made in Kenya affecting property situate in Kenya is necessary and accordingly exhibits “B” and “O” were not Wills.
- (iv) section 57 of the 1865 Act applies to Kenya; accordingly an informal intention by a Sikh in Kenya to revoke a will of property situate in Kenya is not good without more.

This case illustrates the criticisms touching on the Hindu Law. What emerges from this case is that section 30 of the Indian Succession Act 1865 lays down the rules for attesting Hindu Wills and was originally applied to the East African Protectorate by the East African Order in Council 1897, without exception testamentary for 1897, any Succession to the property of HINDU, MOHAMEDANS and BUDDHISTS Equally Section 50 of the Indian Succession Act of 1865 continued to apply by virtue of application to the Protectorate of the Hindu Wills Act 1870.³

Furthermore, it has been observed that the celebrated case of Charan Singh sets out the problems encountered in the Hindu Wills Act 1870, which has relation to the Indian Succession Act 1865 and the Hindu Law and these laws were made applicable to Kenya as well as Tanzania Mainland. The Law in Kenya is in pari material with the law in Tanzania Mainland, hence the problems encountered in Kenya are also

¹¹ Vide: The Law relating to Hindu wills including Hindu Wills Act and the probate and Administration Act by Author Phillips and Sir Ernest John Trowleyan, 2nd Edition - Revised at page 1.

¹² Section 3 (1) of the Hindu Succession Act Cap. 158

³ Vide - Charan Sing Chadra and Another virtus Mohinder sing Chadha and ORS 1961 EACA 637.

encountered in Tanzania Mainland, the paramount difficulty in the application of the Hindu Law under the Hindu Succession Act is its uncertainty. Section 5 of the Hindu Succession Act of 1956 provides that a “Court may ascertain the Hindu law or any custom by any means which it thinks fit, and in any case of doubt or uncertainty may decide as principles of justice, equity and good conscience may dictate.” Apart from the case of Charan Singh quoted above, which has been cited as an authority in all the countries making up East Africa, the Commission has not been able to find

any other case on the matter under reference.

CHAPTER IV

RESEARCH FINDINGS

UNIFORMITY:

- 1.1 Research findings from Tanga, Arusha and Kilimanjaro regions, confirmed a need to enact a unified law of succession which will do away with differences among the various Succession/Inheritance law and rules governing which are considered discriminatory and inconsistent with the principles of equality.
- 1.2 Supporters of the unification of the Law of Succession propose that the process should take into account good customary rules that now exist and are accepted by various communities as well as rules of inheritance which are more open and accessible to many people.
- 1.3 However, a view was expressed from Pangani District rejecting the proposition of unification because if all rules of inheritance including those of Muslim community, which are regarded to be part of the Quran are put together, this will open a flood gate thereby flouting the fundamental principles.
- 1.4 **Of Islam.**
- 1.4 Research findings from Mbeya, Ruvuma, Iringa, Rukwa, and Morogoro regions point to the fact that scattered laws on inheritance bring about uncertainty in the application of the laws. The majority views are that, only unification of the laws of Succession/Inheritance could do away with the problems of uncertainty which brings about confusion and choice of law.
- 1.5 In Morogoro region, however, the question of unification was received with reservations. The exercise of unification was accepted only if it is aimed at strengthening the religious and moral fabrics of our societies; and not interfering with freedom of worship.
- 1.6 Research findings from Kagera region, with regards to suitability of having a uniform law of succession favoured the idea of having more than one law of succession with strong emphasis on the need effect reform and to harmonization of the present laws. The research findings revealed the existing controversy between Customary Law and Islamic Law among the predominant Bahaya tribe. The root cause of the controversy appears to be the concept of the clan land. Customary law should continue to enjoy recognition other than being treated as the cause of problems in the Law of Succession / Inheritance.
- 1.7 The research findings in Lindi and Mtwara regions are divided on whether or not there should be a uniform law of succession of bringing about equality for the purposes among Tanzanians and religions regardless of gender, customs. The other position favours the idea of having more than one law of succession especially having regard to freedom of worship

that is Islamic religion as well as recognition of the role of customs and traditions in our societies.

- 1.8 The research findings in Tabora and Shinyanga regions supports the idea of unification of the scattered laws of inheritance so as to bring them under one umbrella like the Law of Marriage Act No.5 of 1971; with the convert that the Islamic law of succession should be reproduced from the Koran with its Arabic text.
- 1.9 However, further research has revealed that the people in these two regions who are predominantly Wasukuma and Wanyamwezi heavily traditionalists hence still are influenced by their customs and traditions. They still believe that there is nothing wrong with their Customary Law of Inheritance, though they are willing to abolish some of their outdated customs.
- 1.10 In Mara and Mwanza regions, research findings show a divided opinion on the idea of having a uniform law of succession. One position favours a uniform law of succession with the abolition of customary laws and traditions; whereas the other favours the retention of the present system but excluding those customs which are discriminatory and contravene human rights; so that the national identity and traditional values of the societies are preserved, customary Laws and traditions will continue to be recognized in the legal regime of Succession/Inheritance.
- 1.11 On analysing the research findings there emerges the following features on the question of unification of the law of Succession/Inheritance:
 - i) Views have been expressed in favour of unifying the laws of Succession while accommodating acceptable customs;
 - ii) Views which oppose unification of the law on Succession/Inheritance because doing so will unduly interfere with the freedom of worship which is granted by the Constitution. This sentiment was expressed by members of the Muslim Communities;
 - iii) Views have been further expressed that, if the unification of the laws of Succession/Inheritance is to be successfully undertaken, then it must proceed from first recognition of the existing laws, second, reform of certain aspects of such laws which are inconsistent with the provisions of the Constitution and third, harmonize those aspects of laws which are at variance.
 - iv) Unification of the laws of Succession/Inheritance should aim not only the abolition of undesirable customary laws and traditions but also at achieving equality regardless of race tribe and gender.

2. THE QUESTION OF CHILDREN'S INHERITANCE:

- i) Gender based Inheritance:
 - 2.1 In Mara and Mwanza Regions, research revealed that there is divided opinion the people surveyed on among whether female children should be given the right to inherit equally with

the male children. One position favours equality in inheritance expect clan land as well as acquired land, for fear that such property could be transferred to another clan. It was also suggested that the distribution of property should be made according to age. i.e. the young ones should get more than the older ones. The other position does not favour inheritance by female. However, according to the Kurya customary law and traditions, an unmarried female can inherit where there are no male children.

- 2.2 In Mtwara and Lindi Regions, gender based inheritance is governed by Islamic law of inheritance which is discriminatory. Equally customary laws and traditions in particular those relating to immovable property (Clan land) discriminate on gender basis and in fact they deny the right of inheritance to female children.
- 2.3 In Singida and Dodoma Regions, apart from the senior most surviving son being entitled to inherit immovable property of the deceased's father in trust for other children (if any), views were expressed that, as a matter of justice, there should be distribution of the rest of the estate of movable property, on equal basis among all. However, it was further suggested that the surviving children should be free to appoint anybody else among themselves to inherit in trust for them if the senior most surviving son is found incapable of inheritance. and that upon sale of such property the proceeds to be shared on equal basis.
- 2.4 The question of discrimination against female children was confirmed by the research findings to exist in all the areas visited in Kagera Region, where unequal treatment of male and female children was noted. Because a female is expected to get married any time during her life time, she is not considered to be a preferable inheritor. And if she gets anything at all out of the deceased's property (movable property) it is usually half of what a male gets.
- 2.5 In Mbeya, Rukwa, Ruvuma, Iringa and Moroyoro Regions, the majority views favoured abolition of the expressed discriminatory practices among children. However, the Moslem community reiterated the fact that the Quran teachings should be abided by the letter in matters of succession. In Chunya District, the majority of people interviewed admitted that, it was unfair at this particular time in history to discriminate of children in matters inheritance only because of their sex, because parents do toil in life to acquire property for the benefit of all children.
- 2.6 The majority people interviewed in Tanga, Kilimanjaro and Arusha Regions, raised concern over discrimination which is perpetrated by customary rules of inheritance between children of the same parents on gender basis. The research findings revealed that there is need to draw up rules of inheritance which will take into account principles of equality between sexes. However there was divided opinion among the people surveyed on the right of female children to inherit fully the clan land like their male counterparts. Nevertheless the majority of people interviewed support the idea of female children to inherit equally with male children the acquired land.
- 2.7 In Tabora and Shinyanga regions, research has revealed that custom and tradition among the Wanyamwezi and Wasukuma still have a big influence because many people believe that there is nothing wrong in inheritance although the abolition of outdated customs and

traditions was proposed. A case in point is the discrimination of female children on inheritance simply because they are expected to get their share of inheritance through marriage. However this position is negated by the fact that the wife was not justified to get share of her husband's property because of payment of dowry on her. *Masunga Musobi v. Ndege Likuba MZ (PC)* Civil appeal No. 67 of 1984 (unreported) (see footnote No. 20 for the facts and Judgement).

3. RIGHT OF CHILDREN BORN OUT OF WEDLOCK TO INHERIT THEIR FATHER'S ESTATE: ¹⁴

- 3.1 On this question, the research findings in Tabora and Shinyanga Regions, revealed a mixed feeling on the issue of the right of inheritance on the part of a child born out of wedlock by the mother and brought to the father who is not a natural father of the child. 66% of the people interviewed did not accept that such a child should have any right of inheritance from the father other than his natural father.

On the other hand about 29% supported the idea that the child born out of wedlock by the mother could have a right to inherit from a step father provided that a child is a daughter and the mother does not know her natural father. As far as boys are concerned opinions were divided. Some said that the boy should inherit from his mother as is customarily done and others were of the opinion that if no one claims the child until adulthood and one has enjoyed the results of his labour then he will be entitled to be counted as one of the deceased's children with full rights of inheritance from the father's estate. This should be considered as an informed adoption procedure.

- 3.2 In Mara and Mwanza regions, research findings show a divided opinion on whether or not children born out of wedlock have right of inheritance. One position favours the right to inherit by children born out of wedlock provided there is period recognition by the deceased family members or legitimization has taken place. Nevertheless the distribution should be based on the productivity, loyalty or a set down percentage by children born out of wedlock to preserve sanctity of marriage, morality and good customs and traditions.
- 3.3 In Mtwara and Lindi Regions, opinion was expressed on the following divergent views:
- (i) Children who are born out of wedlock are faultless/innocent hence they should not be denied the right to inherit from their deceased father. The Government was argued to ensure that everyone enjoys equal rights.
 - (ii) Giving a right of inheritance to these children contravenes both customary law as well as religious tenets. No recognition whatsoever should be given to this category of children.
- 3.4 The research findings from Singida and Dodoma regions revealed that, children born out of wedlock and introduced to and accepted by the members of the family of the deceased

¹⁴The Court of Appeal of Tanzania in Violet's case insists on written Wills. In *the Estate of Bruno Kahangwa: Administrator General's Cause No.3 of 1987* Initially probate and Administration Cause No.12 of 1987 (unreported) Dar es Salaam High Court; and *Violet Ishengoma Kahangwa and others v. The Administrator General/Endosia Kahangwa (Mrs)* Civil Appeal No. 17 of 1989 (Unreported).

should be entitled to a share in the estate of their deceased father equal to those children of lawful marriage. Most of the people interviewed shared the view that children whose births have been kept secret by the deceased father and remain unknown to the deceased's family could only have an equal share with other children provided that the deceased's partner produces a birth certificate signed by the putative father together with his passport size photograph. On this point, however, the majority of a group of women interviewed in Mpwapwa district objected to give any share of the alleged deceased father's property to these children despite the evidence to certify that the deceased was a putative father, on the ground that such children are normally given much more property by the putative father.

- 3.5 In Kagera region, acceptability of children outside marriage for the purposes of inheritance, was noted to be questionable. Such children could be accepted if prior to the death of the alleged father of the children had shown that they were his, and the fact that the children born out of wedlock had been introduced to the family of the deceased. Among the Waha of Ngara district, children born out of wedlock are not recognized unless their father had put aside distinct property in respect of such children and that of the other. However, children of the father outside marriage are said to stand a better chance of getting a share of the deceased's property rather than children born by the mother outside marriage.
- 3.6 There was unanimous view of the people interviewed in Mbeya, Rukwa, Ruvuma, Iringa and Morogoro regions to the effect that, children begotten out of wedlock by either a father or a mother should also be 'provided with a share of inheritance but added that children born out of wedlock by father should only inherit from father's share.

The same idea was suggested that children born out of wedlock by mothers should only inherit from their mother's share. In Njombe district, doubts were expressed that total exclusion of children born out of wedlock from inheritance where there is obvious acknowledgement of parental links between father and child, could be detrimental to the child since this could mean discriminating true or real children of a deceased parent from those born in wedlock.

- 3.7 The research findings in Kilimanjaro, Arusha and Tanga Regions, revealed that there is acceptance of the idea that children born out of wedlock who have been accepted by the deceased should not be excluded from inheritance of the estate of their deceased father. It was discovered that, in some of the communities visited there exists procedures to legitimise children born out of wedlock. This is done either by marrying the mother of a child or by performing some accepted rituals in the particular community.¹⁵

Reservation noted Chunya District where were some discussants favoured the idea that, children born out of wedlock by father should only inherit from father's share. The same thing for children born out of wedlock by mothers should only inherit from their mother's share.

¹⁵ Violet Ishengoma kahangwa & Other v. the Administrator General and Mrs Endokia Kahngwa, Civil Appeal No. 17 of 1989 (unreported). should only inherit from their mother's share

6. PROTECTION OF WOMEN'S PROPERTY INTERESTS UNDER THE LAW OF SUCCESSION:

A. WITH REGARD TO CLAN LAND/PROPERTY.

It is the customary law principle among the Bahaya that the clan interests must be protected for the benefit of members and not for the benefit of outsiders. Since women leave their families on marriage and accompany husbands who belong to different clans, it is a common fear among the Bahaya that if females are given the right to inherit the clan property, there are great chances that they may transfer clan (land) property to strangers.

There is a traditional Bahaya saying that "A female was born looking outside her family / clan, whereas a male was born looking inside the residence. In other words, a woman is simply considered an outsider in so far as clan property interests are concerned."¹⁶

This position is also illustrated by a number of decided cases both by the High Court and the Court of Appeal¹⁷ with the exception of such cases as have been decided by the same courts', after the enactment of the Bill of Rights in the Constitution.¹⁸

¹⁶"Outsider" means a member of a different clan (a married woman/widow) see Peter S. Rugarabamu v. Constantin—Kijiza (MZ) (PC) Civil Appeal No.76 of 1987 (unreported).

¹⁷Boniface Mhigi v. Philemon Mhigi, [1967] EA 38 at 66; Deocres Lutabana v. Deus Kasha I Civil Appeal No.5 of 1981 (unreported) now it appears in [1981] TLR 122 (CA); Pastory Ijupo v. Winifrida Kailu & Felician Bigambo, (PC) Civil Appeal No. 35 of 1985 (unreported) Mwalusanya J. which cited Deocres Lutabana v. Deus Kashaga, [1981] TLR 122 (CA) Exceptions are such cases as Ngundwa & Two others v. Ibrahim Hassan, (PC) Civil Appeal No. 160 of 1986 (unreported) in which Katiti J. maintained that "where a deceased husband leaves no heir or relative the widow has absolute rights of inheritance and vice versa.

¹⁸In Bernerdo Ephrahim v. Holana Pas tory & Gervasi Kaizilege, (PC) Civil Appeal No. 70 of 1989 (unreported) Mwalusanya J. attempted to construe rule 20 of the GN. 436/1963 in the light of the constitutional amendment brought about by Act 15 of 1984.

But in *Gaspari Lutagwerera V. Samson Lutoha*, Civil appeal No. 278 of 199 (unreported) Lugakingira J. cautions that one must consider the rationale of patrilineal orientation to inheritance.

(b) In respect of property acquired jointly during Marriage.

4.2 Under S. 114 of the law of Marriage Act 1971, where marriage comes to an end by divorce, spouses are entitled to an equitable share of the matrimonial property that has been acquired through their joint effort during the marriage. However such property interest of the wife is not at all protected when the marriage comes to an end upon the death of the husband. This, as we have noted earlier, is because of the restrictive provisions of the customary law and Islamic law.

B. POSITION REGARDING MOVABLE PROPERTY:

4.3 A common practice was noted in various places visited whereby immediately after the death of a husband, the wife (widow) is kicked out from the matrimonial home¹⁹ by relatives of the deceased under the pretext of safeguarding clan interests, particularly so in cases where a widow refuses to be inherited by one of the deceased's relatives. Instances were noted to the effect that in some cases women are harassed and molested even by their own sons and were not given chances of consenting to be inherited by any of their deceased's relatives. With regard to family property, generally a wife in Bukoba does not have an automatic right to it. Even where such a right is ascertainable, it is vested in the hands of her husband who is considered as a bread earner.²⁰

For jointly acquired property husbands have always had an upper hand in its management, except some few families which have adopted a Western way of life. It was further noted that when a wife dies, there is no controversy because a woman is considered to have neither testamentary powers nor wealth of her own. However when a husband dies, the question as to who should inherit the deceased's property become very crucial, particularly for those who still adhere to customary law practices (even among the privileged or educated groups). For even relatives of the deceased husband interfere with the property and harass the widow until she quits the matrimonial home. This abounds in all Regions.

4.4 The position in Tanga, Arusha and Kilimanjaro regions is that, there is a need to enact a law which will give and guarantee a widow a share of her husband's estate when he dies.

4.5 In Sumbawanga District, it was proposed that, the right to inherit the deceased person's property should be limited to family members, that is the surviving spouse should be left to develop and manage the family property without interference from other relatives because they too have their own families and property to take care of this point was reiterated in Mbeya, Ruvuma, regions, Iringa and Morogoro regions.

¹⁹ A widow has no right of residence and this as found in the decision of the Court of Appeal in *Scholastica's* case even though under rule 27 of the GN. 436 of 1963 there is a limited protection accorded to a widow

²⁰ Contrary view is found in *Masunga Musobi V. Ndege Lukuba*, (PC) Civil Appeal No. 67 of 1984, (unreported Mwalusanya, J).

- 4.6 In Tabora and Shinyanga Regions, traditionally a wife under the Sukuma and Nyamwezi customs, was inheritable when a husband dies. There was no justification for a wife to get a share on the husband's property because of the dowry paid on her. Whatever was produced was for the children and the wife was to benefit through them.
- 4.7 The research findings however revealed a divided opinion on whether or not women's share of family property be protected by law when the husband dies, as in the case of the Law of Marriage Act, of 1971. About 85% of the people interviewed agreed to the idea of protection of this right and 15% dissented. This shows that the majority of people see the need to bury this custom and acknowledge women's rights over family property.
- 4.8 In Mtwara and Lindi Regions, the majority of the communities interviewed are matrilineal.²¹ However, research revealed that due to religious, social and economic changes which are taking place now days, the significant portion of the communities do inherit partilinealy. This is in particular with regard to those who profess Christian or Islamic religion. Traditionally there were no permanent marriages and the husband had no landed property. On marriage the husband moves to the wife's family and the children belong to the mother. Presently, wealth is acquired by the husband as head of the family, thereby strengthening the marriage institution, whereby the rights of inheritance by the wife are recognized.
- 4.9 In Mara and Mwanza regions, research findings reveal a divided opinion on the need to protect property interests on wife/wives. One position favours the idea of wife to inherit property acquired jointly during the subsistence of the marriage except clan land and acquired land.
- 4.10 Equally the husband should have the right to inherit up to 50% of the deceased wife's property. However in some cases the right to inherit is conditional upon the widow accepting to remain permanently at the deceased's home.
- 4.11 It was further suggested that, distribution should be based on percentages set down by law, that is, 10% to 50% depending on whether the marriage is monogamous, polygamous or where there are surviving children of the marriage. In case of a polygamous marriage, productivity is the significant determining factor in the distribution of property, although in some cases, the senior wife might get a bigger share than the others because she is expected to have contributed more.
- 4.12 The other position is to the effect that because of payment of dowry, the wife/wives cannot inherit. It further disallows inheritance by widow/widows for fear that the property could be transferred to another family, although widows could be appointed as trustees on behalf of the surviving children.
- 4.13 In Singida and Dodoma regions, research has established that the proposed law of succession should protect the property interests of the wife over the wealth acquired through joint efforts with her husband. Also when the wife dies, her self acquired property should be subject to probate and administration proceeding, except for the Muslim couples when the husband dies, Succession should apply.
- 4.14 Where upon death the husband leaves behind immovable property, such as residential house (s), the position is that, surviving wife or wives should inherit that property for life for the

surviving children,

²¹ Little is known about matrilineal communities as evidenced in Donald s/o Yonathan (1967) HCD n. 118 (Information from Archives).

- 4.15 There was a unanimous view in Rukwa, Mbeya, Ruvuma, Iringa, Singida Regions Dodoma and Morogoro, that Succession/Inheritance in respect of mixed marriages should be governed by statute law.
- 4.16 In all regions members of the public from the Islamic community strongly protested against the application of the intended reform to administration estates of the to deceased Moslems on the ground that would be interfering with the Qoranic rules of inheritance, which are God given and therefore immutable.

5. PROPERTY CRABBING UPON DEATH: ²²

- 5.1 Property grabbing upon the death of the husband has been found to exist in all the regions visited in Tanzania Mainland. The practice is done by greedy and unjust relatives of the deceased immediately upon death. Both the widow and the surviving children fall victim to the practice.
- 5.2 Research findings reveal that the problem is causing a great concern to each and sundry. It has been proposed that a machinery should be established within the purview of the succession. Because the majority of our people are in the rural areas, it has been found desirable that the Government through Ward Executive officers or Village Executive Officers, or Social Welfare officers should take stock of all the properties and safeguard such properties. Its distribution should be prohibited until an administrator is appointed and administration proceedings finalized. It was further proposed that the officers so appointed be duty bound to submit a list of stock taken on all the properties to the court, which will deal with the probate and administration of the estate proceedings.

²² In some instance property grabbing on the death of a spouse (especially husbands) is done by widows, more so even before death

CHAPTER FIVE

WILLS

1.0 INTRODUCTION

Wills play a very important role in the transmission of deceased person's estates. In Tanzania (Mainland) there is a multiplicity of legal systems and laws on Wills as there are Communities. Problems which are encountered under succession are also abound with Testamentary succession. All in all there are four legal systems and laws governing the making of Wills, these are statutory laws, customary laws, Islamic laws and Hindu Laws. All these legal systems and laws recognize two forms of making wills; oral and written, but each of these systems has its own rules for making a Will.

2.0 EXISTING LAW ON WILLS

2.1 There are differences of definitions on Wills. The Hindu Wills Act 1870 which was made applicable to Tanzania (Mainland) by the Indian Acts (Application) Ordinance, Cap. 2 defines a Will as:

[T] he legal declaration of the intentions of the legal testator with respect to his property which he desires to be carried into effect after his death.

Rule 1 of the Local Customary Law Declaration Order No.4 of 1963 (GN.436 (1963)) defines a will as follows:

A will is an attestation made freely by a person in his lifetime showing his intention as to how he would like his property to be distributed after his death.

Under Islamic law a will or wasiyer or Woasia means:

.....a direction by which a person directs his heirs or personal representatives regarding the distribution of his death although it may include expressions or wishes as to other matters.²³

In Kiswahili Wosia means:

.....zawadi ya mali anayoitoa mwenye kumiliki akampa mtu mwingine baada ya kufa yule mwenye kuusia.

2.2 All in all, there are two distinctive meanings of the word "Will". The first is metaphysical, and denotes the sum total of what a testator wishes or wills to happen on his death.

The second which is physical and more common denoting the document or documents in

²³ Abbas Mithain, Islamic Wills, the World Federation of K.S.I. Muslim Communities Stanmore Middix 1994 at p.16

²⁴ mellows, A.R. The Law of Succession, 4th Edition, 1983

which that intention is expressed. Professor Mellows²⁴ sums it all in the following statement:

A will in the metaphysical sense may be defined as a declaration in prescribed form of the intention of the person making it of the matters which he wishes to take effect on or after his death, until which time it is revocable.

- 2.3 These definitions presuppose the following characteristics of a Will:
- (i) The scope of the will is not confined to dispositions of property only, it can also appoint executors of the Wills, give directions as to burial ceremonies among other matters that a Will can provide;
 - (ii) A Will operates as a declaration of intention. Making a Will, one is not at all disposing of his property *intervivos* (when he/she is still alive).
 - (iii) It must, usually, be in a prescribed form.
 - (iv) A Will is revocable unless after making it the Testator ceases to be of sound mind or loses his testamentary capacity.
 - (v) A Will takes effect on the death of a testator, and until the testator dies, heirs have no interest in the estate of the testator.
 - (vi) A Will is ambulatory. It is capable of dealing with property acquired after the date it was made, provided that the said property is owned the testator at the time of his death.

3.0 WILLS UNDER STATUTORY LAW:

- 3.1 Wills under statutory Law are governed by the Indian Succession Act, 1865 which was made applicable by the Indian (Application) Ordinance Cap.2. Under statutory law muslims are excluded from the application of the provisions of this law. It does not even apply to Africans who are non-Christians.
- 3.2 Under this law any person who has attained 18 years of age and above, of sound mind, may dispose of his property by Will. A married woman is also free to dispose of by Will any of her property which she is capable of alienating during her life time. Nevertheless a person who is insane may make his Will during an interval in which he is lucid. A Will which is proved to have been made by a testator while he was of unsound mind will be rendered defective.
- 3.3 According to section 50 of the Indian Succession Act, 1865, a testator/testatrix must execute his / her Will according to the following rules:
- i) "The testator shall sign or shall affix his/her mark to the Will, or it shall be signed by some other person in his presence and by his direction.
 - ii) The signature or mark of the testator/testatrix or the signature person signing for him/her shall be so placed, that it shall appear that was intended thereby to give effect to the writing

as a Will.

- (iii) the will shall be attested by two or more witnesses, each of whom must have seen the testator/ testatrix sign or affix his/her mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator/testatrix a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the Will in the presence of testator / testatrix, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary”.
- 3.4 Under section 82 a testator may bequeath all of his estate to any person he wishes to unless it appears from the Will that only a limited interest was intended to pass to such a person. The testator may make a conditional legacy and until such conditions are met a legatee cannot inherit under the will, but a bequest made with an impossible condition or fulfillment which will be contrary to law or morality is void.
 - 3.5 Section 125 provides that, where a bequest is made absolutely or for the benefit of any person, but the Will contains a direction that the bequest should be enjoyed or applied in a particular manner the legates shall be entitled to receive that legacy as if the Will had contained no such direction.
 - 3.6 An executor of a Will may also inherit under the Will. Before he takes the legacy he must first prove the Will or otherwise manifest his intention to act as an executor of the said Will.
 - 3.7 A Will may be revoked by a subsequent marriage, or by making of another Will or by destroying the Will with the testators intention. Muslims are excluded from the application of the provisions of this law.

4.0 WILLS UNDER CUSTOMARY LAW:

- 4.1 Customary Law Wills are also governed by the Local Customary Law (Declaration) Order, 1963. According to this declaration, any person of the age of 18 years and above, of sound mind is free to make a Will.

It may be a written or oral Will. On making a Will, the testator may appoint his own witnesses to such a will and they must all be present at the same time when the will is made and attest in the presence of each other. Among the witnesses the wife or wives of the testator staying at home at the time of making of such a Will must also be present and attest to the Will.²⁵ Absence of the wife or wives will render the Will to be defective as it was decided by Justice Seaton.²⁶

- 4.2 People benefiting from the Will are disqualified from becoming witnesses to the Will except the wife or wives of the testator. A written Will must be written by a permanent ink and preferably should be printed, or typed. The date of the writing of the Will must be clearly shown on it. A written Will must be witnessed by witnesses who know how to read and write. If the testator knows how to read and write, the number of witnesses required is two (one from the clan and another from elsewhere). If the testar is illeterate the number of

witness required is form two from the clan and two from elsewhere.

- 4.3. The testator must put his signature on the written Will if he is literate and if he is not then he should affix his right hand thumb-print on the Will.
- 4.4. A written will may be registered and deposited in Court. An oral Will must be witnessed by four witnesses; two clan members and two from elsewhere. If all the witnesses die before the testator, the Will cannot take effect and the property will be distributed according to the intestate succession rules. If two of the witnesses die and other two are still alive, the Will will be followed
- 4.5. Rule 28 provides that a testator may give all of his property without necessarily mentioning every item that he will have at the time of his death. Under rule 31 of the rules regarding Wills, one may be deprived of his right to inherit by the testator on the following reasons considered as grave:
- (i) if the heir has committed adultery with the testator's wife;
 - (ii) if the heir attempted to murder, attack or grievously injured the testator or his wife;
 - (iii) if the heir without any justifiable reasons, failed to look after the testator in hunger or in sickness.
- 4.6. Difference of religion is not an impediment to inheritance through a Will. Rule 40 provides that, a husband can leave his crops or property to his wife by a Will till she remarries or for life. A testator may also by Will leave his personal property or part of his inheritance to his friend. The portion to which a friend will be entitled from the estate shall not exceed that of the legal heir.

5.0 WILLS UNDER ISLAMIC LAW:

- 5.1 Under Islamic law, a will has no special formal requirement. It may be oral or written but whatever form it is, must always be proved by witnesses.
- 5.2 An oral will must be proclaimed by the testator in the presence of "just" (adil) adult Muslim males from the testator's relations.²⁷ Windham J.A.²⁸ had this to say under 'the three requirements of an oral Will:
"he who could propound an Oral Will must satisfy three requirements as to pleading, proof and promptness. He must plead the terms or the effect of the will with precision; he must prove precision of what he has pleaded; and he must have put the alleged Will forward with as little delay as is reasonably possible after the deceased's death."
- 5.3 In Islamic law, it is immaterial whether or not a written Will is signed by the testator and formally attested, it is enough if the said Will was approved by the testator before his death. This proposition confirms²⁹ "that the Quran has no specific provisions on matters of inheritance such as:

"first, the Quran provides that, when one makes a bequest he should know his relations and

²⁷Quran S.v. 106, also in a case of Mohamed Thabit Ali Maktari v. Rageh Mohamed Saleh Maktari and others [1966] EA (Sir Clement de Lestang, AG Vice President was of the same view).

²⁸Ali Mohamed Rashid v. Hamis Said Alawi, [1959] EA 877.

²⁹Administrator General Zanzibar v. Nassor Bin Fazil Bin Inassor and Other [1957]

E. A. 159

³⁰Muzera (minor) v. Nazarali Jiwa, [1966] EA 177.

next of kin (Sura 11:180) secondly, one is prohibited to bequest more than a of his property by Will.³⁰ Wicks J. Observed that: “the general rule of the Mohamedan (Islamic of Succession is Law) Law that, a (Moslem) cannot by Will dispose off more than a of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of the effect unless the legal a cannot take heirs consent there to after the death of the testator”.

- 5.4 Justice Wicks in the same case went on to observe that, disposition of b unwillable may be done by the Will of the as Islamic law long they follow testator as principles, otherwise the testator cannot and the court will regard them as being void. He gave an example of payment of funeral expenses and deceased’s debt I which will have to be paid before the testators estate is distributed

Thirdly, taking an oath is an important element on the part of a witness to a bequest by Will, especially on an Oral Will (Sura v. 106). In Islamic law of Succession the Will is an exception rather than the rule because the Quoran has laid down the basic provisions of inheritance.

6.0 RESEARCH FINDINGS ON WILLS:

- 6.1 Research finding in regions, reveals that a practice of writing wills is not common and the reason is that the community believes that to write a will is a bad *omen*. The practice among the Bahaya which is supported by findings obtained in all the Districts visited in Kagera region is that, generally a woman is considered having no testamentary powers. This is because of the very limited rights in the enjoyment of property rights, in keeping with the tradition Bahaya saying that a female is born looking her family / clan or home. In other words, a woman is simply considered an outsider in so far as clan property interests are concerned. However, the practice of writing Wills was found among some of the educated people in Kagera region. It was however suggested that the freedom of attestation be limited to prevent changes of abuse.
- 6.2 In Mbeya, Rukwa, Ruvuma, Iringa and Morogoro regions, the practice of writing Wills was commended with the emphasis that family property be left to be enjoyed by family members and that confidentiality pertaining to Wills be safeguarded.
- 6.3 In Tanga, Arusha and Kilimanjaro regions it was suggested that there is a need for making unified rules on Wills. That all Wills should be in writing, and only in exceptional cases that Oral Wills should be allowed. A proposal was made to the effect that a testator should not be allowed to dispose of all of his property/estate by Will, without making relations/dependents.

The majority view was that one should not dispose of provisions for his nearest his estate by Will to the extent of be only on the question of witnesses on the making of a Will it was proposed that one of the witnesses must be a close relative of a testator for the purposes of ensuring credibility among the beneficiaries/relatives.

- 6.4 Research finding in Mtwara and Lindi regions, revealed that, the majority of people interviewed support the idea of having written Wills as opposed to Oral Wills to avoid fraud and misrepresentation. Equally they proposed to have uniform rules regarding Wills, to the extent that the testator will not be allowed to dispose of all his estate and the need to preserve the secrecy in writing of Wills by excluding the presence of any witness.

- 6.5 Research findings in Mara and Mwanza regions, revealed divided opinion on the status of Wills. One position favours that the testator should be given absolute freedom to dispose of his property by Will. The other position favours the testator be allowed to dispose of only a portion, that is 3 to 1 of his property by Will in order to avoid the possibility of total disposition of property to the detriment of would be beneficiaries.

However, it was emphasized that the idea of making a Will is both desirable and useful and that it eliminates conflict of interests among the survivors as well as giving effect to the wishes of the testator.

A particular proposal was made requiring a testator to make his will before the clan members and the same be witnessed by non-beneficiaries.

- 6.6 The problems arising from Wills relate to diversity of laws, Legal systems and administration in the following manner:

- (i) very few people leave behind Wills. Some people believe that when one writes a Will, he is inviting his own death.
- (ii) the few written Wills more often than not have been found by courts to be defective and have thus been declared void. In many cases such Wills are badly executed.
- (iii) many of those who leave Wills do so on a death-bed when the testator's mind is already impaired. Such Wills are inherently suspicious and courts normally do not entertain them.
- (iv) with the exception of Wills under Islamic Law, one may give away his property without taking into account the needs and welfare of his family and Dependents. This position is considered unfair.
- (v) complaints have been voiced that the formal requirements for making a will under Customary Law are too stringent. There are too many witnesses required to sign on each others presence for a written Will or witness to an oral Will. This requirement of witnesses has led to a divided opinion in the High Court. There are judges who hold the view that the number of witnesses to a will as Prescribed under the Local Customary Law (Declaration) Order 1963 is mandatory and must be strictly adhered to in the case of FERDINAND LUMBUYO VS. NGEIYAMU KAJUNA [1982] L.R.T. 142 Rubama J.(as he then was) upheld the above position. On the other hand there are those who hold an opposing view that requisite number of witnesses as prescribed by the declaration is not mandatory. Such opposing view was held by the late Justice Maganga in the case of FLUGENCE MPIKILWA VS. DOMITINA KIHAMA [1977] L.R.T. No. 9.

- 6.7 Arguments in favour of existing laws on Wills: The following(s) are some of those arguments:
- (i) it has been argued that if Wills are properly applied, they may solve most of the problems cases of intestate succession encountered.
 - (ii) save for Wills under Islamic Law, one may bequeath all his property to anyone he chooses and in a manner he feels appropriate. One may bequeath his property to persons who otherwise are excluded from inheritance when he dies intestate such as

³¹See Footnotes 14, 15 in which the Court of Appeal reiterated that by writing a Will the deceased person would continue to execute his moral obligations to such children.

concubines, illegitimate children friends etc.³¹

- (iii) through the Will one may make equal distribution of his estate among his male and female children in disregard to seniority of children as is prescribed for by the Local Customary Law (Declaration) Order, 1963.
- (iv) one is free to choose under which legal system one may make his Will depending upon ones wishes as to how one would like one's property to be distributed.
- (v) the Will is an extension of one's freedom of disposition of one's property when one is still alive.
- (vi) the Will cuts across tribal (Customary Law) and religious boundaries on distribution of the deceased's estate.
- (vii) the Will cuts across the patrilineal and matrilineal lines of succession.
- (viii) a properly executed Will does away with greedy relatives and prevents property grabbing which is prevalent among the local communities in the country.

CHAPTER SIX

1.0 PROBATE AND ADMINISTRATION

- 1.1 Administration of deceased's estate is as important as having a good law of succession. Even if the Law, is good, bad administration may cause a lot of injustices. Undue delay in the administration of deceased's estate may cause property grabbing. Choice of a fit and competent administrator with the welfare of the deceased family at heart is as an important task as choosing which law or legal system to be applied in distribution of the deceased's estate.
- 1.2 The laws applicable in this country on administration of the deceased's estate are four:
- (i) Probate and Administration Ordinance, Cap. 445.
 - (ii) Administration (Small Estate) Ordinance, Cap.30.
 - (iii) The Magistrates Court Act No. 2/1984.
 - (iv) The Administrator General Ordinance, Cap.27.
- 1.3 According to the Probate and Administration Ordinance, deceased's persons' estate are divided into three estates categories:
- (i) Large estate whose value exceeds ten thousands (10,000/=) shillings the law applicable for the administration of this type of estate is the Probate and Administration Ordinance, unless such an estate is otherwise administered according to Islamic Law or Customary Law.
 - (ii) Small Estate whose value does not exceed ten thousands (10,000/=) shillings are governed by the Probate and Administration Ordinance. If it is an estate belonging to a deceased Native, the law governing such an estate is Administration (Small Estate) Ordinance.
 - (iii) A minor estate whose value is below one thousand (1,000/=) shillings are governed by the Probate and Administration Ordinance. Appointment of 'an Administrator by a court is not necessary. The surviving spouse of the deceased may administer such an estate. Where there is no surviving spouse, then the nearest relative of the deceased available will administer the deceased's estate.
- 1.4 If such an estate is to be administered according to Islamic Law or Customary law, then the court may appoint an Administrator only where it finds it necessary to protect the creditors or beneficiaries.
- 1.5 Where the Probate and Administration Ordinance is applied by virtue of section 88 Cap. 445, then the person to be appointed as the Administrator of a minor estate must be the eldest male relative of the deceased.
- 1.6 The Magistrates Courts Act, 1984 governs administration of all estates whose law applicable is Islamic Law or Customary Law. The Probate and Administration Ordinance applies to

all estates of persons dying while domiciled or leaving property in Tanzania (Mainland).

- 1.7 The jurisdiction of the Administrator General over Administrator deceased's estate is founded upon section 5 (1) of the Administrator General's Ordinance, Cap. 27. The Administrator General may apply for grant of probate where there is a Will and where there is no will for letters of Administration of an estate of a person who dies in Tanzania (Mainland) or else where, where it is believed that the deceased was possessed of property in the Territory and:-
- (a) that person died intestate; or
 - (b) that the deceased had made a Will bequeathing his estate or part thereof and has omitted to appoint an executor; or
 - (c) that the persons named as executors or executor of a Will have died in the testacy life time; or have re-announced probate thereof; or
 - (d) that probate or letters of administration with the will annexed has not been obtained within six months from the death of the testator; or
 - (e) that the deceased has appointed the Administrator General as sole executor of his Will.
- 1.8 However, the provisions of this Ordinance do not apply to estates which may be administered according to Customary Law unless the Probate and Administration Ordinance or part VIII thereof has been applied thereto under the provisions of Part IX of that Ordinance.

2.0 Research Finding:

- 2.1 Research findings revealed that the prevailing practice is for one or more of the heirs to the estate, (mostly children or relatives of the deceased) to apply for the letters of Administration. They are appointed as joint administrators of the estate with equal powers to deal with the estate. This practice has raised a wrong assumption that the one named in the letters of administration is the sole beneficiary of the deceased's estate.
- 2.2 It has been argued by some people that the procedure set under the Probate and Administration Ordinance is lengthy and cumbersome. To follow that procedure one has to fill up to several forms and most of them require an assistance of a legally trained mind to fill them up and a lawyer to attest. All this process requires both time and money.
- 2.3 A deceased family has often to endure all the inconvenience procedure to go through a lengthy procedure such as that set out under the Probate and Administration Ordinance simply to find a fit and competent person to administer the deceased's estate. A wrong choice of an Administrator may lead the family into a disaster. As it has been stated before it is being emphasized at the risk of repetition that there is a gross misconception among the chosen administrators, who believe that when letters of Administration are given to them, then the deceased property belongs to them. On the contrary, Administrators and Executors of the deceased's estate are required to administer and distribute the deceased's estate even if they are also entitled to benefit from the estate as heirs. This misconception has not yet been cleared although of late some attempts have been made by the High Court of

³² Chiku Salum and Hamisi Simba VB. Iddi Omar, (PC) Civ. App. No. 53 of (1990) (unreported)

Tanzania (Mainland).³²

- 2.4 The Probate and Administration Ordinance and the Magistrates Courts Act provide for two safety nets:
- (i) a person who is appointed executor or administrator of the deceased's estate, is required to execute a bond or give security to the court for due administration of the estate, to sign and undertake to administer the estate faithfully.
 - (ii) after completing the administration of the estate and if the court so orders, at any other stage of the administration, an administrator shall account to the court for his administration.³³
- 2.5 It has been observed that if the relevant provisions were followed and enforced by the people on one hand and the courts on the other, most of the problems emanating from maladministration of the deceased's estate, could have been avoided. What is the functions of the Court when adjudicating upon an administration case before it? It must be born in mind that, appointment of an administrator and distribution of the deceased's estate are two distinct functions. Evidence shows that once a court appointed an administrator it washes its hands off the matter. It is presumed that the appointed administrator knows which law to apply on the distribution of the deceased's estate.
- 2.6 However, since the provisions both in the Probate and Administration Ordinance as well the as in the Magistrates Courts Act have articulated respective roles to be played by the courts the courts should not shy away from their clearly spelt responsibility.
- 2.7 Evidence shows that there is another problem which causes confusion among people who wish to go to court on matters of administration. It is the indecision as to which court the matter should be referred.
- 2.8 The nearest court for many people is the Primary Court and that may explain why many of the administration cases are filed in this court. Unfortunately this court has limited jurisdiction.
- The Primary Court will only entertain administration cases, where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic law. This limitation of jurisdiction of Primary courts has greatly affected deceased's' estate in the urban areas where property developed on registered land forms part of the estate.
- 2.9 There are many cases where District Courts have overruled decisions of Primary courts to entertain administration cases which include property on registered land on the ground that the Primary Courts have no jurisdiction to entertain such cases. The District Court which is next nearest to the people has no comparable original jurisdiction on matters of Probate and Administration. The Resident Magistrates Court and the High Courts are far from the ordinary people geographically as well as financially. This observation has been supported

³³ 5th schedule Part II Magistrates Court Act, 1984 as well as section 103 of the Probate and Administration Ordinance, Cap. 445

³⁴ *Manungwa Lutalamila and others VS. Martha Lutalamila*, 91982) TLR 98 (Mwanza)

by Justice Mfalila.³⁴

- 2.10 Appointment of an honest and competent administrator through the court process is important for every family of a deceased person. Choosing a person to be an administrator simply on the ground that he/she is a close relative to the deceased may be unfair. One should be chosen as an administrator on the ground of fitness and competence, he/she should be a person with an honest desire for the development and preservation of the deceased's family interests.
- 2.11 Where a person of such calibre is difficult to come by from within the deceased family or clan, one should not hesitate to appoint an administrator who is not a member of the deceased's family or clan provided he/she is a fit and competent person. Courts may also assist on the choice of an administrator. When examining the would be administrator if courts are in doubt on the competence of the applicant they are free to reject him or her and advise the family to choose another person.

3.0 **Appointment:- of Executors or Administrators other than relatives**

Under the existing laws where there is no fit person among those related to the deceased to be appointed as an executor or administrator of the deceased's estate, one may appoint any of the following persons, public institutions to be an executor or administrator of the deceased's estate:

- (i) The Administrator General: Who qualifies to be appointed as an executor or administrator of the deceased's estate by virtue of the Administrator General Ordinance, Cap.27. The Administrator General is a corporate sole with perpetual succession and an official seal. He may sue and be sued in his corporate name. He is also a Trustee under the Probate and Administration Ordinance, Cap. 445.
- (ii) The Public Trustee, is a corporate sole. Who qualifies to be of appointed as an Executor or Administrator the deceased's estate under the Public Trustees' Ordinance, Cap.31.
- (iii) A Practicing Lawyer may be appointed as an Executor or Administrator by virtue of his office. He is expected to be an impartial and fair minded person. Research shows that very few people appoint their lawyers as executors or Administrators.
- (iv) Religious leaders such as Sheikhs, Priests, Pastors etc. These people are rarely appointed as Executors or Administrators.
- (v) The banks can also be used as executors or administrators of the deceased's estate for example The National Bank of Commerce has a Trustee and Executorship Department. It is noted that few people appoint the National Bank of Commerce as

their executors.

CHAPTER SEVEN

VIEWS FROM DIFFERENT WOMEN'S ECONOMIC GROUPS

Research teams visited Morogoro, Iringa, Mbeya, regions Ruvuma, Rukwa, Tanga, Arusha and Kilimanjaro specifically to meet and discuss with members of Women Economic Groups on the proposed Law of Succession / Inheritance.

In Morogoro and Iringa regions, twelve Women Economic Groups had the following views:

- (a) Unanimous on the distribution of estate left by either spouse on equal basis.
- (b) the surviving spouse and the children of the deceased irrespective of their status that is a son or daughter be entitled to a share and the remaining part of the estate.
- (c) a child be-gotten out of wedlock introduced to and accepted by the other members of the deceased's family should be entitled to a share equal to other lawful children of the deceased except that a child whose birth has been kept secret by the deceased parent and therefore remains unknown should not be entitled to inherit.
- (d) an adopted child should be entitled to a share out of the deceased's estate.
- (e) to protect the property interests of the deceased's husband and to provide assistance to the surviving spouse and children, it was proposed that Ward Executive Officers or Village Executive Officers be assigned take stock and safeguard all the deceased's property pending probate and administration proceedings.
- (f) where the husband dies leaving behind immovable properties such as residential houses (s), the surviving wife or (wives) should be entitled to inherit such property for life in trust of the surviving children.
- (g) distribution of movable properties should be on equal basis among all the deceased children irrespective of their gender.
- (h) where either spouse dies without leaving any children the whole estate of immovable properties should be auctioned to enable the surviving spouse to acquire his/her share in cash and the rest be distributed to the entitled beneficiaries.
- (i) a question was raised as to how the deceased estate would be distributed to the surviving children where there is polygamous marriage children's and age differs.

In Mbeya and Rukwa regions twelve women Economic Group had the following views:

- (a) majority of them condemned the tendency of inheriting wives by any of the relatives of the

- deceased because it is against human rights; and suggested that the Law should be enacted on this issue.
- (b) it was noted that there exist a traditional practice whereby in polygamous marriage, wives do not inherit in accordance to what they have contributed to matrimonial assets but rather on the basis of having a male child. It was suggested that in either polygamous or monogamous marriages contribution should be the guiding criterion.
 - (c) it was suggested that children born out of wedlock and have been introduced to and accepted by members of the family of the deceased should be entitled to inherit. But a child whose birth has been kept secret by the deceased father and remains unknown to other members of the deceased's family should not be entitled to inherit
 - (d) further suggestions were given that women's right to inherit property such as house(s), farms and agricultural produce should be recognized and safeguarded.
 - (e) it is suggested that when a woman wants to join an economic group, she is required to give out a name(s) of persons whom she would like to be her successor. This private scheme only allows daughters or only female members of the deceased member of the economic

group to be beneficiaries. They have to write an “informal Will” on how to distribute their shares in their economic ventures.

CHAPTER EIGHT

RECOMMENDATIONS:

1.0 INTESTATE LAW OF SUCCESSION

1. Uniformity:

1.1 A uniform law of Succession/Inheritance should be enacted in Tanzania, such a law should be moderated on the Constitutional principles and guarantees to such an extent that it will recognise existing tribal, customary and religious differences but at the same time moderating those practices and procedures in the various tribal, religious and customary laws which are inconsistent with principles of justice and equity.

1.2 Such a uniform law will further enhance national unity and avoid or regulate conflicts within various personal laws which in one way or another infringe rights of certain sections of the community.

2. The Rights of children to Inheritance:

2.1 A uniform law of inheritance should guarantee that children regardless of their gender, age and status should inherit equitably. That is the differences found in various tribal, customary and religious laws should be regulated to reflect modern developments. Such a law should eliminate fully the present fetters on females not inheriting properties of their deceased's parents. It must provide that where on the death of one of the parents some of the children are minors thus incapable of exercising their authority fully over their shares of inherited property, a trust should be created in their favour.

In particular it is recommended as follows:

- (a) that the proposed Law of Succession/Inheritance should provide that all of children of the marriage should, irrespective differences, gender, religion or any other in principle be entitled to inherit the estate of their deceased parent on equal basis. However where among the surviving children there are some aged 25 years and below and there those aged above such age and leading an independent life, those aged 25 years and below should be entitled to a larger share than the others.
- (b) That the proposed Law of Succession/Inheritance should also provide that where all parents die intestate, apart from having an equal share in the distribution of movable property, in the case of immovable property, in the event the surviving children resolve not to dispose it by sale: the surviving children would be at liberty to select any of the other children to take charge of such property in trust for the other children, should the senior-most child appear, before or at any time after the probate and administration proceedings, to be incapable of exercising proper management of such immovable property. That could be done by a decision before clan elders or by a decision of a ward conciliation tribunal upon complaint presented

by any of the other surviving children.

3. Rights of adopted children:

The proposed Law of Succession should also provide that upon the death of any of the spouses, any child who had been adopted by the couple shall be entitled to inherit the estate of the deceased on equal basis with the other children of the marriage.

4. Rights of Children Born Out of Wedlock:

Without prejudice to right of foregoing, the inheritance of children born out of wedlock rights should of be accorded as follows:

- (a) Children recognized and known to other members of the family
 - (i) children born out of wedlock who have been recognized by the putative father and are known to the other members of the deceased's family of his marriage should be entitled to inherit the deceased father's estate on equal basis with the other children of marriage.
 - (ii) Likewise, children born out of wedlock by the deceased mother should be entitled to inherit her estate on equal basis with her other children of her marriage.
- (b) children recognized by the deceased putative fathers but unknown to other members of the deceased's family
 - (i) A child born out of wedlock and kept in secrecy by the deceased putative father, should not be entitled to inherit the estate of the father, Unless there is proof that both the, putative father and the child's mother have signed such child's birth certificate and, in addition, a passport size photograph of the putative father has been attached to such birth certificate that is in the custody of the Registrar of Births and Death; provided that in the absence of the photographs, the evidence of a two close relatives of the deceased should suffice.

5. Protection of Women's Property interests:

5.1 In keeping with the provisions of the Constitution on human rights as also embodied under the Law of Marriage Act 1971, in respect of Women's property rights, the proposed Law of Succession must also give recognition to and protect such women's rights to acquire, manage, and dispose of their property by way of inheritance.

The law should limit the right of inheritance to a deceased person's property to family member, dependent, and close relatives such as parents, brothers and sisters, who were then in one way or the other dependent upon the deceased, though entitlement of family members should be higher.

5.2 The proposed law should also provide that where the spouses have had immovable property such as houses, farms, the surviving spouse(s) should have the right to inherit such property for life in trust for the children (if any). Where there are surviving children such right of the widows (s) to inherit immovable property for life cease upon remarriage; in which case the

property shall revert to the children or their appointed trusts.

5.3 All household effects should be left for use by the surviving spouse(s).

5.4 The proposed law should also provide that notwithstanding the provisions of any other law to the contrary, in all cases where there is distributable estate of the deceased other than immovable property in respect of property jointly acquired during the marriage, as proved for under S.114 of the Law of Marriage such property shall only be so distributed to the beneficiaries after the due equitable share of the surviving spouse has been determined and set aside by a court of law.

5.5 The proposed law should further provide that where the spouses had no child of the marriage or one of any of the other categories mentioned in para 3 and 4, above, then upon the death of the husband, where there is immovable property such as a house, forming part of the estate of the deceased, the same shall be inherited by the widows(s) for life, and on re-marriage the property shall be subject to division between herself and the deceased's husband relatives.

However, upon such widow's death, such immovable property left behind by her first deceased husband shall be left to be inherited by her beneficiaries and those of deceased husband on equal basis. Likewise, where the surviving spouse of such childless marriage is the husband upon his death the immovable property that had been jointly acquired with his wife should be inherited and divided among the beneficiaries of both spouse.

5.6 The proposed law should provide that in all cases of mixed marriages Succession/Inheritance issues shall be determined in accordance with it.

5.7 The proposed law should expressly provide that after the property interests of the widow(s) have been determined and set aside by a court of law of competent jurisdiction, the distributable estate of a deceased person., who is a Moslem, Hindu or any person from the Asian Community who did not, during his life time, express any contrary intention in writing or whose life style was not in total contradiction with his Islamic faith and tradition, shall be distributed in accordance with Islamic rules of Succession/Inheritance.

5.8 The proposed law should expressly provide that where either of the spouses dies, leaving behind an inheritable estate the nature of such estate shall first be determined by a court of law before the same is made the subject of probate and administration proceedings. This should be done by way of a declaration order, in a petition for such a declaration, by any beneficiary.

6.0 **Property Grabbing Upon Death:**

6.1 The proposed Law of Succession should have provision to guard against the practice of property grabbing by relatives of the deceased, which is the case particularly when the husband dies.

6.2 This should be do by empowering institutions like the Village Social Executive Officers,

Ward Executive Officers, or Welfare Officers, upon being notified by the surviving spouse of any other beneficiary, to take stock of all the properties constituting the estate that could be the subject of probate and administration proceedings, that is within their locality, immediately after the death of a person has occurred, and announce the same to the relatives of the deceased.

6.3 It should be the duty of all such institutions concerned to ensure that distribution of such, properties does not take place until an Administrator, been duly appointed by a court of law and probate and administration proceedings have been finalized.

6.4 It should be the duty of such an institution and corresponding officers concerned, to submit a list of all the properties to a court of law, which subsequently handles probate and administration proceeding. Such list should then constitute the inventory for the purposes of such proceedings.

6.5 The proposed law should make it an offence for any person to interfere with such property so listed, save upon the permission of such institution or officer or court for good cause, such as saving the goods from damage or decay, or catering for the interests of the beneficiaries, such as providing for school fees, or their maintenance.

7. WILLS

7.1 There should be instituted simplified uniform rules about making of Wills.

7.2 Written Wills should be the main method of bequeathing property in order to avoid misrepresentation likely or fraud likely to occur in case of oral Wills.

7.3 The rules on Wills should limit the power of testamentary disposition to the extent that no person should be allowed to dispose of his property by way of a Will in excess of one third (a) of the whole of his estate of whatever description.

7.4 The proposed law should as far as possible aim at removing conflicts of laws and interests.

7.5 The proposed law should provide the requirement of witnesses to the Will who should be fit, competent and honest persons, thus avoiding possible fraud or misrepresentation.

7.6 Witnesses to the Will should be other persons than any of the beneficiaries.

7.7 In order to safeguard equality among the children of deceased, unless it is for purposes only of disinheriting any of the children, no disposition of the deceased's property should be made by the deceased in favour of any of the children entitled to inherit this estate.

7.8 In the case of a married person, a Will made by him/her should be valid for the estate of the testator only as shall be determined in accordance with the law.

7.9 Any Will in respect of immovable property acquired by spouses during the marriage as a matrimonial home should not be operative until the death of all the spouses.

- 7.10** A testator should be entitled to disinherit any of his/her beneficiaries for reasons such as:
- (i) Attempted murder or grievous harm on him/her by such beneficiary;
 - (ii) Neglect or want of care of the testator by the beneficiary while in a position to do so when the testator was in serious sickness or old age or in times of famine.
 - (iii) In the case of polygamous families, the beneficiary's adultery with any of the other wives of the testator.
 - (iv) Causing deliberate serious loss to the testator through malicious damage to or theft, or wanton misuse or unauthorized disposition of such testators' property for such beneficiaries own gain.
 - (v) Any other cause that shall be considered by the court as grave enough as to warrant such cause of action by any other reasonable person of the community from which the testator comes.

8. Other Issues:

It is recommended that a testator/testatrix should be entitled to make provisions for his/her other dependents irrespective of their description by will, provided that their share is within the limits recommended above (7.3) in relation to the property which has been bequeathed to his/her family.

9. Probate and Administration:

- 9.1 There should be a uniform law governing matters of Probate and Administration for Tanzania (Mainland) instead the existing four different legal systems.³⁵
- 9.2 Differences about categories of the estates and their values, persons who might be affected by such laws, those who might be appointed as executors of administrators should be streamlined. The assumption that executors or administrators are the beneficiaries should be clearly dispelled.
- 9.3 The cumbersome procedure for application for execution or administration of estates which are now in use and simplified should be streamlined to avoid delays, unnecessary expenses, and suffering or loss of benefits on the part of the beneficiaries.
- 9.4 The proposed law must provide for concurrent jurisdiction in matters of probate and administration in the High Court, a court of Resident Magistrate, a District Court and a Primary Court.

³⁵Probate and Administration Ordinance, Cap.445; Administration (Small Estates)

- 9.5** The proposed law should require an executor or executrix (Administrator/Administratrix) to execute a bond or give security to the court for due administration of the estate, and there after to account to the Court for his/her administration or execution.
- 9.6** It should be provided in the proposed law that those appointed as executors or administrators to a deceased person's estate need not be but relatives or children or spouses of the deceased any person who is fit, competent, and honest.
- 9.7** In addition the law should provide that institutions like the Administrator General's office, the Public Social Trustee, Lawyer(s) , Religions Welfare Officials appointed.
- 9.8** It is also recommended that in order to minimise delay in disbursement of deceased's estate money, funds deposited in the primary courts for the purposes of probate and administration proceedings should be so deposited to the Account of the District Magistrate within whose Jurisdiction the primary court falls, from whom the funds would be paid to the beneficiaries, instead of the current practice, whereby payment is made by the Head Office of the Court of Appeal.

