

V. CONTRIBUTING FACTORS

Women's property rights violations in Kenya are caused and aggravated by a blend of discriminatory laws, customs, and attitudes combined with ineffective institutions, official disregard, widespread ignorance of rights, and other obstacles to their enforcement.

Discriminatory Laws

The law right now is not very women-friendly. We're trying to come up with legislation and trying to sensitize the judiciary. I don't think the impact is significant yet.

—Njeri Mwangi, senior state counsel, Office of the Attorney General, Nairobi, November 11, 2002

Kenya's constitution outlaws discrimination on the basis of sex, but exemptions largely eviscerate the nondiscrimination provisions. Article 70 of the constitution provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex. Article 82(1) prohibits any law that is "discriminatory either of itself or in its effect" and article 82(3) defines discrimination to include discrimination on the basis of sex. However, article 82(4) exempts certain laws from the discrimination prohibition. It permits discrimination "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" and with respect to "the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."¹²⁷ In other words, in areas vital to women's property rights, such as marriage, inheritance, and the application of customary law, discrimination is sanctioned. In addition, article 82(6) provides that if an official body controlling transactions in agricultural land (such as a land control board) gives or withholds consent to a transaction, this decision may not be deemed discriminatory. Thus, if a land control board permits a man to sell family agricultural land, a woman cannot challenge that decision as discriminatory. As one lawyer observed, the current constitution "gives with one hand and takes away with the other."¹²⁸

The Law of Succession Act of 1981, which attempted to bring some uniformity to succession in Kenya, should have improved women's inheritance rights. However, it contains several discriminatory provisions. This law governs both testamentary and intestate succession (succession with or without a will). Where there is no will, female and male children should inherit from their parents equally. If there is one surviving spouse and a child or children, the surviving spouse is entitled to (i) an absolute interest in the deceased's personal and household effects and (ii) a life interest in the rest of the estate. This means the surviving spouse becomes the absolute owner of personal and household items and can use other property (such as land and houses) during the spouse's lifetime. The spouse cannot dispose of the second category of property without court permission. If the surviving spouse is a woman, her interest in the property terminates if she remarries. A surviving husband's interest does not terminate upon remarriage. When the surviving spouse dies (or, in a woman's case, remarries), the estate goes to the children. The intestate succession rules also provide that if one dies without a spouse or children, the estate goes first to the father, and if the father is dead, to the mother. Thus, even though women have inheritance rights under this act, men have greater rights.

Exceptions and misinterpretations also undermine the Law of Succession Act. The act was amended in 1990 to exempt Muslims, who protested the equality provisions.¹²⁹ In addition, Section 32 of the act exempts agricultural land, crops, and livestock in certain "gazetted" districts (districts designated in a legal notice in the official gazette) from the intestacy rules. In those districts, customary law applies.¹³⁰ Although the Law of

¹²⁷ Constitution of Kenya, article 82(4). The constitution was last amended in 1998.

¹²⁸ Human Rights Watch interview with Ann Njogu, executive director, Centre for Rehabilitation and Education of Abused Women, Nairobi, October 16, 2002.

¹²⁹ Act No. 21 of 1990. Muslims are subject only to Islamic laws on succession. See n. 79 above for a description of some of the relevant provisions.

¹³⁰ The following districts are exempted: West Pokot, Turkana, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok. Pastoral communities predominantly inhabit these districts. Legal Notice 94 of 1981.

Succession Act is clear about the exceptions, some judges and magistrates assert that all rural land, not just land in gazetted districts, is exempt from the act. A justice on Kenya's highest court told Human Rights Watch, "The Law of Succession Act can't apply [to rural land] because women are supposed to be married and go away."¹³¹ A magistrate in Siaya district (which is not a gazetted district) said, "The Law of Succession Act is applied only by the educated.... If it's in the rural area, we don't want to interfere with the community set-up."¹³²

Statutory law on division of family property remains so undeveloped that lawyers must resort to England's 1882 Married Women's Property Act¹³³ and Kenyan case law interpreting that act. Case law establishes that women are entitled to half of the family property if they can prove contribution. This principle applies even to customary and Muslim marriages. However, the absence of a statute regulating division of property makes the application of this case law uneven. Two statutes, the Matrimonial Causes Act and the Subordinate Courts (Maintenance and Separation) Ordinance, govern spouses' rights and duties following judicial separation, but do not regulate division of family property. "The gap in the law is glaring," said one women's rights lawyer. "Why are we using an 1882 Act forty years after independence?"¹³⁴ Moreover, when Human Rights Watch discussed family property division with local officials, many had no idea that women could be entitled to anything, much less half of the family property, upon separation or divorce. For example, one local administrator said that a woman could not get land or other property upon divorce. He added that a woman "wouldn't get cows because the woman was paid for [with dowry]."¹³⁵

Land laws in Kenya, while not discriminatory on their face, have exacerbated women's inequality by recognizing men's traditional allocation rights as worthy of registration while ignoring women's user rights to clan land. Moreover, although a non-binding administrative decree instructs land control boards—bodies with authority to approve certain land transactions—to take families' interests into account, this guideline is not always effective. Men have reportedly bribed land control boards, fraudulently brought imposter "wives" to the boards to consent to land transfers, and threatened their wives with violence or eviction if they withhold consent.¹³⁶ A land officer in western Kenya said that land control boards encourage men to get their wives' consent before selling land, but confessed, "At times we find that a man sells without getting consent."¹³⁷

Finally, customary property laws, as described above (see Background), overtly discriminate on the basis of sex by giving men greater rights than women to own, inherit, acquire, manage, and dispose of property. With the drastic changes in family and social structures since pre-colonial times as well as the health risks of HIV/AIDS and other diseases that thrive on women's subordination, this gender differentiation and the profound inequalities it produces are no longer justifiable.

Biased Attitudes

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

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

Many men—and some women—in Kenya believe that women should not be entitled to property rights, at least not on an equal basis with men. These attitudes influence the interpretation of customary laws, and vice versa. This cycle legitimizes women's subordination and inequality.

¹³¹ Human Rights Watch interview with Justice Richard Otieno Kwach, Court of Appeal, Nairobi, November 7, 2002.

¹³² Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

¹³³ The MWPA applies in Kenya as a statute of general application pursuant to a 1971 High Court decision.

¹³⁴ Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

¹³⁵ Human Rights Watch interview with a local administrator in the Lake Victoria region, November 3, 2002.

¹³⁶ Human Rights Watch interview with Akinyi Nzioki, gender program officer, Royal Netherlands Embassy, Nairobi, November 7, 2002 and Human Rights Watch interview with Mary Wambua, head, Women's Bureau, Nairobi, November 6, 2002.

¹³⁷ Human Rights Watch interview with assistant land officer, Kisumu, November 5, 2002.

Traditional leaders and local government officials, whose views are influential in their communities and form the basis of customary laws, were candid with Human Rights Watch about their attitudes toward women and their property rights. A government-appointed senior chief in Kajiado district spelled out women's status as chattel: "A woman and the cows are a man's property," he said. "The Maasai believe that the property within their homestead is theirs—the children, the wife, the cows, the land—is all a man's property. There are no disputes." He explained women's rights with respect to cattle: "A wife cannot sell a cow without her husband's consent. She cannot slaughter [cows] unless she has clearance from the man. If a cow is given away, the man decides, never the woman." When asked whether a woman could take cattle if there was a divorce, he laughed and said, "No, that is wrong.... I'd never allow this. I've never heard of such a case.... There are things we Maasai have never experienced."¹³⁸

A village elder in Kajiado district told Human Rights Watch: "When you marry, you show the woman which livestock is hers, but the man knows very well the livestock belongs to him. The woman can milk the cows but she can't slaughter or sell them. She 'owns' them in his trust.... In Maasai culture, a woman is not supposed to own property." The elder said his cows belong to him, not his wife. "In my village," he said, "there are more than one hundred homesteads, but not more than five women own property." This elder has had some human rights training from NGOs, and has since intervened several times to allow women to inherit property. When he did so, the villagers were "utterly perplexed." Despite the training, the elder was not aware that spouses could share family property upon divorce. "A woman is not supposed to take property when there is a divorce," he said. He has never seen a man leave the family home upon divorce: "That doesn't happen because the home belongs with the man.... We would not let the property go with a woman because she can go marry again." If there are disputes in divorce cases in his village, the man's family has the final word.¹³⁹

An elder in rural Siaya district said he has never heard of a divorced woman taking property, and only a man's name can go on a land title deed. He said he knows the Law of Succession Act applies in his village, but in practice, only sons inherit. He said, "In the case of land, you can't let girls and boys inherit equally because girls may marry. Even fifty years from now it should be that way." When asked whether these customs should change, he replied, "While making changes, women shouldn't be given freedom because they will misuse property."¹⁴⁰

Individual men revealed similar attitudes. Kotet ole Supeyo, a Maasai farmer, said "In Maasai land, a woman can't have property on her own." He has given his sisters livestock during hard times, but their husbands, not his sisters, actually own the livestock. "The husband has to own the property because the wife belongs to the husband," he explained. "The husband owns the wife." He elaborated: "Most women are not literate. They can't do anything by themselves. So in Maasai land, women have to rely totally on men.... A woman can't sell property without consulting her husband. But he can sell without consulting his wife." In terms of land, he said, "We don't trust women. Women could go and sell the land." He said some people give land to unmarried daughters, but he has not done so. Moreover, if he ever tried to co-register his land in his wife's name, he thinks his sons would stop him. Ole Supeyo did acknowledge that a few groups of women now own land in collectives. "Nowadays you see groups of women who own land, but they're the only kind of women who own property.... It can't be possible here for a single woman to own property."¹⁴¹

Steven Oketch, a farmer in Siaya district, chuckled when asked if women take property upon divorce. "If there is a divorce, the woman returns to her parents," he said. "When she goes, she leaves everything. It would be funny to hear of a woman leaving with property." When asked if a divorced man would ever leave the family home, he replied, "Here it is the woman who leaves. It is the man who brought the woman to the ancestral land.... Even if they don't live on ancestral land, it is the woman who leaves." He thinks this would happen even if a woman bought the land, but added, "Actually, a woman has never bought land. It never happens that a woman

¹³⁸ Human Rights Watch interview with Wilson Tulito Molill, senior chief, Ngong, October 25, 2002.

¹³⁹ Human Rights Watch interview with Daniel Kusero, elder, Kajiado district, October 25, 2002.

¹⁴⁰ Human Rights Watch interview with Thomas Ojuang, elder, Siaya district, November 3, 2002.

¹⁴¹ Human Rights Watch interview with Kotet ole Supeyo, Kajiado district, October 25, 2002.

buys land.” In terms of women independently owning property, he said this was impossible because “they would automatically commit adultery.” The only reasons to change customs like wife inheritance and ritual cleansing, in his opinion, are the risk of HIV/AIDS and the influence of religion, not women’s rights. “Diseases will force change.... Every tribe has its own customs. If we talk about changes, it’s only because of disease or religion. Otherwise we should continue our tribal culture.”¹⁴²

Thomas Funga, a man from western Kenya who says he advocates women’s rights in his village, described his mixed attitude. He said that wife inheritance should end because of the HIV/AIDS risk. He thinks daughters, but not wives, should inherit when a man dies: “In the case of land, if a husband dies and has no children, then the brother-in-law can take the land. If there are children, the land should go to the children—even girls.” Nonetheless, when he dies, he said only his son will inherit his land. “According to the customs, women should not inherit,” he said. “Just because of laws women pursue inheritance.... People feel women are greedy if they pursue inheritance. It makes people not respect women.”¹⁴³

Some women are resigned to having inferior property rights, and others even oppose the idea of women having equal property rights. Anna Adhiambo, a Luo woman from Kisumu, said, “I didn’t inherit from my parents because when parents die, daughters do not get anything. Boys inherit, but girls do not.... This started much earlier. No one bothers to question it. We’re born into it.” This is true even for her children: “As much as I want to see change, it will be difficult. If I die, I know my son won’t share with my daughters.”¹⁴⁴ A women’s rights lawyer said an elderly woman recently told her, “If we give land to a woman... she will be arrogant and won’t serve her man.”¹⁴⁵ An NGO representative attributes this attitude to socialization:

Very few women have property registered in their name. Why? Patriarchy. The message is always reinforced that women can’t own property. Even some women believe this. Women are socialized in many ways to think that this is the domain of men.... Even well educated women fall in the same trap.¹⁴⁶

Not everyone is against women’s equal property rights, but many supporters have a hard time realizing such rights in their own families. A fair number of individuals and officials expressed concern about the property rights violations perpetrated against women, yet few had co-registered property with their wives or written wills to ensure that wives and daughters would inherit. A district officer in the Rift Valley Province said that cultural limitations on women’s property ownership stunt their development, but then said, “All my property is in my name. I don’t see any reason to put it in my wife’s name. It’s cultural.”¹⁴⁷ One former minister, who said “a lot needs to be done to change attitudes and values in society” and supports women’s equal property rights, acknowledged that he has not co-registered his property with his wife and has no written will to protect her from disinheritance.¹⁴⁸ An official in the Women’s Bureau clearly supports women’s equal property rights, but she and her husband have not co-registered their property: “We bought land, and it’s not in my name. We put up a small house, and my husband called it ‘his’ house. My contribution is not considered.”¹⁴⁹

Some individuals hide their positive attitude toward women’s equal property rights to avoid community scorn. Steven Maina, a taxi driver in Nairobi who is originally from Nyeri, said that title to the family car is in his wife’s name, and their land is in his name. He said his family would ridicule him if they knew the car was in his wife’s name:

¹⁴² Human Rights Watch interview with Steven Oketch, Siaya district, November 3, 2002.

¹⁴³ Human Rights Watch interview with Thomas Funga, Siaya district, November 3, 2002.

¹⁴⁴ Human Rights Watch interview with Anna Adhiambo, Kisumu, November 1, 2002.

¹⁴⁵ Human Rights Watch interview with Judy Thongori, then deputy head of litigation, International Federation of Women Lawyers (FIDA-Kenya), Nairobi, October 16, 2002.

¹⁴⁶ Human Rights Watch interview with Ann Gathumbi, coordinator, Coalition on Violence against Women, Nairobi, October 17, 2002.

¹⁴⁷ Human Rights Watch interview with [name withheld], district officer, Rift Valley Province, October 25, 2002.

¹⁴⁸ Human Rights Watch interview with [name withheld], [title withheld], Nairobi, November 7, 2002.

¹⁴⁹ Human Rights Watch interview with [name withheld], Women’s Bureau, Nairobi, November 6, 2002.

I haven't told anyone that my wife owns the car.... If I let my family know, they'll say my wife is in charge and controlling me. Especially in Nyeri, you're not supposed to say your wife owns anything.... This is because of the belief prevalent in that area. Women should never be ahead of a man.... My opinion is different from men in Nyeri.¹⁵⁰

This fear of community scorn stops some families from respecting women's property rights. "Even if a father is enlightened and wants his daughter to inherit," said one property lawyer, "he won't do this because he will be looked down on by his community. Society dictates this."¹⁵¹ According to one women's organization representative, "Neighbors would laugh at a man if he left property to his daughter."¹⁵²

Unresponsive Government and Traditional Authorities

The problem with the police is that they don't like these cases of disinheritance of widows. They say it's normal.

—Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002

Since many women in Kenya never make it to court to claim property, they often turn to local authorities, both governmental and traditional, to resolve disputes. Although informal dispute resolution can help limit the financial and social costs of claiming property rights, local officials are more apt to apply customary law than statutory law, which can disadvantage women. Women told Human Rights Watch that local authorities were occasionally helpful but more often unresponsive or ineffective. "We have poor local leadership," one NGO representative remarked. "They're not responsive to the community."¹⁵³ Moreover, police and central government officials acknowledged that women do not have equal property rights in Kenya, but officials do not consider this a pressing issue.

Many local officials are loath to get involved in women's property cases, which they justify as a desire "not to interfere with culture."¹⁵⁴ Lydiah Wanza, a thirty-seven-year-old Kamba widow, told an elder that her brothers-in-law took her land in Meru when her husband died. The elder "kept quiet and said he would answer later," but nothing happened.¹⁵⁵ Ellen Achieng, a Luo woman whose husband beat her, went to her local chief to ask if she could live in the matrimonial home and have her husband move out. The chief told her to go back to her husband.¹⁵⁶ Monica Wamuyo, a widow whose in-laws forced her out of her home, told village elders that she wanted to remain in her home. "The elders said I had to move out," she said.¹⁵⁷

Women seldom go to police about property problems—unless their children are endangered—because they believe the police will turn them away, dismissing them as family or clan disputes. "The problem with the police is that they don't like these cases of disinheritance of widows," said a paralegal in western Kenya. "They say it's normal."¹⁵⁸ A police official acknowledged: "Women can't come here [for property cases]. We can't go into family cases on inheritance. Each tribe has its custom. Unless the law is changed to come to the criminal point, [we can't get involved]. For now, the elders sit together and decide.... When it comes to physical harm, we

¹⁵⁰ Human Rights Watch interview with Steven Maina, Nairobi, November 12, 2002.

¹⁵¹ Human Rights Watch interview with Jane Michuki, partner, Kimani & Michuki Advocates, Nairobi, November 6, 2002.

¹⁵² Human Rights Watch interview with Rose Mary Moraa, program manager, Maendoleo Ya Wanawake Organization Nairobi, November 7, 2002.

¹⁵³ Human Rights Watch interview with Elijah Agevi, regional director, Intermediate Technology Development Group, Nairobi, October 20, 2002.

¹⁵⁴ Human Rights Watch interview with Wilson Tulito Molill, senior chief, Ngong, October 25, 2002.

¹⁵⁵ Human Rights Watch interview with Lydiah Wanza, Nairobi, October 20, 2002.

¹⁵⁶ Human Rights Watch interview with Ellen Achieng, Nairobi, October 28, 2002.

¹⁵⁷ Human Rights Watch interview with Monica Wamuyo, Nairobi, October 28, 2002.

¹⁵⁸ Human Rights Watch interview with Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002.

step in.... Evictions [by families] are handled under customary law.”¹⁵⁹ Police corruption can also make women’s property problems worse. Gacoka Nyaga said that while she and her husband battled in court over dividing their family property, her husband influenced the police to harass her with spurious trespass (on her own property) and motor vehicle charges. “The police stopped me all the time,” she said. “My husband paid off the police to punish me. I wasted a lot of time in police stations.”¹⁶⁰

Overall, the Kenyan government has not made women’s property rights a priority. Human Rights Watch interviewed officials in ministries and other government departments who could play a role in preventing or redressing property rights violations, or at least in alleviating the hardships victims endure. These officials could not identify any program aimed specifically at alleviating women’s property rights violations. The government conducts no civic education on women’s property rights and does not fund NGOs that do.¹⁶¹ There is no government legal aid system (other than for murder and treason cases) and no women’s shelters funded or operated by the government.¹⁶² A Ministry of Lands official said that he has “not come across” any policies on women and land, and the ministry has made “no conscious effort to encourage women to own land.”¹⁶³ Another said the Ministry of Lands should provide civic education on women’s property rights, but said, “At the moment, it’s not one of our core functions.”¹⁶⁴ An official in the Office of the Attorney General said that although they train top-level officials on human rights, they have “not gotten to specifics on women’s rights,” much less women’s property rights. She also said that the Attorney General’s office has “no one responsible for women’s rights.... There is no gender desk. We were supposed to have one, but it never kicked off.”¹⁶⁵ The former minister of agriculture said, “[We have] no programs targeting women.”¹⁶⁶ Moreover, the Ministry of Finance has not yet accomplished gender budgeting, which could improve other ministries’ ability to undertake programs on women’s property rights.

Lower-level departments, which could theoretically have a direct impact on property rights violations and their consequences, have not made this a priority. For example, an official in the Department of Housing said that although women—especially those whose property has been grabbed—have specific housing needs, the department’s declining budget and staff has forestalled initiatives on women and housing. She explained, “So far, [the department] has not addressed issues of women specifically.... There is no gender unit in the Department of Housing, but we need one.” Moreover, she said, “There are no direct housing loan programs aimed at women. I don’t see it happening.” The official acknowledged that inheritance laws are not enforced, and women are evicted from their homes as a result. “This is only a problem for women, not men,” she said. “We have no program to stop evictions [by families].” Finally, she noted that women head most slum households, but the department has not made consulting women a priority when planning slum-upgrading projects. “I can’t say we go out of our way

¹⁵⁹ Human Rights Watch interview with P.O. Etyang, officer in charge, Police Division, Siaya, November 4, 2002.

¹⁶⁰ Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

¹⁶¹ Human Rights Watch interview with Njeri Mwangi, senior state counsel, Office of the Attorney General, November 11, 2002.

¹⁶² Human Rights Watch interview with Mary Wambua, head, Women’s Bureau, Nairobi, November 6, 2002. The government pledged in January 2003 to establish a legal aid program for victims of human rights abuses. News reports indicate that the legal aid will be provided primarily to those who suffer abuses due to corruption. Although only minimal information was available about the plans as of early February 2003, there is no indication that the legal aid program will have the capacity to provide women who have suffered property rights discrimination assistance in civil or criminal actions. Mugo Njeru, “State Pledges Legal Aid to Victims of Rights Abuse,” *Daily Nation*, January 28, 2003 [online], <http://www.nationaudio.com/News/DailyNation/Today/News/News81.html> (retrieved January 28, 2003).

¹⁶³ Human Rights Watch telephone interview with Chiboli Shakaba, deputy secretary, Ministry of Lands, Nairobi, November 12, 2002.

¹⁶⁴ Human Rights Watch interview with Benson O. Akungo, provincial physical planning officer, Ministry of Lands, Kisumu, November 5, 2002.

¹⁶⁵ Human Rights Watch interview with Njeri Mwangi, senior state counsel, Office of the Attorney General, November 11, 2002.

¹⁶⁶ Human Rights Watch interview with Bonaya Godana, then Minister of Agriculture, Nairobi, November 8, 2002.

to make sure women are involved. We don't look for them. We talk to the chief and whoever is involved in the day to day running of the slums."¹⁶⁷

Government offices that perform human rights education do not focus on women's property rights. The Women's Bureau conducts "gender sensitization" trainings for government officials but does not offer civic education on women's property rights.¹⁶⁸ The Standing Committee on Human Rights has a human rights education program but does not specifically address women's property rights.¹⁶⁹

Even with the Kenyan government's increasing attention to the AIDS pandemic, official efforts to curb customary practices like wife inheritance and ritual cleansing, both of which can cause HIV transmission, have been inadequate. A UNAIDS official said that Kenya has not done enough to address women's property rights and their vulnerability to HIV/AIDS. "Women's disinheritance in Kenya is terrible, a tragedy," he remarked. He said the government should discourage traditional rituals, which are "shrouded in secrecy, and [require] that if a man dies, the woman has to sleep with a scum of society."¹⁷⁰ An NGO representative said government officials put tradition over health concerns: "I've not seen many government efforts to educate people about the HIV risks of widow inheritance and cleansing practices. I was at a meeting of government and religious leaders where they said a cure should be found first because these traditions should continue."¹⁷¹ Even the government-sponsored National AIDS Control Council acknowledges that Kenya's serious policy and strategic gaps relating to women's rights have contributed to the spread of HIV/AIDS.¹⁷²

Ineffective Courts

The courts and judiciary are strong arms to disinherit women.

—Ann Njogu, executive director, Centre for Rehabilitation and Education of Abused Women, Nairobi, October 16, 2002

Lawyers and individual women complain that Kenya's courts are biased against women, slow, corrupt, and often staffed with ill-trained or incompetent judges and magistrates. These perceptions discourage women from using courts to assert property claims.

"There are biases on the bench," observed a lawyer at one women's NGO. "Access to justice is lacking, but actually biases against women in the court are worse than anything else.... We see bias in both succession and marriage cases."¹⁷³ Another lawyer agrees: "The worst bit is the attitude of the courts [toward women].... Our

¹⁶⁷ Human Rights Watch interview with Jane Mwangi, acting chief housing officer, Department of Housing, Nairobi, October 29, 2002.

¹⁶⁸ Human Rights Watch interview with Mary Wambua, head, Women's Bureau, Nairobi, November 6, 2002.

¹⁶⁹ Human Rights Watch interview with Thuita Mwangi, executive director, Standing Committee on Human Rights, Nairobi, November 8, 2002. Mr. Mwangi said that the new Kenya National Commission on Human Rights, which is to become operational in 2003, should have a department for women's rights and could undertake this type of awareness raising.

¹⁷⁰ Human Rights Watch interview with Dr. Warren Naamara, country programme adviser, UNAIDS, Nairobi, October 31, 2002.

¹⁷¹ Human Rights Watch interview with Alie Eleveld, coordinator, Society of Women against AIDS in Kenya, Nairobi, October 28, 2002.

¹⁷² A National AIDS Control Council (NACC) publication identifies the following gaps: a lack of strategies to implement inheritance rights; lack of specific interventions to address property ownership and inheritance by women in female-headed households; lack of interventions to address women's land ownership; lack of appropriate guidelines for marriage, separation, divorce, and ownership of property; and failure to outline measures to eliminate harmful cultural practices such as wife inheritance. Gender and HIV/AIDS Technical Sub-Committee of the National AIDS Control Council, *Mainstreaming Gender into the Kenya National HIV/AIDS Strategic Plan 2000-2005* (Nairobi: Office of the President, 2002), pp. 4-5. NACC also confirmed in this publication that losing family property when a husband or father dies and practices such as wife inheritance increase widows' vulnerability to HIV infection. *Ibid.*, pp. 8-9.

¹⁷³ Human Rights Watch interview with Judy Thongori, then deputy head of litigation, FIDA-Kenya, Nairobi, October 16, 2002.

courts are failing us.”¹⁷⁴ Some say judges embody the attitude that women are inferior to men. “Judges are men who were brought up to believe less in the rights of women,” said one property rights lawyer. “Judges say, ‘Why should women get property?’”¹⁷⁵ Even a government official who handles succession matters admits: “Men judges do not apply the law. Our men are men whether they are judges or not. [Men judges] may believe a wife should not inherit.”¹⁷⁶

Individual women also feel the bias when their cases reach court. Gacoka Nyaga, a woman who went to court for division of property, said: “Male judges sympathize with men [in property cases]. Judges think this could happen to them.”¹⁷⁷ Ndunge Ritah, who lost a motion asking a court to order her abusive husband to leave the home she bought, believes she lost because she is a woman.¹⁷⁸

Kenya’s courts are also slow. The obvious culprit is the courts’ backlog, but some say corruption plays a part. Gacoka Nyaga, whose division of property and divorce case took almost a decade, said, “My husband paid a High Court judge to drag out the cases. We’d go and the judge would be gone, sick, or not available. This went for years and years.... My court files were lost twenty times over.... This would delay the case for three to six months [each time].” She says her husband “paid the clerks to hide the files.”¹⁷⁹ Other women, such as Priscilla Echaria (whose property division case is still ongoing after fifteen years), blame backlogs and ineptitude for the courts’ crawling pace.

The new Family Division of the High Court (sometimes called the “Family Court”), which currently sits only in Nairobi, should help to speed up family law cases.¹⁸⁰ “We wanted to set up a Family Division in every province,” said the head of the Family Division, but this has not happened.¹⁸¹ Some advocates are critical of the Family Division. “The Family Court is a big letdown,” said one women’s rights advocate.¹⁸² Another lawyer complained that it has not done enough to streamline procedures: “Nothing has been done to simplify the rules for Family Court. The rules committee could do this easily, but it hasn’t taken this seriously. It’s made of men from the Court of Appeal who don’t see the urgency.”¹⁸³ She acknowledged that some succession rules were revised, but said, “They’re still complex.”¹⁸⁴

Sometimes, courts simply do not enforce laws that could protect women’s property rights. “Most law is in writing, not in practice. The courts are far behind.... I don’t think the courts enforce the law per se,” said one government official.¹⁸⁵ This can happen if they think they have no jurisdiction, as exemplified by the remarks of a magistrate who, when asked if a court could order a man to leave the family home upon divorce, said: “A woman can’t come to court if she wants her husband to leave rather than her.... We don’t interfere with the community setup.”¹⁸⁶ It may also be due to ignorance of the law, although the head of the Family Division said she trained all judges and magistrates on family law. There is also a risk that judges’ personal beliefs could interfere with application of the law. One Court of Appeal justice said that the Law of Succession Act should not apply to any

¹⁷⁴ Human Rights Watch interview with Martha Karua, advocate, Martha Karua & Co. Advocates, Nairobi, November 11, 2002.

¹⁷⁵ Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

¹⁷⁶ Human Rights Watch interview with Mary Njoki Njuya, principle state counsel, Office of the Attorney General, Nairobi, November 11, 2002.

¹⁷⁷ Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

¹⁷⁸ Human Rights Watch interview with Ndunge Ritah, Nairobi, November 10, 2002.

¹⁷⁹ Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

¹⁸⁰ The Family Division of the High Court began operating in 2001. Its jurisdiction covers adoption, child custody, matrimonial property, succession, divorce, separation, maintenance, and other family law matters.

¹⁸¹ Human Rights Watch interview with Justice Joyce Aluoch, head, Family Division, Nairobi, October 30, 2002.

¹⁸² Human Rights Watch interview with Martha Karua, advocate, Martha Karua & Company Advocates, Nairobi, November 11, 2002.

¹⁸³ Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

¹⁸⁴ *Ibid.*

¹⁸⁵ Human Rights Watch interview with Mary Njoki Njuya, principle state counsel, Office of the Attorney General, Nairobi, November 11, 2002.

¹⁸⁶ Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

rural land. He so firmly believes that customs sufficiently protect women that he denied women suffer property rights violations. He said:

It's idiotic to say that women can't get land in Luo land [in western Kenya]. If a woman says she's having difficulty getting land, it's crap. She ought to know that clan land can't be inherited by a woman. It has been this way since time began. If a [husband] dies, the widow has a life interest. It has nothing to do with women's human rights.... Brothers-in-law don't interfere. There is no room for interference....

A daughter would not inherit [rural land] under any circumstances.... Suppose I give [land] to my daughter and son, and then [my daughter] marries a Nigerian?... The Law of Succession Act can't apply [to rural land] because women are supposed to be married and go away.... Clan land must stay where it is. Urban property [can be inherited by women], but not rural land.... If you don't control the transmission of clan land, you'll bring in strangers from other cultures that undermine the culture protected by customary law.... The Law of Succession Act is useful because it covers people like us. Rural communities must be protected. It's in the interest of everyone that rural communities are governed by their rules.¹⁸⁷

Some judges are also openly hostile to the idea of requiring a man to leave the matrimonial home upon separation or divorce. In one High Court ruling, the judge wrote:

I will pause here and deal with this issue of husbands vacating matrimonial homes for the wives. Of late a number of applications have been filed in this court seeking orders that husbands vacate the matrimonial homes for the wives. In a Kenyan context this issue has to be approached with extreme caution. We should not blindly ape the English as we have done in almost all our laws. It should be remembered that a wife is married into the husband's clan. The matrimonial home in most cases lies within the clan land. It would therefore not be in keeping with our culture for the husband to be made to vacate the clan land for the wife.¹⁸⁸

Secular courts are not the only ones with problems. Kadhis' courts—religious courts that determine questions of Islamic law relating to personal status, marriage, divorce, and inheritance where all parties are Muslims—are also accused of being inept, slow, and costly. One lawyer who handles property cases for Muslim women said she prefers the secular High Court for divorce cases. “A Kadhis' court is like a kangaroo court. It's frustrating to litigants and lawyers,” she said. “Kadhis are insensitive to women's issues.... More often than not, Muslim lawyers go to civil courts to advocate for rights of women.”¹⁸⁹ In some areas, the pull of custom is so strong that the Kadhis have difficulty applying Islamic law. Kenya's Chief Kadhi said, “Where custom is strong, it may be hard for a Kadhi because people will be hostile to him if he judges according to Islamic law, so they encourage some sort of settlement. Sometimes this may not be beneficial for women.”¹⁹⁰ A Muslim member of the constitutional review commission said, “Some Kadhis don't apply the Koran. The Digo [ethnic group] has their own customary laws which in practice supercede Islamic law.”¹⁹¹ Enforcing Kadhis' court judgments is also hard: “The government can enforce Kadhis' judgments, but there is no enforcement. No one fears the Kadhis' courts.”¹⁹²

¹⁸⁷ Human Rights Watch interview with Justice Richard Otieno Kwach, Court of Appeal, Nairobi, November 7, 2002.

¹⁸⁸ Ruling in the case of Agness Wanjiku Mbugua v. James Mbugua Macharia, Separation Cause No. 50 of 1997, High Court of Kenya at Nairobi, copy on file with Human Rights Watch.

¹⁸⁹ Human Rights Watch interview with Abida Ali-Aroni, lawyer, Nairobi, October 23, 2002.

¹⁹⁰ Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.

¹⁹¹ Human Rights Watch interview with Maimuna Abdallah Mwidau, program officer, Constitution of Kenya Review Commission, Nairobi, October 23, 2002.

¹⁹² Ibid.

Obstacles to Women Claiming Property

Obstacles to women asserting their property rights in Kenya abound. The most serious are women's lack of awareness about their legal rights, the time and expense of pursuing property claims, violence, social stigma, poverty, and harassment of NGOs working on women's property rights.

Kenya's pluralistic legal system is complex and confusing even for those with high levels of education and access to information. For women not in that privileged position, it is unusual for them to know their legal rights. "Women are not educated to know their rights," said the head of one NGO. "They don't know they're supposed to get land and property."¹⁹³ Many women interviewed by Human Rights Watch had not heard of laws relating to property at all or knew little of their content. A fraction had a clear understanding of their property rights. These women were among the most educated and wealthiest women Human Rights Watch interviewed or had attended trainings on property rights conducted by women's rights organizations. Anna Adhiambo, a Luo widow, said, "I'm not aware of a law on inheritance. I know that brothers-in-law grab what the deceased leaves behind. They take the land and the vehicles and they go."¹⁹⁴ Amina Juma, a widow in Kisumu, has a vague awareness of the Law of Succession Act, but said, "I don't know anyone who has been assisted by this law."¹⁹⁵ Some women know they have legal rights to property, but do not know how to claim them. Caroline Wanjiru, a widow living in Nairobi, said she never went to court or other authorities about the property her in-laws seized because she "didn't know whether such places existed. I didn't know where to go."¹⁹⁶

The time it takes to pursue property claims, especially in court, is an obstacle for many women. "Many women give up going to court because it takes so long," said the head of a women's organization.¹⁹⁷ A lawyer specializing in women's rights cases added, "It's time consuming to pursue your rights. Being bogged down with day-to-day challenges, women generally don't go to court."¹⁹⁸

The cost of claiming property rights is another deterrent. If a woman initiates a legal case, lawyers are her biggest expense. Of the women Human Rights Watch interviewed, two whose cases went the furthest had to pay legal fees of approximately KSh5 million (U.S.\$62,893) and KSh8 million (U.S.\$100,645), respectively. "To go to court you just pay," said Patrice Nayoke, a widow from western Kenya. "You're wasting money."¹⁹⁹ An NGO representative concurred: "[Going to court] is a technical, tedious process, but you can't get property without it. Many women don't have the money to do this. If they want to get a lawyer in private practice, it's expensive."²⁰⁰ Accessing Kadhis' courts poses similar problems. The Chief Kadhi told Human Rights Watch: "Most women who come to the Kadhis' courts are economically empowered. It is often impossible to reach courts because of the cost of lawyers."²⁰¹ Local dispute resolution, such as arbitration by elders or chiefs, can also be unaffordable. Susan Wagitangu, a widow from central Kenya, said, "If you want to be assisted, you have to produce money. Even to go to the chief or the land department, they will always ask for money."²⁰² A women's rights educator who trains local officials said, "[Informal] village courts are harsh to women. In most cases, widows spend a lot of money trying to pay a bribe to the elders to handle their [property] cases."²⁰³

¹⁹³ Human Rights Watch interview with Tabitha Seii, executive director, Education Centre for Women in Democracy, Nairobi, October 22, 2002.

¹⁹⁴ Human Rights Watch interview with Anna Adhiambo, Kisumu, November 1, 2002.

¹⁹⁵ Human Rights Watch interview with Amina Juma, Kisumu, November 1, 2002.

¹⁹⁶ Human Rights Watch interview with Caroline Wanjiru, Nairobi, October 21, 2002.

¹⁹⁷ Human Rights Watch interview with Tabitha Seii, executive director, Education Centre for Women in Democracy, Nairobi, October 22, 2002.

¹⁹⁸ Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

¹⁹⁹ Human Rights Watch interview with Patrice Nayoke, Kisumu, November 1, 2002.

²⁰⁰ Human Rights Watch interview with Ann Gathumbi, coordinator, Coalition on Violence Against Women, Nairobi, October 17, 2002.

²⁰¹ Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.

²⁰² Human Rights Watch interview with Susan Wagitangu, Nairobi, October 29, 2002.

²⁰³ Human Rights Watch interview with Zedekia Ouma, paralegal, Education Centre for Women in Democracy, Siaya, November 4, 2002.

Threats of violence also inhibit women from pursuing property claims. Many divorced and separated women told Human Rights Watch that they feared their husbands would attack or kill them if they pursued their property rights. These women were also willing to tolerate abuse because their housing alternatives were limited. Some widows also said they feared violence from their in-laws if they tried to regain their property.

Social stigma discourages women from claiming their property rights. Women who pursue property claims are often considered greedy traitors of custom. The near certain alienation they face from their families and communities stops many women from asserting property claims. According to an official who works on women's rights for the Supreme Council of Kenya Muslims, "Women are indoctrinated since childhood not to pursue their rights. If I were to ask for a share of my father's estate, it would be a big issue. People would ask, 'why is she acting like this?'... If a woman tries to pursue her rights, it looks like she's gone haywire. It's not just Muslim women—it's women in general in Kenya."²⁰⁴

The stigma is especially strong if women attempt to use courts to protect their rights. "Going to court is a deviation," said a teacher in Siaya district. "It's not accepted. Divorced women fear they will be seen negatively in the community if they pursue their rights in court."²⁰⁵ A magistrate confirmed that communities would condemn a woman going to court for property as a "bad woman."²⁰⁶ According to a local administrator in western Kenya, such women would be "outcasts."²⁰⁷ An NGO representative added, "When you're seen going to court, people think you're going to jail.... If a woman went to a chief [about property], he would say, 'Why are you bothering me?' The chief would see her as defiant for not following the norms."²⁰⁸

Poverty not only contributes to women's property rights violations, it also discourages women from claiming their rights. Some women simply cannot afford to pay what it takes to pursue property claims. Poverty can also increase the strain on families, leading to perceptions that a woman pursuing her rights is competing against her male relatives. An activist in Nairobi remarked: "In a city like ours, you're fighting over crumbs. When women try to fight for property it is hard because men are also going for the crumbs. But if everyone reaches a certain level, they won't all be against women."²⁰⁹ A commissioner on the Constitution of Kenya Review Commission said that in their community consultations, more young men objected to women having property rights than older men. She attributes this to poverty: "Many young men were the first ones to oppose recognizing women's property rights. Older men were more willing to recognize them. Brothers are competitors, and seeing their sisters inherit is considered part of their deprivation. When there is poverty and a lack of jobs, it looks like daughters are encroaching if they inherit."²¹⁰

Finally, activists' and NGOs' ability to help women claim their property rights is jeopardized by harassment they face for doing their work. A paralegal who conducts civic education on women's property rights was once threatened after holding a training in a village: "I received a call on my cell phone with a man's voice saying 'If you ever set your foot in this place again, then you will not leave here alive. You will know there are men in charge here, not women.'... I felt threatened. I thought I was going to lose my life."²¹¹ Another paralegal who works on inheritance cases said, "The villagers get angry. Brothers who want to take widows' property say

²⁰⁴ Human Rights Watch telephone interview with Nazlin Rajput, national deputy secretary for women affairs, Supreme Council of Kenya Muslims, Nairobi, November 16, 2002.

²⁰⁵ Human Rights Watch interview with Doris Adem, teacher, Siaya, November 3, 2002.

²⁰⁶ Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

²⁰⁷ Human Rights Watch interview with Joseph Kisangau, senior district officer, Siaya, November 4, 2002.

²⁰⁸ Human Rights Watch interview with Odenda Lumumba, coordinator, Kenya Land Alliance, Nairobi, October 18, 2002.

²⁰⁹ Human Rights Watch interview with Professor Wangari Maathai, Green Belt Movement, Nairobi, October 18, 2002.

²¹⁰ Human Rights Watch interview with Professor Wanjiku Mukabi Kabira, commissioner, Constitution of Kenya Review Commission, Nairobi, October 23, 2002.

²¹¹ Human Rights Watch interview with Samson Michura, paralegal, Education Centre for Women in Democracy, Nairobi, October 25, 2002.

'I'm going to kill you' or that they'll do a witchcraft curse."²¹² He said that people criticize him for helping women. "Women's relatives say I am interfering with the culture and misleading the women. They say I'm a bad man, and I should let culture go on. I refer them to the law."²¹³

²¹² Human Rights Watch interview with Zedekia Ouma, paralegal, Education Centre for Women in Democracy, Siaya, November 4, 2002.

²¹³ Ibid.