# THE LAW OF SUCCESSION

## PART 1

## 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 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 is ethnicity, religious affinity or race. The multiplicity of legal systems gives rise to a problem of internal conflict of laws leading to the question of choice of law in the distribution of a particular deceased person's estate.

1.2 In it 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 level[1] 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.

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[1] Selection on Probate and Administration Chapter V.

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 Where a person dies intestate such property devolves upon a wife or husband or upon those who are of the kindred of the deceased.[2] Succession to such an estate is effected according to the following basic rules prescribed by the Indian Succession Act, 1865:

(a) Section 27 provides that:

> *"Where the intestate has left a widow, if he has also left any lineal descendants, ½ of his property shall belong to his widow and the remaining ½ 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*

[2] Section 26 of the Indian Succession Act.

*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. If there be only one, or more shall be equally divided among all his surviving children."*

2.3 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 are no lineal descendents 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.[3]

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.

## 3.0 CUSTOMARY LAW

[3] Section 43 of the Indian Succession Act, 1865.

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 Law which is either written, declared or 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.[4] 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[5] to that 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 decease estate are 10 in number; children (sons and daughters), grand children, brothers, sisters and their children, father, paternal uncle 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:

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[4] Volume 2 No. 2 December 1988 ***Tanzania Law Reform Bulletin***, p. 56, 2. The Declaration set out in the First, Second and Third schedules ... the areas subject to the jurisdiction of Chunya, Dodoma, Kasulu, Kibondo, Kigoma, Kondoa, Manyoni, Maswa, Mbeya, Mpwapwa, Ngara, Njombe, Shinyanga, Singida, Songea, Ufipa, and Ukerewe District Councils and to be binding upon ***Africans, to whom the Local Customary Law relates. It was extended to many more areas***.

[5] Decision by Said, J. (as he then was) in ***Donald s/o Musa v. Tutito s/o Yonathan***, [1967] HCD No. 118.

(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 that 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 fathers' 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 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 EMPHAHIM 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. 279 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 ½ 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;

(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 difficult** 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 the 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 venture along side with their spouses outside clan, ethnic or religious 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 dependants. 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 on 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 1963/1963) which codified rules of inheritance and will of the patrilineal tribes of Tanzania (Mainland).

1.7 The presumption 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**, deceased [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 tht: "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] TRL 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 No. 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) **<u>The Intention of the Deceased Test</u>**

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 declaration 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 Mohammedan 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 Law 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 and 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 19(1)(a) of the Administration (Small Estates) Ordinance Cap.30 and so he resorted to 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 looses 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 has 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 where 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. 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 elsewhere, 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 life[6] and not disposition. The 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 recognized equality of right to acquisition, ownership and disposition of property irrespective of gender.[7]

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 spouse in their joint lifetime.

(c) Islamic Law

1.22 Islamic Law is linked with the Mohammedan beliefs in that it is embodied in the Quran Surat-1-Bagaro (S.II), Surat Nisaa (S.iv) and Surat-1-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 a 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 the matter of **THE LATE SALUM OMAR MKEREMI** [1973] LRT No. 80; **TATU ABDALLAH vs.**

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

7 Section 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 12-13.

**WAZIRI MUSSA** [1975] LRT No. 7**; SHARIFA SAID vs. RAJABU SAID** [1976] LRT N. 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 estates. 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  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 Shiete, Sunni etc.

(d) **Hindu Law**

High 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.[8] By virtue of the Indian acts (Application) Ordinance (Cap. 2) Hindu Law is applicable in Tanzania, as is the case in Kenya.[9] The Hindu Succession Act of Kenya defines the term HINDU LAW as **"the Law relating to Succession adopted by any school or sub-school of Hindu Law."**

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8 Vide: The Law relating to Hindu Wills including Hindu Wills Act and the Probate and Administration Act by Author Phillips and Sir Ernest John Trovelyan, 2nd Edition – Revised at page 1.

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

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. This position is fortified further by the case of **CHARAN SINGH CHADHA and Another versus MOHINDER SINGH CHADHA AND OTHERS** 1961 – EACA 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, Mohammedans 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 in those sections of the Indian 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, Mohammedan or Buddhist in East Africa (and Wills made and intestacies occurring 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 "D" 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 criticism 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 any exception for testamentary Succession to the property of HINDU, MOHAMMEDANS 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.[10]

Furthermore, it has been observed that the celebrated case of Charan Singh sets out the problem 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 encountered in Tanzania Mainland, the paramount difficulty in the application of the Hindu Law under the Hindu Succession Act as 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.

[10] Vide – Charan Singh Chadra and Another virtus Mohinder Singh Chadha and ORS 1961 EAA 637.

## PART 2

## RESEARCH FINDINGS

### 1.0 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 law and rules governing Succession/Inheritance 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 of Islam.

1.4 Research findings from Mbeya, Rukwa, Ruvuma, Iringa 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 to effect reform and 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 for the purposes of bringing about equality among Tanzanians regardless of gender, religions and custom. 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 are traditionalists hence still heavily influenced by their customs and traditions. They still believe that there is nothing wrong with their Customary Law in 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 identify and traditional values of the societies are preserved, customary laws and

traditions will continue to be recognised in the legal regime of Succession/Inheritance.

1.11 On analyzing the research findings these emerges the following features on the question of unification of the law of Succession/ Inheritance:

(i) View have been expressed in favour of unifying the laws of Succession while accommodating acceptable customs;

(ii) View 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 Constitutions 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 among the people surveyed on whether female children should be given the right to inherit equally with the male children. One position favours equality in inheritance except 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 females. 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 the surviving children. 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 lifetime, 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 Morogoro Regions, the majority views expressed favoured the abolition of 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 children in matters of 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 of 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 with their customary law of 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:[11]

**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 fatehr provided that a child is a daughter and the mothr does not know her natural father. As far as boys are concerned opinions were divided. Some said that the body 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, such as  or ¼. The other position disallows inheritance 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:

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[11] The Court of Appeal of Tanzania in **Violets** 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).

(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 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 exist procedures to legitimize 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.[12] Reservation were noted in Chunya District where 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.

## 4. PROTECTION OF WOMEN'S PROPERTY INTERESTS UNDER THE LAW OF SUCCESSION

### (A) With Regard To Clan Land/Property

**4.1** 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 husband who belong to different clans, it is a common fear

[12] *Violet Ishengoma Kahangwa & Other v. The Administrator General and Mrs. Endokia Kahangwa*, Civil Appeal No.17 of 1989 (unreported). Should only inherit from their mother's share.

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.[13] This position is also illustrated by a number of decided cases both by the High Court and the Court of Appeal[14] 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.[15]

(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 restrictie 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

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13 "Outsider" means a member of a different clan (a married woman/widow) see ***Peter S. Rugarabamu v. Constantine Kiiza*** (MZ) (PC), Civil Appeal No. 76 of 1987 (unreported).

14 ***Boniface Mhigi v. Philimon Mhigi***, [1967] EA 38 at 66; ***Deocres Lutabana v. Deus Kashaga***, 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. Deuse 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.

15 In ***Bernerdo Ephrahim v. Holana Pastory & 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 ***Baspari Lutagwerera v. Samson Lutoha***, Civil Appeal No. 278 of 1990 (unreported) Lugakingira J. cautions that one must consider the rationale of patrilineal orientation to inheritance.

out from the matrimonial home[16] 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.[17]

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 practice 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, Iringa and Morogoro regions.

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16 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.

17 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.[18] However, research revealed that due to religious, social and economic changes which are taking place nowadays, the significant portion of the communities do inherit patrilineal. 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 case the right to inherit is conditional upon the widow accepting to remain permanently at the deceased's home.

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[18] Little is known about matrilineal communities as evidenced in ***Donald s/o Yonathan*** [1967] HCD No.118 – (information from Archives).

**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 case, 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 subject to probate and administration proceeding, except for the Muslim couples when the husband dies, the Islamic Law of Succession should apply.

**4.14** Where upon death the husband leaves behind immovable property, such as residential house(s), the position is that, the surviving wife or wives should inherit that property for life in trust for the surviving children, unless she remarries then property would revert to the children.

**4.15** There was a **unanimous** view in Rukwa, Mbeya, Ruvuma, Iringa, Morogoro, Dodoma and Singida regions 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 reforms to the administration of estates of deceased Moslems on the ground that

would be interfering with the Quranic rules of inheritance, which are GOD given and therefore immutable.

## 5. PROPERTY CRABBING UPON DEATH[19]

**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 victims 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 machinery should be established within the purview of the law of 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.

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[19] In some instances property grabbing on the death of a spouse (especially husbands) is done by widows, more so even before death.

# PART 3

# 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 encouraged under Intestate 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 recognise two form 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 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*.[20]

In Kiswahili Wosia means:

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

> *... 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 which that intention is expressed. Professor Mellows[21] 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, given directions as to burial ceremonies among other matters that a Will can provide;

(ii) A Will operates as a declaration of intention. By making a Will, one is not at all prevented from disposing of his property intervivos (when he/she is still alive).

(iii) It must, usually, be in 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.

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[21] Mellows, A.R. ***The Law of Succession***, 4th Edition, 1983.

(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 by 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 Acts (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 of the 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, or have received from 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 take 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.[22] Absence of the wife or wives will render the Will to be defective as it was decided by Justice Seaton.[23]

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 to (one from the clan and another from elsewhere). If the testator is illiterate then the number of witnesses required is four (two form 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 thumbprint 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 heirs has committed adultery with the testator's wife;

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22 Rule.

23 ***John Lwehabura vs. Edward s/o Lwahabura*** [1968] HCD 358.

(ii) if the heir attempted to murder, attach 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 Differences 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.[24] 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 at 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 was confirmed[25] that the Quran has no specific provisions on matters of inheritance such as:

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[24] Quran 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.

[25] ***Administrator General Zanzibar v. Nassor Bin Fazil Bin Nassor and Other*** [1957] E.A. 159.

> *"First, the Quran provides that, when one makes a bequest he should know his relations and next of kin (Sura II: 180) secondly, one is prohibited to bequest more than  of his property by Will.*[26] *Wicks J. observed that: "the general rule of the Mohammedan Law (Islamic Law) of Succession is that, a (Moslem) cannot by Will dispose off more than  of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of the legal  cannot take effect unless the heirs consent thereto after the death of the testator."*

5.4 Justice Wicks in the same case went on to observe that, disposition of  unwillable may be done by the Will of the testator as long as they follow Islamic Law 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 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 Quran has laid down the basic provisions of inheritance.

## 6.0 RESEARCH FINDINGS ON WILLS

6.1 Research finding in Kagera region, 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 outside 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

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

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 confidentially pertaining to Wills be safeguarded.

6.3 In Tenga, 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 provisions for his nearest relations/dependents. The majority view was that one should not dispose of his estate by Will to the extent of  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 ¼ to ¾ of his property by Will in order to avoid the possibility of total disposition of property to the detriment of would be beneficiaries.

However, if was emphasized that the idea of making a Will is both desirable and useful and that it eliminates conflict of interest 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 Will 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 requirement 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] LRT 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] LRT N. 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 encountered in cases of intestate succession.

(ii) Save for Wills under Islamic Law, one may bequeath all his property to any one 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 concubines, illegitimate children,[27] friends etc.

(iii) Through the Will one may make equal distribution for the 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 ones property to be distributed.

(v) The Will is an extension of ones freedom of disposition of ones property when one is still alive.

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[27] See Footnotes 11, 12 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.

(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.

## PART 3

## 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 the 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' estates are divided into three 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 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 elsewhere, where it is believed that the deceased was possessed of property in the Territory and:

(a) that the deceased had made a Will bequeathing his estate or part thereof and has omitted to appoint an executor; or

(b) 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

(c) that probate or letters of administration with the Will annexed has not been obtained within six months from the death of the testator; or

(d) 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 past VIII thereof has been applied thereto under the provisions of Part IX of that Ordinance.

## 2.0 RESEARCH FINDINGS

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 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 Tanzania (Mainland).[28]

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.[29]

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 appoints administrator knows which law to apply on the distribution of the deceased's estate.

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28 ***Chiku Salum and Hamisi Simba vs. Iddi Omar***, (PC) Civ. App. No. 53 of 1990 (unreported).

29 5th schedule Part II Magistrates Court act, 1984 as well as section 103 of the Probate and Administration Ordinance, Cap. 445.

2.6 However, since the provisions both in the Probate and Administration Ordinance as well as in the Magistrates Courts Act have articulated the 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 Court has greatly affected deceased's estate in the urban areas where property developed on registered landforms 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 have 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 by Justice Mfalila.[30]

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.

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[30] ***Manungwa Lutalamila and Others vs. Martha Lutalamila***, [1982] TLR 98 (Mwanza).

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 appointed as an Executor or Administrator of the deceased's estate under the Public Trustee's 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.

## PART 4

## VIEWS FROM DIFFERENT WOMEN'S ECONOMIC GROUPS

1.0 Research terms visited Morogoro, Iringa, Mbeya, Ruvuma, Rukwa, Tanga, Arusha and Kilimanjaro regions 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 store and the remaining part of the estate.

(c) A child begotten 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 decease'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 to 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 house(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 and children age differs.

In Mbeya and Rukwa regions twelve Women Economic Groups 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 in 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 the 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 recognised 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.

# PART 5

# RECOMMENDATIONS

## 1.0 INTESTATE LAW OF SUCCESSION

### 1.1 Uniformity

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.

## 2.0 THE RIGHTS OF CHILDREN TO INHERITANCE

A uniform law of inheritance should guarantee those 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 the present fetters on females not inheriting fully the 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 children of the marriage should, irrespective of gender, religion or any other differences, 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 of 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.*

## 3.0 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.

## 4.0 RIGHTS OF CHILDREN BORN OUT OF WEDLOCK

Without prejudice to the foregoing, the rights of inheritance of children born out of wedlock should 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 photography 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.

## 5.0 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, dependents, 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 widow(s) to inherit immovable property for life should 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 provided 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 state of the deceased, the same shall be inherited by the widow(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 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 spouses.

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, Hindi 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 done by empowering institutions like the Village Executive Officers, Ward Executive Officers, or Social 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 has 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 offices 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.

## 7.0 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 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 (1/3) 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 the 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 different from the other 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 the 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.

## 8.0 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.

## 9.0 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.[31]

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.[32]

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.

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 thereafter to account to the Curt for his/her administration or execution.

9.6 It should be provided in the proposed law that those appointed an executors or administrators to a deceased persons' estate need not be relatives or children or spouses of the deceased but 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 Trustee, Lawyer(s), Religions Leaders or Bankers Social Welfare Officials appointed.

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[31] Probate and Administration Ordinance, Cap. 445; Administration (Small Estates) Ordinance, Cap. 30. The Magistrates Courts Act, 1984 and the Administrator Generals Ordinance, Cap. 27.

[32] Vide Section 76 of the Law of Marriage Act.

9.8 It is also recommended that in order to minimize 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.