WOMEN’S RIGHT TO LAND: A CRITICAL ANALYSIS OF THE DISPUTE RESOLUTION PROCESSES OF INHERITED LAND UNDER CUSTOMARY LAW AND ISLAMIC LAW. A CASE OF ILEMELA DISTRICT MWANZA: TANZANIA.

AUTHORIZED BY: REHEMA HAMIDU MTULYA

SUPERVISOR

Dr ROSALIE K. KATSANDE

Submitted in partial Fulfilment of Master’s Degree in Women’s Law, Southern and Eastern African Centre for Women’s Law, University of Zimbabwe, 2016
DECLARATION

I, REHEMA HAMIDU MTULYA do hereby declare that, this research is my own original work and has not been submitted for a masters, in Masters Degree in Women’s Law Degree at the Southern and Eastern Africa Regional Centre for Women’s Laws, University of Zimbabwe, or any other University, or a degree, masters course or any other specialization whatsoever.

Signed………………………………                                          Date ……………………………..

This work is approved for submission towards by the supervision; Dr Rosalie Katsande, Deputy Director of SEARCWL

Signed …………………………                                          Date …………………………………..
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Ahsanteni sana
DEDICATION

This work is dedicated to my parents and Muslim both women and men, my father Hamidu Mtulya and mother Asha Kambi

Quran 20:114

“O lord give me greater knowledge”
LIST OF ACRONYMS/ABBREVIATIONS

AIDS Acquired Immune Deficiency Syndrome

BAKWATA Baraza la Kiislamu Tanzania (Islamic Reconciliation Board in Tanzania)

CAP Chapter

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CMA Magistrate Court Act

ECESCR International Convention of Economic Social and Culture Rights

HIV Human Immune-Deficiency Virus

H.C.D High Court Decision

ICCPR International Covenant on Civil and Political Rights

JALA Judicature and Application of Laws Act

LRT Law Report of Tanzania

LMA Law of Marriage Act

NGO’s Non Governmental Organizations

PAEA Probate and administration of Estates Act

UDHR Universal Declaration of Human Rights

P.B.U.H Peace Be Upon Him

URT United Republic of Tanzania

R.E Revise Edition
SADC Southern Africa Development Community
INTERNATIONAL INSTRUMENTS


Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

International Covenant on Civil and Political Rights (ICCPR)

International Convention of Economic Social and Culture Rights (ECESCR)

Southern Africa Development Community Protocol on Gender and Development

Universal Declaration of Human Rights (UDHR)

TANZANIAN STATUTES

The Constitution of the United Republic of Tanzania of 1977, Chapter 2 of the Laws Revised in 2002 (here in after to be referred as the Constitution)

Customary Law (Declaration) Order No. 4 of 1963, (Government Notice No. 436 of 1963).

The Judicature and Application of Laws Act, Cap 358 R.E. 2002

Law of Marriage Act, Cap 29 of R.E 2002

Probate and Administration of Estates Act Cap 453 R.E. 2002

The Interpretation of Laws Act, Cap. 1 R.E 2002

Magistrate Court Act cap 11 R.E 2002

The Land Act, Cap 4 of 1999

The Village Land Act, Cap 5 of 1999
LIST OF TANZANIAN CASES


Bernado Ephrahim v. Holaria Pastory and Gervazi Kazirege (1989) Civil Appeal No. 70

Bi Hawa Mohamed v. Ally Sefu (1983) TLR 31

Clementina Tikengwa and Another v. Trases Kabogi (1978) LRT 49

Dewawoisia d/o Ndeamtzo v. Immanuel Malasia (1968) HCD 127

Elizabeth Mtawa v. Hassan Mfaume Risasi [1983] TLR31


List of tables and figures

Figure 1: Ilemela District Map in Mwanza

Figure 2: Bismark Rock Symbol of Mwanza city

Figure 3: Number of respondent and how data was collected

Figure 4: Group Discussion
ABSTRACT

Women’s substantives right to inherit land from their deceased husband’s estate and their ability to enforce that right through various dispute resolution mechanisms are serious problems that affect thousands of women who live under either customary or Islamic law in Ilemela District, Mwanza in Tanzania.

This is because the perception of many societies in Tanzania is that women are inferior to men and this adversely affects women’s right to inherit land under customary and Islamic laws. Equality for all citizens before the law and access to justice are two human rights which make ideal tools to inherit land from their deceased husband.

This study examines and analyse the challenges faced by women especially widows, not only when they seek to enforce their right before dispute resolution mechanisms which are controlled by men but the substantive rights to inherit land (under customary, Islamic and statutory law ) itself. These challenges essential undermine women’s right to inherit for example, under customary laws a widow does not have the right to inherit the land of her late husband; under Islamic law however women do not have the right to inherit land of their deceased husband or father in accordance with the Holy Quran.

These are additional factors that make women’s right to inherit of land problematic in Mwanza, and these include the conflicting and discriminatory approaches to women’s right to inherit land. While customary laws are highly patriarchal and fraught with gender discrimination, Islamic laws is based on the obedience of women to men and their submissive nature. In both cases, women are discouraged from pursuing their rights for fear for loosing their existing economic dependence on male family members or as a result of false accusations of witchcraft against them.

The majority of respondents believed that the statutory law was the most supportive of their rights three systems of law as they confirm with the provisions of the Tanzania Constitution and other International human rights Conventions which prohibit discrimination against women.
This study recommended that Tanzania should enact or reform its laws to abolish all discriminatory laws which undermine women’s rights to inherit land, and cooperate with international human rights instrument.
EXECUTIVE SUMMARY

Tanzania’s land Inheritance laws are acknowledged by human rights activists as being discriminatory and against women. This is particularly apparent when a man dies and his surviving wife and/or daughters seek to inherit his land, especially clan or family land.

This study aimed at examining the challenges faced by women, especially widows, as a result of existing discriminatory inheritance laws and legal procedures. It is proposed that a uniform law or single legal mechanism for resolving land inheritance disputes for widows is the best way of handling these challenges.

This is due to the fact that inheritance laws discriminate against women and cause them to suffer after the death of their husband within the relevant mechanism upon claim their rights to inherit land.

The study aimed at establishing the extent to which existing literature, laws (International and domestic laws i.e Customary, Islamic and statutory) and cases which have taken place in Tanzania contribute to the problems women come across after the death of their husband because of discriminatory inheritance laws. The literature shows the application of three systems or bodies of inheritance laws. They are customary, Islamic and statutory law totally excludes women from inheriting land. Islamic laws permit women to inherit a small portion from their deceased husband’s estates. The literature proposed with different recommendations including the reforms of succession laws and strategies to empower women through dissemination information and sensitization campaign for the societies and structures (i.e judges, magistrates and chairmen) to change their negative attitudes regarding women’s right to inherit land.

The research used different methodologies and methods to analyze, explain and explore the lived realities of women within their societies in relation to their to inherit land inheritance in the Sukuma tribe and Muslim in Mwanza Region. I used the women’s law approach to expose the gaps between the inheritance laws and policies and women’s lived realities as a result of which suffered various challenges at the hands of relevant authority when they tried to claim their right of inherit land after death of the husband and the problem women faced trying to inherit matrimonial property which they helped to acquire during their husband’s life time. I used
different approaches for instance, the actors and structures approach (such as interviewing Judges, lawyers, advocates, magistrates in the legal system) to understand their position in relation in land inheritance and different ways of their resolving disputes. The Human rights approach helped me to find out about how the government has failed to take the necessary measures to amend and eliminate discriminatory laws against women in accordance with its commitments international human rights treaties. The sex and gender approach showed me how society could be influenced to change its negative attitude towards women and to obtain a further understanding of the position of women in society. I used different methods of collection to obtain data from various respondents including in-depth interviews, focus group discussions with key informants and my own observations.

The major findings of the research indicate that inheritance laws are discriminatory against women, especially in relation to clan land. This study exposed that while women contribute the acquisition of matrimonial property during their marriage, everything changes after the death of their husband’s and, as a result they either lose everything under customary law or inherit only a small share of such property under Islamic law. They face many challenges including having their claiming before relevant authorities, property grabbing by insensitive relatives, and founded accusations and they killed their husbands using witchcraft, and ignorance of relevant inheritance laws on their part or their part of service providers. If the wishes to claim their rights through the judiciary complex procedures are involved and ordinary widows do not know about them or how to use them to their benefit.

Therefore inheritance laws need to be reformed, especially customary laws which exclude women from inheriting land, especially clan land, by enacting new gender and sex sensitive laws of inheritance which will remove the existing pluralist system of conflicting laws. There is a need to encourage husbands to write wills, and as a result help to realize for women their right to inherit land to the full and beneficial extent guaranteed under the various human rights treaties to which Tanzania has promised to abide.
# TABLE OF CONTENTS

DECLARATION .................................................................................................................. ii
ACKNOWLEDGEMENTS .................................................................................................. iii
DEDICATION ...................................................................................................................... iv
LIST OF ACRONYMS/ ABBREVIATIONS ..................................................................... v
INTERNATIONAL INSTRUMENTS ............................................................................... vii
TANZANIAN STATUTES .............................................................................................. vii
LIST OF TANZANIAN CASES ..................................................................................... viii
List of tables and figures .............................................................................................. viii
ABSTRACT ...................................................................................................................... ix
EXECUTIVE SUMMARY ............................................................................................ xi
TABLE OF CONTENTS ................................................................................................. xiii

## CHAPTER ONE ............................................................................................................. 1

1.0 INTRODUCTION ........................................................................................................ 1

  1.1 CHOICE OF RESEARCH TOPIC ........................................................................ 2
  1.2 BACKGROUND OF THE STUDY ...................................................................... 3
  1.3 STATEMENT OF THE PROBLEM .................................................................. 4
  1.4 GENERAL OBJECTIVE OF THE STUDY ....................................................... 6

    1.4.1 SPECIFIC OBJECTIVES OF THE STUDY ........................................ 6
  1.5 RESEARCH ASSUMPTIONS ............................................................................ 7
  1.6 RESEARCH QUESTIONS ................................................................................. 8

LIMITATION OF THE STUDY ....................................................................................... 8

  1.8 DEMARCATION OF THE STUDY ................................................................... 9
  1.9 DEFINITION OF KEY CONCEPTS ................................................................... 11

    1.9.1 ISLAMIC LAW ...................................................................................... 11
    1.9.2 CUSTOMARY LAW .............................................................................. 12
    1.9.3 WIDOWHOOD ................................................................................... 13

CHAPTER TWO ................................................................................................................ 15
2.0 LAW AND LITERATURE REVIEW ................................................................. 15
2.1 HUMAN RIGHTS INSTRUMENTS .............................................................. 20
2.2 ISLAMIC HUMAN RIGHTS ........................................................................ 24
2.3 THE ROLE OF THE NATIONAL LEGISLATURE IN RELATION TO WOMEN’S INHERITANCE OF LAND AND THE DISPUTE RESOLUTION PROCESSES ................................................................. 24
  2.3.1 CONSTITUTION OF UNITED REPUBLIC OF TANZANIA OF 1977 ............ 25
  2.3.2 PROBATE AND ADMINISTRATION OF ESTATES ACT CAP 453 R.E. 2002 .......... 26
  2.3.3 CUSTOMARY LAW (DECLARATION) ORDER, 1963, G.N NO. 436 .................. 27
  2.3.4 MAGISTRATE COURT ACT CAP 11 R.E. 2002 ............................................ 29
  2.3.5 ISLAMIC LAW .......................................................................................... 31
  2.3.6 THE LAND ACT, CAP 4 OF 1999 ............................................................ 32
  2.3.7 THE VILLAGE LAND ACT, CAP 5 OF 1999 ................................................. 32
  2.3.8 LAW OF MARRIAGE ACT, CAP 29 OF R.E 2002 ....................................... 33
  2.3.9 THE NATIONAL LAND POLICY .................................................................... 34
CHAPTER THREE ............................................................................................... 36
RESEARCH METHODOLOGIES, METHODS AND THEORIES .............................. 36
  3.0 WOMEN’S LIVED EXPERIENCES IN RESOLVING DISPUTES OVER LAND INHERITANCE .... 36
  3.1 WOMEN IS RIGHT TO INHERIT LAND IS A HUMAN RIGHTS .......................... 38
  3.2 INFLUENCE OF ACTORS AND STRUCTURES ............................................... 39
  3.3 LEGAL PLURALISM ...................................................................................... 40
  3.4 SEMI AUTONOMIUS STRUCTURES ............................................................... 41
  3.5 SEX AND GENDER ANALYSIS .................................................................... 42
DATA COLLECTIONS METHODS ........................................................................ 43
  3.6 IN-DEPTH INTERVIEWS ............................................................................... 45
  3.7 KEY INFORMANTS ....................................................................................... 45
  3.8 FOCUS GROUP DISCUSSION ........................................................................ 46
  3.9 OBSERVATIONS ........................................................................................... 47
CHAPTER FOUR ................................................................................................... 49
FINDINGS, DISCUSSION AND ANALYSIS ............................................................ 49
4.0 SOCIAL AND ECONOMIC FACTORS WHICH MAKES WOMEN DELAY IN OBTAINING THEIR 
LAND RIGHTS IN THE RELEVANT AUTHORITIES .......................................................... 49
4.1 DIFFERENT AUTHORITIES AND THEIR JURISDICTION ............................................. 50
  4.1.1 FAMILY MEETINGS ................................................................................................. 50
  4.1.2 COURTS ................................................................................................................... 51
  4.1.3 LAND TRIBUNAL ..................................................................................................... 54
  4.1.4 DISTRICT MUSLIM COUNCIL OF TANZANIA (BAKWATA) ................................. 55
4.2 CHOICES OF SYSTEM OF LAWS: CUSTOMARY AND ISLAMIC LAWS ..................... 57
  4.2.1 THE LIFE STYLE OF THE DECEASED PERSON ..................................................... 58
  4.2.2 THE INTENTION OF THE DECEASED TEST ......................................................... 60
4.3 KIND OF MARRIAGE ..................................................................................................... 61
4.4 WOMEN INHERITANCE IN LAND: CUSTOMARY AND ISLAMIC LAWS ..................... 62
  4.4.1 ISLAMIC LAW .......................................................................................................... 62
  4.4.2 CUSTOMARY LAW .................................................................................................... 64
4.5 CHALLENGES THAT WOMEN FACE IN CLAIMING THEIR RIGHT TO INHERITANCE OF LAND UNDER CUSTOMARY AND ISLAMIC LAWS .................................................. 65
  4.5.0 Accessibility and ownership in land inheritance ....................................................... 65
  4.5.1 Lack of capacity or knowledge of laws among the implementers of the laws .......... 67
  4.5.2 Witchcraft accusations and the killing of widows .................................................... 68
  4.5.3 Property Grabbing ................................................................................................... 69
  4.5.4 Widow Inheritance ................................................................................................ 70
4.6 POSITION OF A GIRL CHILD’S RIGHTS IN RELATION TO LAND INHERITANCE UNDER CUSTOMARY AND ISLAMIC LAWS .................................................................................. 71
4.7 POSITION OF WOMEN IN DECISION MAKING IN RELATIONS TO LAND INHERITANCE ..... 73
CHAPTER FIVE .................................................................................................................... 75
STRATEGIES AND DISSEMINATION OF INFORMATION AS A TECHNIQUE TO EMPOWER WOMEN IN DISPUTE RESOLUTION AND LAND INHERITANCE SYSTEMS ................................................................. 75
5.0 LEGAL RIGHTS STRATEGIES AND EMPOWERMENT OF WOMEN .......................... 76
  5.0.1 LEGISLATION AND REFORM .................................................................................. 76
5.0.2 REFORM AND REVIEW OF CUSTOMARY LAW................................................................. 76
5.0.3 STATUTORY LAWS........................................................................................................ 78
5.0.4 ENACTMENT OF WILL AND ADMINISTRATION OF ESTATE LAWS............................ 78
5.0.5 DISPUTE RESOLUTION BY RELEVANT AUTHORITIES .............................................. 79
5.0.5 MASS MEDIA CAMPAIGN........................................................................................... 80
5.0.8 ESTABLISHMENT OF ISLAMIC COURTS................................................................... 81
5.0.9 ECONOMIC EMPOWERMENT OF WOMEN............................................................. 82

CHAPTER SIX......................................................................................................................... 84
6.0 CONCLUSIONS AND RECOMMENDATIONS............................................................. 84
  6.1 CONCLUSIONS............................................................................................................... 84
  RECOMMENDATIONS........................................................................................................ 86

BIBLIOGRAPHY..................................................................................................................... 89
CHAPTER ONE

1.0 INTRODUCTION

‘Even if national legislation will fully recognize women’s equal rights to co-own, access, control and inherit land… existing practices will not automatically be changed; wider changes in social and cultural attitudes are necessary for these legislations to real women’. (Benschop cited Strickland 2004:28).

This statement shows that women still face challenges in the enjoyment of substantive equal rights to inherit land as men. This is because many pieces of legislation are biased in terms of gender, inconsistent of enforcement mechanisms such as access of justice system and lack of awareness for majority of women in their rights due to the practices and social attitudes enshrined in customary and Islamic law of inheritance.

Women’s right to inherit land under both customary and Islamic laws in terms of dispute resolution is a serious problem that affects thousands of women at Ilemela District, Mwanza in Tanzania. There are different factors that make women’s inheritance of land problematic in Mwanza. Most women are expected to inherit land after their husband’s die, as the laws provide the right for women to inherit land. However, these laws are rarely applied.

In Tanzania, inheritance laws and dispute resolution mechanisms are in need of reform under both Islamic and customary law. These two system of law limit women’s right to inherit land on the basis of their gender and sex. Dispute Resolution mechanisms and procedural laws also favour the selection of males in the administration of the deceased’s land, even if those male are distant relatives of the deceased husband, thus excluding women from the administration of the deceased’s land. The widespread exclusion of women in Tanzania from either inheriting or owning land is a factor which limits the written customs and religious concerning their access to and uses land of their deceased husband.
Therefore, the research questions and interventions strategies recommended by this study are intended to explore the relationship between the law on land inheritance and dispute resolution processes through which claim their rights to inherit land through the relevant authorities. By considering these factors, the research seeks to provide a critical analysis of the link between women’s right to inherit and the different ways of resolving disputes by appropriate authorities, who settle land dispute. The research concentrates on the differences between customary and Islamic laws, how to prevent discrimination regarding women’s right in relation to land inheritance and the different ways of resolving disputes applied to each authority.

1.1 CHOICE OF RESEARCH TOPIC

I made my choice after joining the women’s law program in Zimbabwe. After a short while of studies, I realised that women are oppressed and subordinated in my country because of the inheritance laws are excluded women to be a part of entitled to inherit their deceased husband property. I felt I could do something to help women in my country. I decided to research and write on customary and Islamic laws in relation to women’s right to inherit land.

In fact, in Tanzania, particularly in the Lake Zone region of Mwanza, there is widespread exclusion of women from claiming their right to own or control land. One would expect that upon the dissolution of the marriage by the death of her husband, a woman would have the right to inherit and control land, but that comes with challenges from various groups of people and authorities.

Under the Constitution of the United Republic of Tanzania, the right to own land is a human right enshrined under article 24. Women are entitled to own and inherit land and the

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1 Under Sukuma customary law, like many customs in Africa, women are regarded as second-class citizen
2 The Constitution of the United Republic of Tanzania, Chapter 2 of the Laws Revised in 2002 (here in after to be referred as the Constitution)
3 Article 24(1) provides that every person is entitled to own property and has the right to the protection of his property. Every person has been interpreted to include women and property to
Constitution guarantees them equality under the law the same as men.\textsuperscript{4} This means that their rights are protected from any form of discrimination on the grounds of their sex or gender.\textsuperscript{5}

My specific interest in the research was to examine the extent of the effectiveness of the dispute resolution mechanisms\textsuperscript{6} in protecting women's right to inherit land under Islamic and customary laws in Ilemela District, Mwanza. The main issue is whether women’s right to inherit land is enforced. If so, how? And if they are not being enforced, why not?

1.2 BACKGROUND OF THE STUDY

This research basically focuses on the exclusion and discriminatory inheritance laws and mechanisms which resolve the disputes which are majority are men, against women and promotion the practices and custom of both Islamic and customary laws. The study aimed at examining the challenges faced by women, especially widows as a result of existing discriminatory inheritance laws and legal procedures, and it suggests that a uniform law or single legal mechanism for resolving land inheritance for widows is the best way of handling these challenges.

In Tanzania, there is no regular law or consistent decisions by authorities that regulate matters of inheritance. Therefore there is much uncertainty because of the different of laws and this requires a court to exercise a choice of law discretion. If the deceased has left a will, and then the land or property is administered or distributed according to his or her wishes.

The laws which govern inheritance and resolving dispute processes in Tanzania are in urgent need of reform under customary law which is very common, land inheritance laws discriminate against women’s rights to inherit on the basis of their sex and gender. Islamic law of inheritance gives women (widows) and daughters the right to inherit certain portions from deceased include land. Read: \textit{Ntiyahela Boneka v. Kijiji cha Ujamaa Mutala} (1988) TLR 156 and \textit{Attorney General v. Lohay Akonaay} (1995) TLR 80

\textsuperscript{4} Article 13 (1) of the Constitution which provides that: \textit{All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law}

\textsuperscript{5} Article 13 (5) of the Constitution

\textsuperscript{6} The quality of women rights to access justice as men in enforcing their land right to inheritance
husband’s or father’s estate and this is just and equitable. Problems still exist within our society due to the weaknesses in and application of our Constitution in any matter which a widow tries to inherit land and we need to come up with more positive decisions in terms of equality for men and women in order to improve the system.

Tanzania is a signatory to different international human rights Conventions which require the government to protect, respect and fulfil the rights contained therein. Inheritance laws and procedures for resolving disputes do not considered women’s fundamental rights of equality such as their equal participation in decision making, owning and controlling land through inheritance.

The customary and Islamic laws of land inheritance do not consider the matrimonial property which is acquired during the life time of the deceased. Once a husband dies there is a presumption that the property belongs to the deceased, the right of his widow to matrimonial land is totally forgotten.

The majority of authors and researchers have discovered that women are deprived of their land inheritance rights after the death of their husbands because the laws discriminate against them and/or they are ignorant of how to enforce their rights for instance through court procedures.

In my research, I will focus on dispute resolution processes of inherited land under customary law and Islamic law in relation to Women’s land rights. The research will help society, especially its widows, to be aware of their right to inherit land and the procedures which they will be entitled to be followed once their husband dies and they to claim their rights within the mechanism of the legal system.

1.3 STATEMENT OF THE PROBLEM
Tanzania’s inheritance laws subordinate and impoverish women’s rights. Women are denied equal shares of inheritance, women lack access to economic resources and are kept in a state of perpetual dependence. Indeed, Tanzania Law Reform Commission identified succession laws as ‘the major factor that has greatly worked toward the derogation of status of women’ (WLAC: 2009). Widows in Tanzania, especially those who claim the right inherit land, find their rights are violated on a daily basis.
Population statistics show that Tanzania comprises 48.7% men and 51.3% women (Tanzania National Bureau of Statistics: 2015). Therefore, women’s right to land should be acknowledged reflected under customary, Islamic and statutory laws. In addition, women face various challenges when claiming their right to inherit land from their deceased husband’s before the relevant authorities. Women also suffer during the exercise by relevant authorities as to whether a customary or Islamic law applies to her claim. These laws do not conform with Tanzania’s obligations under relevant international human rights instruments and Tanzania own Constitution and statutory laws.

Women’s contributions to the matrimonial properties acquired during the lifetime of their husbands are not properly or full recognised. In short, customary laws are discriminatory in nature when it comes to inheritance in land. This is attributable to the fact that most of the tribal groups in Tanzania are patrilineal and inheritance rights are based on male lines only. Women are normally regarded as minors who are not entitled to inherit land, especially clan or family land. Customary law rules on women’s right to inherit land conflict with international human rights instruments, the Constitution which provide for women’s with men equal right to own land. Under Islamic law, however, women are entitled to inherit a small portion of their husband’s estate. In this regard, Islamic law gives men a higher status than women under the laws of inheritance.

In addition to the fact that these various customary, Islamic and statutory laws discriminate against women, they also face many different challenges. These challenges start within the dispute settlement mechanisms at the lowest or family level and ......in every such mechanism right up to the final court in the legal justice system. This challenges are attributed to cultural, economic and social attitudes towards women that give rise barriers against them and their efforts to enforce their land inheritance rights. Corruption and bribery in the legal system, especially in the subordinate courts where most succession cases are filed and heard, also constitute a further challenge to women.

It is within the above context that I shall analyse the various dispute resolution processes relating to women’s right to inherit under customary and Islamic laws most of which is based on gender and sex. Such analysis is necessary in order to begin to learn how to protect women, especially widows from their families, the offensive laws and the obstructive relevant authorities. These
authorities cannot be ignored because it is they who will finally be relied upon to enforce women’s right to inherit land.

1.4 GENERAL OBJECTIVE OF THE STUDY

The general objective of the study is to analyse and summarise the challenges faced by women in the dispute resolution process relating to their right to inherit land under customary and Islamic law.

1.4.1 SPECIFIC OBJECTIVES OF THE STUDY

i. To examine why customary laws and Islamic laws are usually applied as opposed to the statutory law (Constitutional law).

ii. To scrutinise why customary and Islamic laws have failed to protect widow’s right to inherit land.

iii. To explore why widows are excluded from land inheritance, decision making, and why they inherit small share of land in Islamic than men.

iv. To study why widows are discriminated against in their application of customary law and Islamic law within dispute resolution mechanisms such as in families, courts and Islamic Reconciliation Boards.

v. To scrutinise why religious faith and law under Islamic law never changes within the Islamic societies.

vi. To find a solution to the legal barrier for example court procedures which widows face in accessing and enforcing their land inheritance rights.

vii. To inspect changes in customs, social and economic conditions and their impact on the legal status of widows in relation to their right to inherit land.

viii. To examine why there is such high number of men as compared to women in decision making bodies under Islamic and customary rules.

ix. To examine why the government is failing to reform the laws of inheritance of land despite the existence of the Bill of Rights in the Constitution.
To make recommendations on whether the Constitution and human rights instruments can be applied to widows rights to land inheritance and suggest the strategies to be used for law reform through the amendment or enactment of new laws.

To sensitize policy makers, members of the legislature and other concerned stakeholders on the need to abolish discriminatory laws and procedures in the customary and Islamic laws of the land in women’s rights to land inheritance.

1.5 RESEARCH ASSUMPTIONS

1. That there are differences between the dispute resolution processes relating to women’s right to inherit land under customary law and Islamic law in Tanzania.

2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of authorities for dispute resolution.

3. That there are processes used to determine the choice as to which system of law (customary or Islamic) should be applied to a women’s right to inherit land.

4. That there are laws which give women the right to inherit land under both customary and Islamic law.

5. That there are challenges which women face in claiming a right to inherent land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.

6. That there is a need to develop strategies to empower women effectively to participate effectively in dispute resolution processes to inherited land under customary and Islamic laws.
1.6  RESEARCH QUESTIONS

1. Are there differences between the dispute resolution processes relating to women’s right to inherit land under customary law and Islamic law in Tanzania?

2. Do disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of authorities for dispute resolution?

3. Are there any processes which are used to determine the choice as to which system of law (customary or Islamic) should be applied to a women’s right to inherit land?

4. Are there laws which give women the right to inherit land under both customary and Islamic law?

5. Do women face challenges in claiming the right to inherent land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each?

6. Is there a need to develop strategies to empower women to participate effectively in dispute resolution processes to inherit under customary laws and Islamic laws?

LIMITATION OF THE STUDY

1.6.1 Difficulties to obtain statistical data from court: It was not possible to find out about the cases filed by widow in the primary court who were claiming their right to inherit land from their deceased husbands. Therefore, it was impossible to gauge to what extent the number of cases had increased or decreased, or the number of cases in which widows choose to go to an ordinary court after a decision was made by either an from Islamic Reconciliation Board or prior to that decision.

6.1.2 Rains and floods: The Lake Zone area of Mwanza receives a lot of rain during the year. At the time of doing my research, it was the rainy season this caused floods. Flood destroyed
road infrastructure and made it difficult to reach the interior of Mwanza. However, I managed to interview those who came from to market places near town.

6.1.3 Financial constraints: I conducted only few group discussions because of the lack of finance. Many interested stakeholders demanded money rather than offer their cooperation in helping to improve women’s rights.

1.8 DEMARCATION OF THE STUDY

This research was conducted at Ilemela District in Mwanza Region and it covered different places including Buswelu, Sengabuye, Nyamangolo, Kayenze, Kiseke and government offices. Mwanza as mentioned earlier is a city within the Lake Zone area and is also known as the Rock City of Tanzania because it has rocks everywhere. The study was conducted between October 2015 and January 2016 and targeted the customary and Muslim communities comprising men, women, customary leaders, religious leaders and government officers who could shed light on inheritance. A few non-Muslims were consulted because they were key informants in obtaining their perspectives of customary laws. This was important because customary laws regulate Muslims, Christians and atheists. The respondents I targeted were from both the urban and rural area within the District of Ilemela.
Figure 1: ILEMELA DISTRICT MAP IN MWANZA

Figure 2: BISMARK ROCK SYMBOL OF MWANZA CITY
1.9 DEFINITION OF KEY CONCEPTS

This research contains some technical terminology and words which need to be defined for the purpose of understanding the study:

1.9.1 ISLAMIC LAW

The definition and scope of Islamic law is based on its two main sources, that is Shariah and Hadith. Shariah means rules derived from the text of the Holy Quran and Hadith. Sada, I.N discussed the meaning and sources of Shariah and in its wider meaning are usually translated as Islamic law. He divided the sources of Islamic law into two components, that is, divine and human sources. The divine sources comprise the Holy Quran and the Sunnah (practices) of Prophet Muhammed, while human sources comprise Ijma, Qiyas, Maslaha, Urf which broadly means Ijtihad.

According to Shafii’s doctrine the two clearly recognized sources of law of a religious nature are the text of the Quran and the prophet’s tradition, Sunna.

“The only Quran is the primary source of Islamic jurisprudence. All imams and all the schools are agreed on this. The Quran is the highest source, since it is the result of divine revelation.”

(Dahl pg 19)

Sunnah is the tradition left by the prophet (P.B.U.H) which explains all his acts and words. All he said and did is religious, moral legality relevant. Thus the Quran authorizes the will and law giving of the prophet, verse 7:157(Dahl 23).

The important question is whether Islamic law is static or dynamic. Sada concludes that Islamic law, if considered from the aspect of its divine component, is rigid and unchallengeable. It is flexible, dynamic and adaptable if viewed from the aspect of human opinion (ijtihad) which speaks of the changing of human nature from both time to time and generation to generation.

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7 Read: Chapter 6 Verse 57, Chapter 5 Verse 67, and Chapter 53 Verse 3 of the Holy Quran
9 Verse 32:1, 4:106, 53:4( verily, we have revealed to thee the Book in truth that thou mayest judge between men of what God has shown thee; so be not with the treacherous a disputant
10 Say, ”O ye folk! verily, I am the Apostle of God unto you all,-of Him whose is the Kingdom of the heavens and the earth
Fiqh means as the study and science of Islamic law (understanding in religion). Fiqh is used by Muslim scholars, and Verse 7:179 of the Holy Quran which states that: Quran beneficiaries are those people who are entitled to get their share according to the Quran and stipulates that Quran women (widow) are included although they only get a small portion of inheritance.

1.9.2 CUSTOMARY LAW

Black’s Law Dictionary defines that law consisting of customs that are accepted as legal requirements or obligatory rules of conduct practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. The Interpretation of Laws Act defines ‘customary laws’ as:

‘any rule or body of rules whereby the rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 12 of the Judicature and Application of Laws Act, and references to native law or to native law and custom shall be similarly construed’.

In the case of Eshugbayi Heko v. the Government of Nigeria, the court defines customary law to mean the indigenous laws of people. Customary law is founded on the social norms or cultures of the people. This reflection of the habits and social attitudes of the people it governs. In Tanzania, there is no single set of customary laws of land inheritance because each customary law belongs and applies to the tribe concerned and the origin of that tribe. Therefore, customary laws are differing from one tribe to another and from one community to another.

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1. Eight Edition by Bryan A. Garner
2. The Interpretation of Laws and General Clauses Act, Cap. 1 of the Laws Revised in 2002
3. [1931] A.C 667-673, where the Privy Council said where “It is assent of the native community that gives a custom its validity”
1.9.3 WIDOWHOOD

A widow is defined\textsuperscript{14} as a woman whose husband died and who has not remarried. Ncube and Stewart observed that in general law terms a widow or widower is a person whose spouse has died during the subsistence a marriage, regardless of whether at the time of death the couple were living together, were legally separated or were even in the process of divorce. Conversely, no matter how strong the union, no matter how long the couple may have cohabited with each other, if there was no marriage the survivor will not be legally regarded as a widow or widower, that is a surviving spouse (Ncube & Stewart, 1995:32). They also discussed whether the formal legal system, as it affects matters of inheritance and succession, determines whether a woman is a widow or a man a widower by reference to the existence of a valid marriage, be it under general law or custom, the family or the community may have its own criteria to be applied to determination.

Aphane, et al, in the concept of widowhood (1995: 8) says that widowhood, defined by society, customs and general law, presupposes that marriage in one form or another must have taken place between the deceased and the surviving partner. Tuhaise, (2001:307) gives the concept of widowhood on the base of customary law concepts. He states that the customary concept of widowhood is determined more by marriage practices and attitudes than by marriage laws, and it is more associated with women than with men. Marriage practices do not strictly conform with the statutory requirements of a valid marriage. Traditional values, like bride price and child bearing, play a vital role in determining the status of a marriage. He also insists the traditional concept of marriage (and, therefore, widowhood) differ from the legal concept. The difference stems from various factors including gender roles, marriage practices, patriarchal attitudes and general property relations. According to Islamic law a women who has not contracted an Islamic marriage during her lifetime is excluded from any right of inheritance, because the Quran distributes the deceased share only among people who are entitled to receive it. Based on the different writers on the concept of the widow we can conclude that widows are related by marriage whether under customary or Islamic law, and it depends on the kind of marriage the

\textsuperscript{14}Black’s Law Dictionary, Eight Edition Bryan A. Garner
widow contracted before her husband died which makes her entitled or not to claim her right of inheritance of her deceased husband.

CONCLUSION
This chapter provided the background to the research problem being the challenges widows face under Islamic and customary law when they try to enforce their rights to inherit land from their deceased husband’s estates, such challenges includes socio-economic factors and problematic legal procedures within the various dispute resolution mechanisms in the jurisdiction of Mwanza city. Also it covers different main concepts of this research.

The following chapter reviews the relevant literature and law on the subject in the context of women’s lived realities. I doing so, the chapter gives details the theory and practice of Islamic and customary law relevant to women’s right to inherit land from their deceased husbands, International Conventions and statutes by various authors and people who have experience in the subject.
CHAPTER TWO

2.0 LAW AND LITERATURE REVIEW.

There is a lot of literature on women’s land inheritance and ways of resolving disputes. As we have already seen, women’s right to inherit land after death of their husbands and processes to be followed takes many different forms. It is a widespread experience not only in Tanzania but also in many countries in Africa that there are different obstacles which cause widows to fail to inherit their deceased’s husband land and claim their rights through the relevant authorities, many of the court procedures can be linked to customary values, for example the vats of majority of courts women were not eligible to be member (Pretorius 1993:127).

These hindrances include culture, customs, practices, and court procedures, religious and economic dependence. If women do manage to succeed in inheriting some land it will always turn out to be small than any portion inheritance by males.

Legal pluralism in Tanzania since independence 1961, women ability to obtain equal rights to inheritance has both been hindered and found opportunity for expression in the law Sieder and McNeish cited in Hellum and Stewart (2013:182) says that which advocates an anthropological conception of legal pluralism; one that advanced both that there is an official legal system recognizes more than one system of law and which recognizes “that there regulatory or normative system other than the formal law that affect and control people’s life.

When I conduct my research I realized that the primary court has jurisdiction to adjudicate matter in relation to Islamic and customary, but also recognized the family meeting as the starting point of widows to claim their land rights either the deceased profess Islamic law or follow customary law .

Sieder and McNeish (1997: 76) have observed that the current trends to recognize religious and customary norms may, on one the other hand expand the spaces for the exercise of local autonomy by different social, ethnic and religious group, but, on the other hand they may reinforce existing inequalities within these groups in terms of gender, status and age.
Ncube and Stewart, (1995:32) for instance state that: The status of the widow under customary law is far more or more problematic since there is throughout the region evidence that the impact of customary law or, more properly, the customs and practices of the indigenous people impose constrains and restrictions on a widow. I agree with Ncube and Stewart because it shows that most women are still constrained by restrictions of land inheritance due to the customs and practices of certain tribe or ethnic group and women are forced to follow all practices and customs of their societies.

When I conducted an interview with a respondent and widow in Kayenze, she said that according to her culture, a woman is not allowed to go anywhere to claim her right to inherit land once her husband has died because she afraid her culture, customs and practices that women is not entitled to claim on land inheritance. However, customs and practices are not only reason. Women not being able to or not wanting to take advantage of their legal rights can be due to various factors, pertaining to their class background, urban or rural background, education, religion and ethnicity due to the lack of legal language, financial barriers could be another reasons for the very limited use of the laws, and the attitudes towards courts also prevents women from considering the formal court system as an institution to safeguard their rights, and the geographical placement of courts and administration in the towns and big cities is also barrier for the access of rural women to the formal system (Mehdi and Shaheed 1997:28).

Akujobi (2013:32) believes that there are discriminatory aspects of property inheritance under customary law and they affect the rights of spouses. She criticizes the role of customary law to the effect that a wife cannot inherit the property of her deceased husband, because the customary law offends the principle of natural justice, equity and good conscience. She recommends that government should promote and encourage the role of Non Governmental Organisations, which have been educating women, and society to appreciate the unfairness of discriminatory law and they work toward eliminating discrimination and reforming the laws. In addition, she recommends the reform of customary laws through unification, codification and harmonization to create certainty in formulating, applying and implementing of the laws bolstered as necessary by the principle of natural justice. I agree with Akujobi because she shows how much customary
law discriminates against women’s rights to property (land) and she suggests how our legal rules in relation to customary laws should be reformed so as to provide equality within the societies.

In Islamic law the religious factor which makes women to claim their right due to the fact that Quran stated that all the material things owned by God and he is entitled to give human being, so a human cannot claim on it but she or he can get from God that’s why Quran divided the share in relation to inheritance, this statement supported with Rwebangira et al (1994:12) says that:

“The Holy Quran stipulates that all material things belong to God and therefore no man or woman can righteously claim to own any worldly goods... Every human being has the right to a meaningful living and those who hold economic power, and do not have the right to deprive others of the basic necessities of life by misusing resources which have been created by God for the benefit of humanity.”

The author worried that Muslim women have a right to enjoy all human rights stipulated in the Holy Quran verses. Moreover, they have the right to complain against any form of domination.

I also found that a lack of Islamic knowledge among the majority of Muslim women in Ilemela District, where women, especially widows do not approach the Islamic Reconciliation Board to claim their rights or to solve their disputes. Once a dispute arises within their families and communities they use their Islamic law.

Rwebangira, MK et al (1994: 4) argues that: the inadequacy of Islamic knowledge among Muslim women is responsible for their low status in the society. Contrary to the common knowledge, Muslim men have used weaknesses to deny women their rights as provided in the Holy Book of Islam the Quran. Concurring with inherent logic of this point, where Mehdi and Shaheed(1997:134) quotes Patel state: Apart from that problem (Islamic knowledge most Muslim women), women are exposed to misinterpretations of Islam by their religious leaders. Muslim clerics often lead women to believe that they are inferior and have limited role to play in society.

When I conducted an interview among of Muslim religious leader (Sheikh) at the headquarter of the Muslim Reconciliation Board, he said the majority of women have no knowledge of Islamic law especially Quran and practices of Prophet Muhammad (Sunnah) and this makes

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15 Verse 4:126 (An-nisa).”For, unto God belongs all that is in the heavens and all that is on earth, and, indeed, God encompasses everything”
prevents them from enforcing their rights. There is a vital need to examine these laws and explore how advancements could be made in these laws and also see whether the laws are meeting the needs and aspirations of people and in our case especially women. Thus efforts have been directed to raising legal rights awareness through legal literacy programmes and partly through legal aid projects on the other hand and the implementation of Shariah (Islamic law) to make women live within a specific framework on the other hand Mehdi and Shaheed (1997:16) Rwebangira et al cited Hassan also points out that, according to Islamic teachings, only a small proportion of property is intended for a woman’s ownership or inheritance in marriage.

Rwebangira notes that the Quran embodies pronouncements and reflections on various themes. The earliest Muslim communities observed these instructions. The author notes that there are four main schools of law in Islam and that the differences in the interpretation of these laws have adverse and varied consequences on women. The Holy Quran already provides a widow’s share from her deceased husband but the challenges arise on the application and interpretation of Quran within the Islamic communities. Their inferiority complex and submissive conduct n the part o the among the majority of women who underestimate themselves means that they lack strength to claim their rights to inherit land even though Islamic law provides for their specific right to inherit from their deceased husbands.

Rwebangira observed that:

‘There are women do not consider inheritance as a right although Islam considers it so. Other factors discussed include submissive attitudes of women, witchcraft and inferiority feelings’. (1999:11).

Leila Sheikh echoes Rwebangira’s statement in her paper “The Rights of Women in Islam” and she puts women’s rights in Islam into context. Sheikh notes that the Quran does not create a hierarchy in which men are placed above women; neither does it pit men against women.

The knowledge of laws it seems, is a big challenge among the women in both Islamic and customary system of laws. This is caused by the social, economic and cultural factors of particular societies which prevent women from claiming their rights of inheritance. (Schuler and Rajasingham 1992:22) law is capable of providing women protection and redress and see the
problem only in terms of women’s lack of knowledge; legal literacy is that mere knowledge of the law is sufficient to assure enjoyment of rights and obligations as a citizen.

Tuhaise, P.N et al express this problem as follows:

‘The ethnic groups studied generally lacked awareness of statutory laws and legal conception in inheritance, within varying degrees.... the men are more knowledgeable about the laws and invoked them more than the women.’ (2001:304)

I also found this was the case in Buswelu in the Ilemelela District, where the majority of women are not aware of the statutory laws which give them rights to land inheritance.

Customary laws is surrounding in traditional attitudes and practices as well as social, cultural and economic situation. The authority systems are not aggressive to women and more effective arenas in which they can defend their rights, because they can access, afford and compose of people who have knowledge to support women in any particular case in relation to her rights.

Thus, it is potential to recognize and take an advantage upon those aspects of customary law that can be drawn upon and integrated with some provisions of the statutes and consistent with non-discrimination and basic principles of equality.

The accusation of widow having killed their husband through witchcrafts, (Aphane, 2000:87) that men never die natural deaths and that the of a man is always the result of witchcraft usually with the widow portrayed as the witch. Cultural believes also contributes widows fail to claim their right to inherit, and often excluded from her matrimonial home and communities.

The different writers also encourage the use of different feminist approach to change the women from claiming their rights from the family level up to relevant authorities. Schuler and Rajasingham quotes herself that: A feminist approach to legal literacy involves education to empower women for action and change (1992:97), because social structures do not encourage women to act independently in their own interest, patriarchal, economic and cultural biases and practices keep women isolated, lacking of self-confidence, resources, access to the legal system, and support needed for making a claim or complain. Where women have managed to gain access
or recourse the legal system, the insensitive try of the judiciary becomes another major obstacle (1992:22)

Dahl cited Abdullah who believes that the gates have been closed since the tenth century. Some therefore demand that they be opened again at a time when more and more voices are raised in favour of building a modern Islamic law, he also argues convincingly that an open use of ijtihad will not go far enough if the historic Shariah is to be reconstructed in a just, fair and appropriate form in the modern communities Muslim lawyers live in (Dahl 27)

Literature review shows that there are several factors which prevent women who are entitled to inherit land from accessing the justice system containing dispute resolution mechanisms both customary and Islamic authorities. The mentioned books do not specifically cover Mwanza-Ilemela districts. Therefore this research intends to cover women’s right to inherit land and the different procedures for resolving disputes in the Ilemela District area and it is hoped improve women’s rights to inherit and their right to claim it.

2.1 HUMAN RIGHTS INSTRUMENTS

The research examined the international instruments that the Government of Tanzania has either ratified or signed and which deal with the issue of women’s right to inherit land and processes of resolving their dispute by the relevant authorities. Collectively, these international laws impose a duty on the part of the state to take appropriate steps to protect and promote widows right to inherit land and different procedures for resolving their disputes. At the time women’s rights to inherit in land must be recognised as fundamental right to live in a peaceful life free from any traditional or customary interference which prevents them from enjoying these rights and their full participation in the legal system.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is one of the international instruments which Tanzania has ratified and it became a party of it on the 20th of August 1985. CEDAW is the first international human rights instrument to recognize formally the influence of culture and tradition in restriction, distinction and exclusion of women’s enjoyment of their fundamental rights. CEDAW requires the state parties to take
appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.\textsuperscript{16} It also requires state parties to treat every person as equal before the law\textsuperscript{17}. This is a good test to apply to the women’s right to inherit land and processes of resolving disputes within the legal system, since CEDAW is meant to help to enforce rights and avoid discrimination against either of the sexes. Women should be given equal opportunities and the state should create enabling conditions for the empowerment of women in order for them to achieve equality in both \textit{de jure (in law)} and \textit{de facto (in fact)} when they claim their rights within the legal system in order for them to redress the historical wrong and in equalities which previously prevented them from accessing justice within the legal system in the past.

This research highlights the challenges facing women when claiming their rights to inherit land within the justice system in both customary law and Islamic law. Most of these challenges come from the authorities who control and manage the justice system. Non-discrimination and equality between women and men are fundamental principles of human rights laws. Article 1\textsuperscript{18} of CEDAW defines discrimination against women broadly as:

\begin{quote}
\textit{any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field}.
\end{quote}

In practice this discrimination may occur in the form of direct discrimination through different provisions in the laws or policies that restrict, or distinguish women from men. The Conventions demand state parties to eliminate all forms of discrimination. In the case of women’s right to inherit land, this obligation entails that country legislation must expressly recognize the equal rights of men and women to inherit, use and own inherited land. Tanzania must recognize that it needs to amend some provisions of its laws especially its customary and Islamic laws since it is secular state. For instance, any law is granting inheritance rights to men and not women or

\textsuperscript{16} Article 5 of CEDAW
\textsuperscript{17} Article 15 of CEDAW
\textsuperscript{18} Article 1 of CEDAW
denying women the rights to participate in decision making (i.e., being members of relevant authorities such as the legal system or clan meetings), must be amended to explicitly recognize the equal rights of both sexes.

However, CEDAW’s definition has been expanded by the Human Rights Committee in its General Comment Number 28\(^\text{19}\) by requiring state parties to ensure that women have recourse to affordable accessible and timely remedies as well as access to legal aid and assistance if necessary, so that their disputes may be settled in a fair hearing by competent and independent or tribunals. This recommendation is incorporated in Article 15\(^\text{20}\) of CEDAW which provides for access to justice and equality before the law. In other words, every person must be treated equally without regard to his or her sex and gender.

Another relevant instrument with the same emphasis on equality is the International Covenant on Civil and Political Rights (ICCPR)\(^\text{21}\) which establishes a general and independent protection against discrimination and protects such women’s rights as the right to own, control and access land and property on the a non-discriminatory basis. In addition, ICCPR\(^\text{22}\) confirms that all persons shall be equal before the courts and tribunals. This article insists on the treatment of men and women being equal within the legal system regardless of a person’s gender and sex, and this includes their right to access court procedures to ensure the access of justices under the jurisdiction of relevant authorities. It provides\(^\text{23}\) that the right of everyone to be recognized everywhere as a person before the law, and\(^\text{24}\) equal protection of the law, without discrimination on any ground, including sex.

The Universal Declaration of Human Rights (UDHR) provides that\(^\text{25}\) every person has a right to own land and that right may be protected and this means that to women free to inherit from their deceased husbands. The International Convention of Economic Social and Culture Rights

\(^{19}\)Human Rights Committee of the United Nations, General Recommendation No. 28 (2010)
\(^{20}\)Article 26 of ICCPR
\(^{21}\)Article 14 of ICCPR
\(^{22}\)Article 16 of ICCPR
\(^{23}\)Article 17 of UDHR
(ECESCR) prohibits discrimination of any kind, including sex\textsuperscript{26}, cultural and religion, and obliges the state parties to undertake and ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.\textsuperscript{27}

The African Union Protocol on the Rights of Women in Africa (The Maputo Protocol) defines the term discrimination\textsuperscript{28} to include distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status of human rights and fundamental freedoms in all spheres of life. Article 2(1) requires state parties to take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist. In Tanzania, customary and Islamic law continue to exist and discriminate against women’s rights to inherit land based on sex and gender. In fact, widows are excluded and restricted from inheriting because of the customary laws. Article 8 of the Maputo Protocol also guarantees women’s access to justice and equal protection before the law including their effective access to the relevant authorities which resolve disputes within the judiciary and other law enforcers. This includes the right of women to access legal aid to make sure that they are represented equally before law enforcement mechanisms, such as magistrates, court clerks, chairpersons of land and housing tribunals and clan leaders which are the major authorities which deal with dispensing justice. In other words, there must be equal treatment for both sexes in order to ensure that justice is seen to be done. Article 9 of the Maputo Protocol\textsuperscript{29} binds state parties to ensure effective representation and participation of women at all levels of decision-making.

Article 10 of the Southern Africa Development Community Protocol on Gender and Development\textsuperscript{30} also provides that a widow has the right to an equitable share in the inheritance of the property of her husband. It proceeds further that a widow must have the rights to continue to

\textsuperscript{26}Article 2(2) of ICESCR  
\textsuperscript{27}Article 3 of ICESCR  
\textsuperscript{28}Article 1(f) the Maputo Protocol  
\textsuperscript{29}Article 9 (2) of the Maputo Protocol  
\textsuperscript{30}Article 10 of the SADC Gender and Development Protocol
live in the matrimonial house. Tanzania is now addressing the situation of rural women with references to customary law which affects women in this regard. Again, the Beijing Platform for Action (1995) requires the recognition of women’s right to inherit and owner property including land, and the government should take legislative reform measures to remove disparities from discriminatory laws and traditional customs, as well as prejudicial attitudes against women and their rights to own property.

2.2 ISLAMIC HUMAN RIGHTS

In discussing this part, it is important to explain the principles discussed under Islamic women rights of inheritance above and examine them within the context of Islamic human rights. Verse 49:13 set out that there is equality between men and women without any discrimination on the bases of sex and social status, with superiority being based only on one’s faithfulness and good deeds. Verse 4:1.31 clearly explains that men and women under Islamic law are intrinsically equal to each.

2.3 THE ROLE OF THE NATIONAL LEGISLATURE IN RELATION TO WOMEN’S INHERITANCE OF LAND AND THE DISPUTE RESOLUTION PROCESSES

There are the laws that deal with women, land inheritance, and dispute resolutions in Tanzania. The legal system in Tanzania is different depending on the matter in dispute. For instance, land disputes are determined by one specific authority. And Inheritance matters are dealt with by another. This creates confusion for women for example when a widow claims inheritance to land, she is required to go to a common law court, but when a dispute arises as to who is the original owner of the disputed land which deceased’s left to heirs, she is required to claim that land before a land tribunal. Furthermore she is also required to have locus stand (i.e if she is the administrator of the deceased’s estates). Generally, land inheritance laws in Tanzania are

31 “O mankind, fear your lord, who created from one soul and created from it mate and dispensed from both of men and women. A fear Allah through whom you ask one another and the womb. In deed is ever, over your and observer.”
regulated by several pieces of legislation: The following are some of the important laws regulating the subject in Tanzania.

2.3.1 CONSTITUTION OF UNITED REPUBLIC OF TANZANIA OF 1977

The Tanzania Constitution is the mother law of the country and one of its functions is to ensure that all people are treated equally by the law and receive an equal right to the protection of the law.\(^{32}\) Equal access to justice is one of the most important rights of the Constitution in that it guarantees individuals equal access to the justice system and therefore gives women the right to protect their right to inherit land. Tanzania is a signatory to several international instruments that protect and promote human rights.

The rights of equality are provided under articles 12 and 13 of the Constitution. Article 12 of the Constitution\(^{33}\) states that all human beings are born free, and all are equal and that every person is entitled to recognition and respect of his dignity. Furthermore, Article 13 (1) of the Constitution\(^{34}\) provides that all people are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.

The Constitution\(^{35}\) provides that no law enacted by any authority in Tanzania to make any provision that is discriminatory either in itself or in its effect, and no person shall be treated in a discriminatory manner by any person acting by virtue of any law or discharge of the function of any state, office, party or organ. This article advocates for the protection of women against any form of discrimination in law or practice under customary and Islamic laws.

The Constitution\(^{36}\) also defines discrimination to mean to fail to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, and place of origin or to treat persons differently on those grounds. Moreover, Article 13 (4) prohibits discrimination and further empowers a court to declare discriminatory laws unconstitutional.\(^{37}\) In this respect, the

\(^{32}\) Article 29(2) of the Constitution
\(^{33}\) 12 of the Constitution
\(^{34}\) 13 (1) of Tanzania Constitution
\(^{35}\) Article 13 (2) of the Tanzania Constitution
\(^{36}\) Article 13 (5) of the Tanzania Constitution
\(^{37}\) 30 (3) of the Tanzania Constitution
High Court in Tanzania has made decisions to modify customary law rules limiting the rights of women and daughters to inherit land from their deceased husbands and fathers respectively. In the case of *Dewawoisia d/o Ndeamtzo v. Immanuel Malasia*, Saidi, J, (as he then was) held that:

'It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race and colour. On the grounds of natural justice and equity daughter’

The decision of Lugakingira, J, in the case of *Clementina Tikengwa and Another v. Trases Kabogi* is another good example. The dispute involved the right of women to inherit land. It was argued that Rule 20 of the Customary Declaration Order denied the daughters and the widow of a deceased their full right to inherit a portion of clan land held by the deceased. The court declared that all individuals are equal and have an equal right to inherit clan land regardless of their gender or sex. It was also stated in this case that article 64 (5) of the Constitution provides that any law which contravenes the Constitution is null and void. This article also applies to those customs and practices under both customary and Islamic law which contravene the Constitution such as discriminatory laws against women and their right to inherit land and defend their rights before the relevant judiciary system.

### 2.3.2 PROBATE AND ADMINISTRATION OF ESTATES ACT CAP 453 R.E. 2002

Section 89(a) of the P.A.E.A provides that where the estates are to be administered according to tribal (practices and customs of certain ethnic) is considered valid. Section 89(c) provides that where the estate is to be administered according to Islamic Law the disposition must be recognized as valid by that law. These provisions of law recognize the application customary and Islamic law upon the disposition of a deceased estate without taking into consideration the sex or gender of the heir. Section 88 (1) (b) provides that the administration of the small estate of a Swahili is to be administered with accordance to Islamic law unless the court exercising jurisdiction over the estate is satisfied from written or oral declarations of the deceased or his

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38[1968] H.C.D 127
39[1978]LRT 49
acts or manner of life that he intended his estate to be administered, either wholly or in part, according to any customary law.

2.3.3 CUSTOMARY LAW (DECLARATION) ORDER, 1963, G.N NO. 436

According to section 4 of the Interpretation of Laws and General Clauses Act custom law is defined as:

‘any rule or body of rules whereby the rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 12 of the Judicature and Application of Laws Act (JALA), and references to native law or to native law and custom shall be references to native law or to native law and custom shall be similarly construed’.

Section 11 (1) (b) of JALA provides that:

‘Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature, relating to any matter of status of, or succession to a person who is or was a member of a community law relevant to the matter are established and accepted’.

In Tanzania, inheritance has been made uniform under the Customary Law Declaration for patrilineal tribes which comprise is about 80% of the population and are of the Bantu ethnic group. The remaining 20% is made up of matrilineal people from Eastern, Tanzania, such as Zaramo and Luguru.

The Local Customary Law (Declaration) Order and Customary Rules govern the system of inheritance which can be divided into three degrees of kingship under customary law.

1. Rule 22 provides that first-degree heirs inherit and receive the largest share that is elder son of the first house wife (in case there is a polygamy marriage).

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40 Cap 1 Interpretation of Laws Act
41 Judicature and Application of laws Act, Cap 358 R.E. 2002
42 Tanzania Women Judges Association (TAWJA) 2012 pg. 17
43 Local Customary Law (Declaration) Order No. 4 of 1963, (Government Notice No. 436 of 1963). Hereinafter to be referred as the Customary Orders
44 Customary Rules, GN 436 of 1963. Hereinafter to be referred as the Customary Rules
2. Rule 23 provides that second-degree heirs (i.e all other sons) who receive a large share than their sisters but a smaller share than the first born.

3. Rule 25 provides that third-degree heirs are normally the daughters of the deceased. Their share of the inheritance is usually smaller than the sons.

Rule 27 and 28 of the Customary Rules provide that a widow receives has no share in her husband’s estates if there are children of the union and a husband cannot inherit from his wife who dies intestate unless she has left the wife left no children or any other member of left no children or any member of her own family. This customary law has a form of discriminates against women.

Land which may be inherited may be land that has been acquired by self acquired land such as sale, purchase, it may be family land or clan land is held under customary law which discriminates against women in that they cannot inherit, own or sell such land according to Rule 20, but they may enjoy usufruct rights in respect of that land.

According to Rule 5 of the Customary Rules the administrator at customary law of an intestate estate, that the eldest brother of the deceased if there is no brother it could be the deceased’s father or any brother of the deceased chosen with the help of the clan council. This patrilineal selection process mean that a women could possibility be chosen as the administrator of the deceased’s estate. Rule 6 provides for the meeting of the Clan Council and their duties are: to ascertain the deceased’s possessions, to discuss the deceased’s claim and debts, and finally to call upon claimants to present their claim. Rule 7 and 8 of the Customary Order provides ways on how to determine how to distribute the inheritance.

Under Local and Customary Law Declaration Order, No 4 of 1963 men inherit both movable and immovable (land) properties absolutely according to the degrees of heirs provided, but women (i.e widow and daughters) inherit land only for their use during their life time. They cannot sell or own land unless there are no men members in the family.

The High Court in the case of Bernado Ephrahim v. Holaria Pastory and Gervazi Kazirege,45 Mwalusanya, J. (as he then was) declared a principle of customary law, which denied

45 Civil Appeal No. 70 of 1989
women the right to inherit clan land, unconstitutional for being discriminatory on the basis of
gender.

Rule 77 provides that all movable and immovable property acquired during the subsistence of a
marriage shall be divided into two equal shares after paying all the debts of the deceased. In
respect of movable property the widow share is equal to a one-half (1/2) for each year of
marriage. In respect of immovable property (i.e land) the widow shall get a portion of land in the
same proportion and shall have the right to use the land in a diligent manner until her remarriage
or death. Rule 77 (2) provides that in the case of permanent crops she shall get her share in the
same proportion and may get its interest until she remarrying or dies. Rule 77 (3) provides that the
widow should be allowed to stay in the house till she remarries or until her death, and sub rule 4
provides that all immovable property shall revert to the deceased’s relatives immediately upon
the widows remarriage. Therefore, rule 77 contradicts the Constitution and Land Act that provide
that women enjoy equality with men and have the right to own land, and it does not take into
account widows who have no children and their contribution to the property which was acquired
during their marriage.

Rule 66A which provides that a widow has a right to choose any relatives of husband deceased
and live with him as her husband or she may claim the right to remain with her children in a
house of the deceased, and thus become one of the deceased’s clan member, This lead widows
risk of HIV/AIDS and STD’s due to the inheritance, and cause conflicts among widows
themselves for widows such a when there is more one widow and widows who are childless
which are excluded total from the practices of customs.

2.3.4 MAGISTRATE COURT ACT CAP 11 R.E. 2002

The original jurisdiction in the administration of deceased estates is vested in the primary court
by virtue of section 18 (1) (a) (i) of the Magistrates’ Court Act (MCA). In relation to customary
and Islamic laws, the MCA provides that:

\[^{46}\text{1}^{st}\text{ schedule of the Customary Law Declaration Order}\]
‘A primary court shall have and exercise jurisdiction in all proceedings of a civil nature: where the law applicable is customary law or Islamic law, provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the land registration Act.’

Therefore the primary courts have original jurisdiction to entertain any case in which customary law and Islamic law apply in relation to land which form part of the deceased’s estate whether the land was registered or not. Section 1 (1) of MCA provides that primary Court has jurisdiction in the administration of deceased estates, where the law applicable to the administration or distribution of the estate is customary law and Islamic law. This may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the Primary Court’s jurisdiction.

Section 2 of MCA provides that a primary court shall apply the customary law prevailing within the area of its local jurisdiction or, if there is more than one such law, the law applicable; in the area in which the act transaction or matter occurred or arose, unless it is satisfied that some other customary law is applicable; but it shall, subject to rules of court, apply the customary law prevailing within the area of its local jurisdiction in matters of practice and procedure to the exclusion of any other customary law. This is applicable to certain specific area.

Section 33 (1) of MCA limits lawyers and advocates to present their clients in Primary Courts. This situation makes it difficult for women to face challenge any discrimination due to the fact they may that the majority of women do not know court procedures.

In this specific provision specified that primary courts have jurisdiction to apply the living practices of custom of a give community or societies. Rwebangira and Mukoyoge (1995:27) cited James and Fimbo that; This requirement may be a positive way of ensuring that the custom being enforced by the primary court is the same as those being practised by the community in which the said court is situated. Such a requirement would also give custom the flexibility that it is meant to have (James and Fimbo 1973:185) by allowing a community or particular lineage to change its norms whenever it suits their contemporary needs.

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47 Section 18 (1) (a) (i) of the MCA
48 Fifth schedule to the MCA
49 Fourth Schedule to the MCA
Section 7 (3) provides that when the court is not conversant with Islamic law it can get opinion from Muslim council officials, this section gives magistrate and judges to seek opinion from the Muslim Authorities.

2.3.5 ISLAMIC LAW

Under Islamic law a person under Islamic law has a right to inherit either by marriage or birth. The Islamic law is not dynamic and is embodied in the Quran Surat Nisaa. However, in Tanzania the laws which provide for the application of Islamic law in matters of succession are the JALA and P.A.E.A which provide the application of Islamic law if the deceased professed Islamic Law during his or her life time and declared either orally or in writing that it is her or his intention to have her or his property administered according to Islamic law upon death his or her. According to Islamic law, a widow is entitled to inherit 1/8 from her deceased husband’s estate if there are children, if there is no children half of her deceased husband. The situation of a polygamous marriage widow 1/8 share is divided between all the wives. Quran Chapter Verse 12 states that:

‘In that which wives leave, your share is a half if they have no child. But if they leave a child you get a fourth of that which they leave after payment of legacies that may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you have no child’.

Islamic law provides maintenance of widows one year without turning them out, Shariah considered on the maintenance of widow upon death their husbands. Also are rules which Muslim leaders should be followed upon resolving dispute, and chapter God Almighty forbids making decisions in advance before the leader of the community purpose to avoid confusion of the Islamic management.

50 Chapter 4 Verse 4 -12 of the Quran
51 Surat al-baqrah 2:240
52 Surat Nisaa 4:59 “O you who have believed, obey Allah and obey the messenger and those in authority among you. If you disagree over anything, refer it to Allah and the messenger…. Better suitable for final determination.”
53 49:1
Islamic law does not discriminate against women in terms of inheritance or in the administration of deceased estates. The challenges inequality arises because when a wife dies, her husband’s portion is larger rather to a widow portion in a polygamous union. This is because in polygamous unions, if the husband dies, all the widows have to share a 1/8 share (if there are children) but if one wife dies, the surviving husband takes her share for himself and he does not have to share with anyone else.

2.3.6 THE LAND ACT, CAP 4 OF 1999

According to section 3(2) of the Land Act women have an equal right to acquire, hold, use, and deal with land. This provision confirms that there is equality for all people to use and own land without to their sex or gender.

2.3.7 THE VILLAGE LAND ACT, CAP 5 OF 1999

Section 20(2) of the Village Land Act provides that any customs, traditions and practices of the community which deny lawful access shall be void and may not enforced. As we have seen from the above, the challenge for women in respect of land inheritance arises from traditions, customs and practices which prohibit or limit them from the inheriting land, especially clan land. The Village Land Act provides that where a village council establishes a land council, that council shall consist of not less than five and not more than seven persons, of whom not less than two shall be women, who shall be both nominated by the village council; and approved by the village assembly.

However section 3(2) of the Village Land Act states that the right of every adult woman to acquire, hold, use, deal with and transmit by or obtain land through the operation of a will, shall be to the same extent subject to the same restrictions as the right of any adult. The law insists on the elimination of any restriction against women from inheriting land through a will. Section 3 ensures that there is established an independent expeditious and just system for adjudication of land disputes which will hear and determine land disputes without undue delay. This section is

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54 Section 60 (2) (a) (b)
55 3 (1) (a) of MCA
separate from those legal systems which deal with matters of inheritance. The Village Land Act insist that any disputes concerning the land rights of a person occupying land under a customary right of occupancy, shall be determined under customary law.

### 2.3.8 LAW OF MARRIAGE ACT, CAP 29 OF R.E 2002

The Law of Marriage Act governs to all systems of marriage in Tanzania, both Islamic and customary marriages. The law was amended in 1971 to recognize the position of wives in the distribution of matrimonial property upon divorce or death of the spouse. Section 114 provides that upon divorce, the court has power to order the distribution of matrimonial property acquired by the parties through their joint efforts during their marriage.

In the case of Bi Hawa Mohamed v. Ally Sefu,\(^56\) the Court of Appeal held that the domestic work of wives amounts to effort and its fruit constitute contributions which entitle them to a share of the matrimonial property upon divorce. A similar situation could make to apply in a new law of succession where a widow should be entitled to inherit matrimonial land regardless of her contribution in the acquisition of the land. The Law of Marriage Act regard women land inheritance because it consider the issue of marriage within the spouses during life time, due to the fact that marriage and claim the rights of inheritance it is related each other, so a widow has a authority to claim inheritance from her deceased husband once the issue of marriage arises; However, section 68 of the Law of Marriage Act provides that:

> 'Notwithstanding any customs to the contrary a women whose husband has died shall be free to reside wherever she may please, and remain unmarried or, subject to the provision of section 17, to marry again any man of her own choosing.'

This section gives widows the right to live in the matrimonial home without any disturbance and forced marriage with elder or young brother of the deceased husband according to customary law widow inheritance. Section 160 provides for the presumption of marriage which means that a

\(^{56}\)[1983] TLR31
widow is entitled to inherit upon proof that she lived with her deceased husband for many years in order to consider widows contribution to the welfare of the family.

In the case of Elizabeth Mtawa v. Hassan Mfaume Risasi,\(^{57}\) where the parties lived together but were not marriage, upon the death of her deceased husband the court relied on the presumption of marriage, and a conflict arose between the widow and her husband’s relatives claim to that property. A lower court made an order to allow the appellant to live in the in the house she either died or the deceased’s relatives secured her alternative accommodation or she remarriage. The High Court however stated that the terms of the order were in violation of Article 16 of the Constitution.\(^{58}\)

2.3.9 THE NATIONAL LAND POLICY

In order to enhance and guarantee women’s access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation. However, inheritance of family or clan land will continue to be governed by tradition and custom, provided they are not contrary to the constitutions and doctrine of natural justices.

CONCLUSION:

Therefore this chapter aimed at providing a comprehensive background to the existing relevant literature and laws in Tanzania and then revealing the extent of the various problems women come across after the death of their husband because of discriminatory inheritance laws.

The following chapter tackles the research methodologies, methods and theories used to conduct the research and involve for example, the case women’s right to inherit of the human rights approach which highlights the highly discriminatory practice under land as a human rights issue. Issues of influence and actors towards the subject are also customary law of denying them any right to inherit land from their lack given opportunity husband’s estate.

\(^{57}\)Civil Appeal No. 12 of 2001, high court of Dodoma

\(^{58}\) Article 16 of the Constitution provides that: every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications
CHAPTER THREE

RESEARCH METHODOLOGIES, METHODS AND THEORIES

This chapter discusses the methods and methodologies I used in collecting data during the research. The methods and methodologies used to collect and analyse data depended on the data needed to meet the requirements of the research assumptions, questions and objectives.

According to Meena cited Harding’s Work (1992: 32) the concept of theory is used for the construction of concepts to analyse specific problems or topics, and /or to examine, compare and contrast the connection between observed and imagined phenomena. She continues that methods refer to the techniques used to gather evidence or ‘collect data’. There are three methods used in research: firstly, questioning and observing, secondly, observing and, thirdly, reading, rereading or examining documents of different kinds. Feminists usually use all three methods in their work. According to Harding methodology is theory and analysis about the kind of methods and general research approach most appropriate for a given a body of theory, such as Marxism or critical feminism.

The purpose of these different methods, theories and methodology is to understand the position of law and women in reality within societies (Bentzon et al 1998:81).using the above-mentioned methods and approaches I have looked at the challenges that women face on accessing justice or legal system in relation to their right to inherit. In this chapter I describe the specific methodologies I utilized to collect data to identify the gaps that exist in Tanzanian laws in addressing women’s right to inherit land.

3.0 WOMEN’S LIVED EXPERIENCES IN RESOLVING DISPUTES OVER LAND INHERITANCE

Women Law approach is based on the reality experienced by widows in inheriting land when they make claims against their deceased husbands’ estates through relevant in dispute resolution mechanisms. There is an assumption that existing authorities obstruct undermine women’s right to inherit land. Guberman and Wolfe as follows:
‘The inherited bias of male–dominated institutions contributes to a situation where it is difficult for women to get help’ (1985:55)

The study took women especially widow as a starting point so as to identify their lived reality and look at the challenges which they face when they make claims to land after the death of their husbands and engage with the procedures of the relevant disputes resolution mechanisms under customary law and Islamic law. Women are not involved in decision making different authorities, the including dispute resolution mechanisms.

Dengu-zvogbo et al confirm Dahl Observations:

‘The methodology of women’s law is cross disciplinary and pluralistic and calls for a rather free use of the available material wherever it can be found... [T]his term implies that we wish to see law, reality and morality from women’s point of view’ (1994: 21;22).

Thus, the women’s law approach is associated with grass-root oriented research. The grass-roots approach takes women’s experiences in life as the starting point. This is inspired by gender-neutral legal systems established by the welfare states of the world. In this sense women’s law methodology is a women-centred approach which focuses on the biological, social and cultural differences of women and men. I asked myself, based on women realities in the context of their daily life and the law: Are women following proper procedure when claiming their right to inherit land? Do women that they are entitled to inherit the land of their deceased husbands? I adopted this approach when looking at the laws regulating land inheritance under both customary and Islamic laws. I assumed that the laws subordinated women to men through social, economic and cultural status. The structure of the legal system in Tanzania regarding inheritance laws and dispute mechanisms also subordinate women.

The existence of biological, social and cultural differences between women and men are not regarded as the main challenge in women’s lives, but rather law and societies organized and valuation of female activities, as the result of women subordination (Dahl 1987:13) the subordination of women is addressed, a social and legal order, which recognizes that there are biological and cultural differences between women and men, needs to be created.
During my research some women expressed their views about their ignorance about the existence of such laws. Others who faced challenges in the legal system expressed their concerns about the payment of various court fees, the strange court procedures and the laws which are written in a foreign language. For instance, I interviewed a widow to find out whether she knew about the procedure she needed to follow to make her land claim in a court of law, and her reply was a strange one. She said she knew the system, but English language and procedure make her sick. When I inquired further she mentioned other challenges including ignorance of the law, witchcraft the deceased husband’s relatives murdering his widow out of hatred. This made me more interested in the subject. I discovered that while i was correct to focus in my assumption the technical legal matters which challenge women, there are also many other factors such as these which obstruct women’s effort to realise their right to inherit land.

3.1 WOMEN IS RIGHT TO INHERIT LAND IS A HUMAN RIGHTS.

The human rights approach was used in the research in order to determine the extent to which Tanzania, as level to which Tanzania as a state party has complied with its international obligation in terms of relevant international human rights instruments to which it’s bound. One of my assumptions is whether there are laws which give women the right to inherit the land under customary and Islamic law. It was important to look at human rights law because it embraces strategies of improving women enforcement of their right to inherit land through the dispute resolution processes.

Human rights are a set of universal rights that every person is entitled to enjoy without any regard to their sex, gender, colour, religion, custom and status. Such as approach improve women’s access to their rights to inherit land. Human rights based analysis of both the laws relevant to women’s right to inherit land and the procedures and judiciary structures through which such right must be enforced not only reveals the discrimination women face but also offers solutions as to how to eradicate or reduce it. The human rights based approach offers hope to women struggling to make male-dominated judiciary institutions work for them.
Guberman and Wolfe very accurately describe the effects of this hostile environment of women, the inherent bias of male-dominated institutions contributes to a situation where it is difficult for women to get help’ (1985:55)

This approach critically examines the people’s life lives especially women and then determines whether the societies, actors or government are complying with the requirements of international human rights standards. Therefore, following this approach I analysed the Tanzania Constitution, the laws regulating inheritance the enforcement of those laws through the land laws and legal system especially as it related to women’s right to inherit land.

3.2 INFLUENCE OF ACTORS AND STRUCTURES

This approach enabled me to examine how different actors interact with different structures. In this case, women, men, religious leaders and families are involved. I was able to analyse the influence of structures and actors and how are they sometimes affect women’s choices in economic, social and legal matters. Hellum and Stewart observe:

‘An actor perspective does not imply that women and men are seen totally free to change the rules affecting their social positions which in its turn inform their gender relationship. People’s choice of action may be limited by the social or family structure, the legal structure, religious structure or the economic structure they think or act within.’(1998:102).

In some widows exercise their rights to inherit land because of the nature of the relationship that exists between the widows and the families. This methodology may be a starting point to help crafting strategies which can support the actors and structures review or change some laws in relation to women’s land inheritance in Islamic and especially customary laws. This is important because widows are not given the proper consideration their legally due when it comes to their right to inherit land.

When implementing this approach I needed to interview both men and women, religious leaders, the chairman of land tribunal and magistrates who are responsible for enforcing women’s right to inherit land in the justice system and relevant disputes resolution mechanisms. I manage to
interview different widows and the people in charge of administering justice within the court system, clan and families. The lower courts always determine customary law. There courts function in a pragmatic, procedural framework in interplay between the different actors take place, and how familiar or comfortable the effectiveness of their work depends on these actors are with the prescribed procedures.(Hellum and Stewart 1998:57). And their ability to determine what the law is in a particular case and enforce it. Hellium and sterwart, citing Hamnett describes this process as follows:

‘...a set of norms which the actors in a social situation abstract from practice and which they invest within binding authority.'(1998:103).

Using this approach, I discovered that widows face many challenges when trying to enforce their claim to the right to inherit against their families or through local authorities for example, they are denied according to legal aid and some authorities even deny that women have the right to inherit land. Some magistrates however, are prepared to interpret relevant laws and grant widows the right to inherit.

3.3 LEGAL PLURALISM

Tanzania is a country where legal pluralism has applied since independence in 1961. This forms of pluralism impedes women’s ability to obtain equal rights to inherit land (Sieder and MacNeish 2013:182). Hellum and Stewart (1998:41), who advocate an anthropological conception of legal pluralism, make this statement:

‘Customary law or customs and practices of indigenous people are only applied within the formal legal system when specifically recognized by that system. The extent of recognition may be by high or low but, the governing statutes act as the gateways which permit the admission of customary law in the resolution of disputes that arise for adjudication’ (Hellium and Stewart 1998:33).

Thus, the existence of different systems of laws of different kinds may be a barrier to widows securing their inheritance rights. Griffiths states that:

‘That law is and should be the law of the state, uniform applied to all people exclusive of all other law, and administered as single set institutions. That is a circumstances where multiple laws which operate together and recognized by the state’ (1996:3)
This approach highlights the different legal perspectives that affect women’s rights to inherit land. I found that Therefore, laws are not restricted to state law but there are other laws, which extend to norms and practices of societies. It was not enough just to challenges to women’s right to inherit land three laws, namely customary, Islamic and statutory laws, only while there other laws of these laws which also govern inheritance issues. Under customary and Islamic practices which also exist in the structure of the set of principles that guide dispute resolution in family meetings, I needed to know the laws that are applied in the case of a deceased estate and the procedures used in resolving inheritance in land disputes. This approach exposed that what the law, such as customary and Islamic law, provides is different from what the people practice in their lives when it comes to land inheritance matters. I also examined how widows under Islam resolve their disputes on inheritance within the authorities of the Quran.

3.4 SEMI AUTONOMIUS STRUCTURES

Dengu-Zvogbo cites Moore (1979) who defines the term semi-autonomous as follows:

‘The semi autonominous social field is defined and its boundaries identified not by its organisations (it may be not) but by a procession characteristics, the fact that it can generate rules and coerce or induce compliance to them... [M]any such fields may articulate with others in such a way as to form complex chain, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains.’(1979: 16)

This semi-autonomous field are important mechanism. Institutions such as family, clan leaders and legal authorities become a place where regulations generate power beyond the official law in relation to women inheriting in land and resolving disputes. Thus, semi- autonomous social fields is a tool that assists in describing and analyzing the rule-generating and rule-upholding the processes which affect the position of women and gender relations in a situation where the plurality of normative structures informs human interactions (Bentzon et al 1998).

In order to grasp the universality and diversity of legal developments it is important to look for gaps and overlaps between the normative practices of the different institutions such as families, workplaces, organizations and courts. (Hellum and Stewart, 1999:65) SERIES No. 2. This methodology help to examine the interaction between the statutory provisions and court
determinations relevant to women’s right to inherit land. It is also explores and explains procedures that are used by the courts of law in determining disputes, structures and other institutions within the legal framework. It explores things that affect the position of widows and gender relations in terms of actions and decisions, for instance in clan meetings between the participating families. However it is also necessary to use this methodology to link the customs, practices, religious laws and laws relating widow’s inheriting land after they have lost their husbands. Most widows suffer economically after the death of their husbands. This is attributed to many factors including loss of entitlement to social benefits from their deceased husband’s estates which they loss according to the general laws of the land. Thus, women suffer in situations where they should not benefits they from ought to have received from social security would have assisted in paying court fees or paying an advocates to represent them.

3.5 SEX AND GENDER ANALYSIS

Hellum and Stewart argue that many theories about the role and position of women in law and society are based on notions about sex and gender differences. To quote their words on sex, the authors’ state:

‘…sex is based on the physical distinctions between men and women; whereas gender is a social and cultural construct’. (1998:82).

Gender is seen as a concept that involves cultural interpretations of the biological differences between women and men. This approach helps to try to influence society to change negatives attitudes towards women and understands the position of women in society as well as improving their position. The data I collected, gave me a real insight into the real life of women, the role they play the people with whom they interact, and influences they come under from various institutions like the family, the court system and religious authorities. In relation to land inheritance and dispute resolution processes, widows should be given a voice for example at family meetings and knowledge which would give them power to claim their rights concerning inheritance of land. I have seen that women do not have a voice or legal knowledge to enforce their right to inherit land. Catherine McKinnon’s jurisprudence conceptualises gender in the light of power relations and disparity of power between men and women, supported by the law and society. Based on this perception, women’s role is determined by their socially constructed gender, which ensures her inequality and subordination in relation to law and society which is
characterised by male dominance. I agree McKinnon that laws are used as a tool to subordinate and reinforce the inequality of women for example customary law excludes women from land inheritance women can only use land. Also only a few women participated in decision making at family meeting or in relevant authorities due to the patriarchy which exists within both societies and institutions.

Radical feminists argue that it is the patriarchal system that oppresses women. The system is characterized by power, dominance, hierarchy and competition. The system cannot be reformed but only ripped out root and branch. Mackinnon also state that in her sex approach that has dominated politics, law and social perception, equality is equivalence, not a distinction. The legal mandate of equal treatment (which is both a systemic norm and specific legal doctrine) becomes a matter of treating likes alike and unlikes unlike; and the sexes are defined as such by their mutual unlikeness. Patriarchy is far too compliant and flexible to hold by any standard capable of being administered by the courts.

On the other hand, Mackinnon asks judges to determine whether a rule or policy contributes to the equitable distribution of power between men and women. But neither standard would be judicially manageable. Radical feminists, however, state that the exclusion of women from power is no fortunate and easily remedied accident, for the structures and institutions of the state have been made by men and embody their interests rather than those of women. Using this approach, I can see why women do not participate in the decision making, especially widows at the family level. Sieder and McNeish quotes Kandiyoti, as follows:

‘…patriarchy is continuously bargained with and legal norms within the Shariah are being contested, redefined, and renegotiated’ (2013:139).

The Islamic’ construction of gender equity thus challenges dominant ideas of women agency suggested by liberal feminist to gender equality.

DATA COLLECTIONS METHODS

I used several research methods which helped me to collect data on land inheritance and disputes resolution. Both primary and secondary sources were used to collect data in this research, such as in-depth interviews and group discussions with widows, widowers and family member, key
informants and I also used observation. There methods give me deeper understanding of the process involved in widows claiming their right to land inheritance and enforcing those rights through the various dispute resolution processes. Secondary source includes books, articles and law books, statutes, journals and literature were also consulted.

The Table below gives the indication of the total population

<table>
<thead>
<tr>
<th>RESPONDENT</th>
<th>WOMEN</th>
<th>MEN</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual interviews and focus group discussion.</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Widows and widowers</td>
<td>10</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>Magistrate</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Chairman of land and Housing tribunal</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Private Advocates</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Islamic Religious Leaders</td>
<td>6</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>NGO’s</td>
<td>3</td>
<td></td>
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</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>36</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
3.6 IN-DEPTH INTERVIEWS

Most of the data collected in this study come from in-depth interviews with widows, beneficiaries of the deceased estate and several other relatives who had played important roles in the inheritance and resolution of dispute processes. I manage to conduct five interviews with widows of whom two were Muslim and three were Christian and I found they followed customary practices and rules in their decision making. They were very helpful and cooperative believing that I was going to solve their problems with the relevant authorities. These in-depth interviews were held in the community and it was therefore easy for me to identify widows who followed Islamic and customary laws. I asked the widows about their experiences in relation to inheritance, like their personal details, age and tribe, details what happen after the death of their husband, what law applied in their situation, how the land was distributed which included their efforts and contribution during life time (matrimonial property and land). I also asked them when the dispute arouses where they were going or preferred to go to solve their matters. Is it settled out of court or between the families? Do they receive legal advice or not? The aim of in-depth interviews helped me to find out the position of women from their own mouths. This method gave widows the opportunity to express their own opinions about their own experiences once their husbands died and they did so in relation to their rights to inherit land and to the processes of resolving disputes when they tried to enforce their rights. In addition, I also managed to interview two men and two women who were not widows in order to see the situation from a different perspective and to take into account the attitude of men.

3.7 KEY INFORMANTS

Interviews with key informants involved people of a professional background, such as legal practitioners, magistrates, legal officers, chairmen and members of the land and housing tribunals, Non Governmental Organizations and Muslim leaders. The interviews with different key informants enabled me to get views and attitudes of people belonging to different socio-economic groupings and living in different places, and also the views of those who handle inheritance cases and dispute resolution processes within the societies at different levels.
The main aim was to find out how inheritance rights, especially land, are handled in both urban and rural areas. The fact is that if land is traditionally owned people only have a right to inherit its rights use only. I managed to interview three magistrates, two Primary court magistrates and one Resident Magistrate Court from Nyamagana. My main intention was to discover how they handle and resolve disputes relating to the rights of widows to inherit land and how they treat widows. I also interviewed the chairman of land and housing tribunal court, two chairmen from the village and ward tribunal. My aim in this regard was to know more about women and their right to ownership of immovable properties (land) inherited from their deceased husband. I also interviewed religious leaders (Sheikhs) who regulate family matters. The sheikh informed me of the procedures involved in distributing an estate and solving a dispute one it had arisen. The main objective of this method was to get the relevant information about the administration of widow’s land inheritance and about procedures for claiming their rights and the multiplicity of laws within the legal system.

3.8 FOCUS GROUP DISCUSSION

This method of data collection was used for several reasons. I conducted group discussions to obtain the perception of groups about customary law and Islamic law in their own area of jurisdiction. I also asked them about the forms of customs and practices among different societies. Five group discussions were conducted at Sengabuye Ward in Ilemela District. This method was used in order to get a broad view and different perspectives from both men and women on their rights to inherit land and the processes involved in resolving disputes under customary and Islamic law. The main objective was to gather a broader response about certain issues such as land inheritance, procedures, ways to claim land, distribution of deceased land, the law applicable, cultural practices, customs and religious beliefs. Group discussions helped me to learn about societies’ knowledge, practices and widow inheritance of land.
3.9 OBSERVATIONS

I observed that one needs to be patient in order to obtain information about the treatment offered to widows in court proceedings in inheritance. While it was easier to acquire information in a group discussion of Shekhs, sheikh, traditional people and land chairmen, it was difficult to get hold of court information. Although a court record is a public document and should be accessible to the public, I found the court treatment of the same is a secretive and confidential. The same applies to the handling of inheritance cases involving widows. Court practice shows that it always appoints an administrator to a deceased’s estate. This shows the court’s attitude towards women and relationship between the court officials and women litigants.

I also observed that most of the widows’ litigants are willing to exclude themselves from being appointed as administration to their deceased husband’s estate. They prefer to suggest for an elder or younger brother of their deceased husband to administer his estates. From what I observed, there so many different circumstances and factors surrounding women’s inheritance of land that they end up confusing widows and in their exasperation they finally they give up enforcing their rights to inherit their deceased husband’s land.
CONCLUSION:
This chapter used different methodologies and methods to analyze, explain and explore the realities of women within in relation to their rights to land inheritance the Sukuma tribe and Muslim people in Mwanza region.

The following chapter embraces the findings revealed the research as well as a discussion and analysis of the data within the context of the background already covered in chapter two and three. Factors affecting women’s right to inherit land from their deceased husbands and the various processes of dispute resolution mechanisms under customary or Islamic laws are discriminated in detail.
CHAPTER FOUR

FINDINGS, DISCUSSION AND ANALYSIS

This chapter discusses research findings and analysis. The chapter attempts to answer the research questions. The discussion of the findings is based on the lived reality of women in relation to inheriting land within the context of the relevant laws and theories.

4.0 SOCIAL AND ECONOMIC FACTORS WHICH MAKES WOMEN DELAY IN OBTAINING THEIR LAND RIGHTS IN THE RELEVANT AUTHORITIES

Land inheritance disputes in various areas are concerned with customary laws. Most of these disputes are between widows’ one hand and deceased husbands’ family, on the other. In Tanzania, the rights and status of women are greatly influenced by the socio-economic situation of a particular community, its law enforcers like magistrates, its culture and norms which are deeply rooted in the community’s customs and religion. In addition, the difficulties associated with inheritance are further complicated by the fact that the ownership of property which is subject to an inheritance dispute may itself be under challenge. These challenges arise as a result of the many different laws which apply to the subject of inheritance of land. The legal framework has both informal and formal systems of property ownership. Suggestions have been and are made to change the laws on inheritance of land issues and the process of resolving land disputes. Based on the research findings, it has been realized that there are various types of structures which address both the rights relating to the inheritance in land and land inheritance disputes resolution processes within the family and at the state level.
4.1 DIFFERENT AUTHORITIES AND THEIR JURISDICTION

There are different authorities in that resolve land inheritance disputes in Tanzania. This is because there is a multiplicity of laws regulating the subject. Each of the authorities which are about to be mentioned has its own jurisdiction and procedures in determining these dispute.

4.1.1 FAMILY MEETINGS

These are family or clan meetings which take place immediately after the burial ceremonies have been completed. They comprise all family members on both sides of the family and include both men and women. This is the first step in determining rights the widow in land matters. These meetings are normally prolonged due to the family’s interests in the deceased’s land. The relatives on the husband’s side, especially all brothers of the deceased, have more powers than anyone else and they play a very important role in the family or at clan meetings. With regard to the right of a widow to inherit her husband’s land one of the respondents in Ilemela commented:

‘Clan member do prolong meetings for long time. Instead of the normal three days after burial ceremonies or forty days, it can take three months or more depending on the clan leaders. This is intended to preserve men interest and undermined the rights of the widow. This causes delay in appointing administrator or division of land to the widow and other heirs.’

Family meetings are conducted under both customary and Islamic law. They are the court of first instance to determine the distribution of deceased estate. If it happens one of the parties is not satisfied with the decision of the family meeting that partly can petition to the lowest judiciary court (i.e the primary Court) or Islamic Council of Tanzania (Kadhi). The Primary Court or Muslim leaders (Shekhs) will decide whether customary or Islamic law applies depending on life style of the deceased person.

The majority of people feel that the customary laws applicable in the clan system are the best way of dealing with land inheritance issues. This is because many husbands fail to make a will during their life time. However, the best way to resolve dispute is if there is a will which determine every beneficiaries are entitled to. The existence of will does not cause any delay at

59 9th November 2015 Buswelu, Ilemela District
the clan or family level. This is because their meetings rely on the deceased wishes obtained from the written will, unless the will is invalidated for some reasons. Some testators state in their will whether Islamic or customary law is to apply to the estate.

Regardless of whether Islamic or customary law applies, fairness might not be observed as most of the customs do not recognize women as part of the group that is entitled supposed to inherit the deceased’s land. This is attributed by women’s illiteracy and lack of knowledge of the law which prevents them from knowing the proper authorities to approach and procedures to be followed so as to seek redress. An illiterate widow confirmed this when she said:

‘I do not know where I should go for assistance to enforce my right from my deceased husband’ 60

Therefore I found that only a few widows knew the existence of legal mechanism and provisions within the law which entitled them right to inherit land from their deceased husbands.

4.1.2. COURTS

The primary court is the lowest ranked court in Tanzania. It has powers to determine matters in relation to inheritance in respect of both registered and unregistered land, provided the law that applies is customary or Islamic law. The court has jurisdiction to appoint the administrator/administrix or executor/executrix of the deceased’s estate under both customary and Islamic law. Thus, all cases involving inheritance in land are referred to the primary courts. Appeals from Primary Courts lie to District Courts, thereafter, to the High Court, and finally to the Court of Appeal.

When a widow files an application for the administration of a deceased estate, she is required to produce a certificate of death and minutes of the family meeting. The majority of widows fail to produce these documents within the prescribed period and as a result, the enforcement of their right to inherit of their deceased husband estate is delayed. This was confirmed by Resident Magistrate Hon: S. Kiama who said:

60 20th November 2015 Kayenze ward, Igombe
‘As a court we cannot proceed without family meetings documents and death certificate as among the important documents for a widow to file any succession application to the court.’

The learned magistrate used the legal maxim *justice delayed justice denied* to describe the effects of the delays on the cases she often deals with in her area of jurisdiction. Another challenge is that of the failure of witnesses to appear before the court to adduce their evidence so as to appoint an administrator or executor in case. In other words, the family members themselves cause delays as some of them fail to appear before the court. This is because most families have argued, over their rights to the land. The deceased’s side of the family always attack the widow’s interest in land and therefore refused to co-operate by evidence in court. Magistrate also often fail to help widows and their cases are not given priority in the setting down of hearing of matters until final judgement. They are not treated properly as human beings who are entitled to enforce their right to inherit land. Sometimes, as a result the unawareness of widows of their rights combined with corrupt courts, magistrates enter judgments in favour of the husband relatives.

At Nyamagana Primary Court, one primary court magistrate stated that:

‘In practices it does not take long time to complete probate or administration cases in courts of law, and this is because the laws requires 90 days notice to the general public before the appointment of an administrator, and if there are any objections it might take some time even nine (9) months before the appointment finalized. And in higher courts, it might take long time because of accumulation of court cases.’

The majority of people who raise such objections are usually those on the husband’s side of the family because they are interest in inheriting deceased’s land without a care of what will happen to the widow after her husband’s death.

Another respondent who is a widow observed that:

‘After death of my husband, we had family meeting then I went to Primary Court to file application of administration of the deceased estate, because my husband left land under Sukuma

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61 17th November 2015, In the District Court of Nyamagana at Mwanza
62 24th November 2015, Nyamagana Primary Court.
In order to research the issue further, I interviewed the legal officer and the programmer officer with the KIVULINI WOMEN’S RIGHTS ORGANISATION, based in Mwanza. Kivulini noted that economic and social factors play a big role in widows failing to enforce their right to inherit land:

‘Majority of widows are dependant. They do not have any source of income once their husbands are dead. Poor widow who lacks money cannot either hire advocates or to pay fees for legal representation, especially in District Court and higher courts. The same in filling cases, widows have no court fee for probate and administration of estate cases or bus fare to travel back-forth to the court. Finally, they fail to take legal steps or withdraw their cases.’

Again, in accordance to Magistrate Courts’ Act and Advocates Act, advocates are not allowed to appear and represent clients before Primary Courts, this result in widows representing themselves before these courts. Considering their illiteracy and lack of knowledge of court procedures, widows fail to enforce their rights.

In addition, courts and centres for resolving disputes and legal aid organisations are based in urban areas. This discourages women from making follow-ups on their cases due to their lack of economic capacity. However, there is also the problem of corruption among judicial officers within the legal system, including magistrates, judges and clerks of court. Many delays in court cases have been associated with corruption. Practice has shown that there are litigants or beneficiaries who have offered bribes and had their cases determined within a short period of time. The fact is that most of such decisions have not benefited widows and their to inherit their deceased husband’s land.

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63 10th December 2015, Gederi-Buswelu, Ilemela District
64 15th December 2015 Kivulini Women’s Rights Organization- Nyamhongolo- Ilemela District.
4.1.3 LAND TRIBUNAL

Land and housing tribunals are bodies that deal with land matters only. These tribunals do not have jurisdiction to hear or determine inheritance matters, whether under customary or Islamic law. There are Village Land Tribunals, District Land Tribunals recognised by the Land Act, Village Land Act and Land Dispute Settlement Act, respectively. Appeals from the District Tribunals lie to the High Court – Land Division that deals with all land a both registered and unregistered, under customary and Islamic law. Appeals from the High Court lie to the Court of Appeal.

The jurisdiction of Land Tribunals is to decide matters in relation to who is the rightful owner of the land. If it the case that the deceased died intestate (i.e without a will) and owned land and his right to the land is in dispute these tribunals may intervene and decide the matter. If it so happens that a widow is appointed as the administratrix or executrix or beneficiary of the deceased estate, she has the right stand to stand before the tribunal to claim her rights to possess of the land, and then distributed according to either religious or customary it depend the deceased either his wishes (will) or heirs who are entitled to.

In my interview with Chairman of District Land and Housing Tribunal, Hon Lung’wecha, he stated:

“We are deciding any matter related to land inheritance. Our cases are based on the claim of the rightful owner of the disputed land after being appointed administrator or executor/executrix of the deceased estates from the common court, especially Primary Court, who have jurisdiction to determine Islamic and customary matters in relation to inheritance”.  

In the legal process of resolving disputes, the Hon. Chairman stated that:

“It depends on the legal sciences and arts. Actually there is no specific time the matter to be decided, it depend on a particular case, but in legal procedure there are specific limitation of time due to the speed track (schedule) under land rules and regulation, like filling application by the applicant and the respondent reply within 21 days and then I schedule date for hearing.”

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65 16th November 2015 In the District Land and Housing Tribunal for Mwanza at Mwanza
66 16th November 2015 In the District Land and Housing Tribunal for Mwanza at Mwanza
There are other several factors which prevent a matter from being heard, including adjourning a matter because either party fails to appear for instances as a result of illness.

Sometimes widows are not aware that the land is mortgaged land. This means that they have to repay a debt of their deceased husband of which they had no prior knowledge. Village Land Tribunals solve land disputes regardless of whether customary or statutory law applies, but they do not deal with disputes land which is registered under the registrar of land. The law requires every village to form a village land tribunal and consider women participation in decision-making.

4.1.4 DISTRICT MUSLIM COUNCIL OF TANZANIA (BAKWATA)

This is another legal mechanism in Tanzania that resolves land inheritance matters and distributes the deceased’s estates in accordance with Islamic laws. This body regulates people of the Islamic faith or profess Islamic religious writings. (i.e the Holy Quran)

**District Muslim Council of Tanzania (BAKWATA)**

The BAKWATA does not take long to determine inheritance matters. However, there are certain procedures that must be followed by applicant who approaches this body. As a result of these procedures, it might take long to resolve these disputes. The procedures are as follows:

Firstly, family members should make sure that they give information upon the distribution of the deceased’s estate to the Islamic local leader (Imam) including the place where the deceased’s funeral is take place or where land of deceased person are allocated which is to be distributed after the family meeting. The Imam then takes the matter to the Ward Islamic Board that contains six members. The members are Ward Islamic Leader, the head of the mosque and four other members from the Ward. All members of the Islamic Board must be Muslims men (women are excluded) and have authority to decide the matter according to the provisions of the Quran and Hadith of the Prophet Muhammad. If the heirs are not satisfied with the decision, they can appeal to the District Muslim Council of Tanzania. Three members of the Board have authority to resolve disputes involving women’s inheritance to land, provided they abide by the Quran and
Hadith. Those who are aggrieved by the District Muslim Council can appeal to the Regional Muslim Board, and a finally, to the National Kadhi. Therefore, decisions are made likely to be the same from Imam up to the Regional Kadhi, because all decisions are relying on the Holy Quran and Hadith of Prophet (P.B.U.H) and they cannot turn against to these provisions of Quran. Although these long procedures delay the enforcement of women’s inheritance rights, the Quran is very clear about the distribution of the deceased’s estate among the heirs.

Most women cannot afford to pay the filling fee specified by BAKWATA because of their low income status or they are usually dependant on their families or relatives. However, in BAKWATA there is no backlog of cases as there with normal courts of law. For instance, one Muslim leader marked:

'It does not take long time to resolve disputes here as you compare to normal courts of law. We do not have so many cases here. When you register your complaint, it is just a matter of calling all parties concerned, beneficiaries or heirs of the deceased estates. Then we make decision or division of the deceased estates according to Quran that direct us to do so. We do not have any authorities to delegate or distribute estates apart from implemented the Holy Quran.'

This statement was corroborated by one respondent who is an advocate who observed:

'The reason which makes the deceased’s properties delayed in distribution is because the majority of Muslims do not know the Quran and Islamic law on the distribution of deceased properties. The Quran has provisions stipulating distribution of the deceased estate… most of time we used Muslim scholars who not take long time to distribute the deceased estates to the heirs. The problems is that majority of women are not prefer to go the relevant authorities to solve their problems.'

The General Secretary of District Muslim Reconciliation Board echoes the above statement. In his opinion, the Islamic system of resolving inheritance matters is more accessible and quicker in its decision making. He stated:

'If the deceased husband left a Wosia (will) to his wife (widow) wishing his widow to inherit land once he died, a widow has a right to inherit that land automatically without any delay and any

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67 26th November 2015 at District Muslim Council Office of Tanzania – Ilemela District
68 11th December 2015, Obeid and law chambers office
The Secretary also confirmed that Islam recognises a will, provided it is made according to Islamic law. According to the Secretary Islam does not recognise a will which is biased or against Islamic laws. Examples are will that exclude woman and her children from benefiting at all under a will without specified a reasonable cause. Such exclusion violates the essence of Quran and it is not permissible unless such a woman was already divorced from her husband before his death.

Based on this analysis, I discovered that some of the reasons that inheritance cases are delayed include build-up of case backlogs, negative attitudes towards women and corruption. This results in widows to failing to enforce their right to inherit the land of their deceased husbands. In Muslim communities, there is also the challenge of the Muslim Reconciliation Board. This Board sometimes fails to recognise a will due to the requirement of the Holy Quran such as 1/3 of the all deceased estates should be seek the consent from the heirs in order to be excluded among the estate which the heirs entitled to be distribute among them. Again, failure on part of the widows to pay the fee to register their cases gives rise to yet a further challenge in seeking to enforce their inheritance rights in land.

### 4.2 CHOICES OF SYSTEM OF LAWS: CUSTOMARY AND ISLAMIC LAWS

There are different systems that apply under customary and Islamic laws in determining ways of distributing the deceased’s land. The current Islamic and customary laws are applicable to African communities based on origin and religious beliefs. This causes conflicts on the choice of system of laws to be considered by the courts in determining whether Islamic or customary laws should apply. With regard to the choice of law to be applied, two tests have been employed by the courts of law. These are the ‘mode of life’ test and ‘the intention of the deceased’ before his death test.

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69 26th November 2015 at District Muslim Council Office of Tanzania – Ilemela District
4.2.1 THE LIFE STYLE OF THE DECEASED PERSON

When applying this test, the court of law has jurisdiction to determine whether to apply either customary law or statutory law based on the mode of life of the deceased person. One of the respondents, who is the Chairman in Charge of the District Land Tribunal, observed:

‘Customary law should live in a specific time and a person should be conversant (know) with the customs and practices of his or her specific ethnic communities.’

I concur with this respondent because the court should apply the choice of law test in relying on the life style of the deceased person on the basis of the particular practices and customs she or he observed before she or he died.

The mode of life style test of the deceased person is illustrated in the judgment of Re Innocent Mbilinyi,

In which Georges, C.J held that:

‘The deceased had abandoned the customary way of life in favour of what may be called a Christian and non-traditional way. There is satisfactory evidence that he was to a large extent alienated from his family and that his children had no connection whatsoever with them.’

In this case statutory law was chosen to apply. The facts of the case, in brief, were as follows: The deceased was a Ngoni married to a Chaga woman under Christian marriage rites. Both were staying in Dar es Salaam. The deceased had left Songea when he was about seven years old. He was educated outside Songea and Moshi. They had three children of the marriage. He died intestate and the matter was brought before the High Court to determine which laws should apply in the administration of deceased’s estate. The widow argued that the statutory law should apply so that she could benefit. On the other hand, the brother of the deceased argued for the application of Ngoni customary law in which case the widow would get nothing out of the estate.

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70 16th November 2015 In the District Land and Housing Tribunal for Mwanza at Mwanza
71 (1969) HCD No. 283
In this case, we can see how much the mode of life test helped a widow to benefit from her deceased husband upon the application of statutory and not customary law.

In the matter of **George Kumwenda v. Fidelis Nyirenda**, the deceased’s wife wanted to inherit a house under statutory law but the deceased brother wanted customary law to apply so that the wife could not inherit the house. The primary Court invoked the application of customary law and appeal District court and District Court relied on the same decision. In the High Court, Kisanga, J. ordered a retrial of the case because the two courts arbitrarily made a choice of law decision without investigating the mode of life of the deceased and Primary Court should exercise original jurisdiction based on small estate, customary and Islamic law only.

In this case we can see how that mode of life of the deceased serious is taken seriously by the courts in making their decisions. The High Court insisted that original jurisdiction on such matters rests with a Primary Court. Primary Courts have jurisdiction to entertain land matters (whether or not registered) if that inheritance falls under the application of customary or Islamic laws. These few points show that women can have less chance of inheriting land under customary law because customary laws exclude widows from inheriting their husband’s estate. In Islam, the widow is entitled to inherit 1/8 of her deceased husband’s estate. Confirmation of the jurisdiction of the Primary Court to chose the test to be applied in customary and Islamic law is seen in the case of **Scolastica Benedict v. Martin Benedict**, where the Court of Appeal held that it is the jurisdiction of Primary Courts to determine matters of administration of the estates regardless of whether the subject matter is land, registered or not, provided the applicable law is customary or Islamic law.

Therefore the point of land inheritance, Primary Court has jurisdiction to decide that matter whether registered or not, if it could be among of the deceased estates.

Among of the magistrate whom I interviewed explain to me that the Act is not often used instead the court use case laws (precedent) in resolving disputes relating to land inheritance.

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72(1981) TLR 211  
73(1993) TLR 1
Also explain more customary law developed since in colonial period where the socio-economic condition was too different from the present one, so it will be difficult for us hundred percent to rely on the Acts.

4.2.2 THE INTENTION OF THE DECEASED TEST

According to the law, Islamic law is applicable to those who profess it and live by it. Muslims must establish satisfactorily that the law applicable to the administration and distribution of the deceased’s estate is Islamic law. This can be deducted from the intention of the deceased. Once Islamic law applies it affects the whole estate of the deceased whether the deceased left a will or not. This statement was corroborated by a respondent who stated that:

‘Any disputes which is decided in Islam way, should apply Islamic laws. Ways of life and the act of the deceased person before he died is very important.’

In the case of The Estate of the late Salum Omari Mekeremi, the deceased was a Hehe Muslim. He was an army Officer. He married a member of his own tribe and contracted a civil marriage. He was a practising Muslim. Mfalila, J held that applying mode the of life test (that he was a practising Muslim) the deceased had intended his estate to be administered according to Islamic law and not customary law, as the deceased’s manner and way of life were far removed from his tribal customs. Therefore, the intention of the deceased person is seriously taken into consideration in the determination of succession of heirs.

An advocate said, African Muslim widows suffer many challenges due to the conflict of laws that is customary and Islamic law, she said the application of Islamic law is not automatic, it depend the intention of the deceased during his life.

74 18th December 2015, Head quarter of Foundation of Shekhs and Islamic scholars of Tanzania, Dar es salaam
75 (1973) LRT 80
4.3 KIND OF MARRIAGE

In some legal systems, the land rights of a widow upon death of her spouse depend upon the kind of marriage she contracted with her deceased husband. Therefore, if the marriage was civil in nature, the succession would be governed by the received laws and if it was a customary marriage it would be governed by customary laws, and if it was an Islamic marriage it would be governed by Islamic law.

In practice the issue of marriage has been affecting widows in relation to the deceased relatives. Widows are not recognized as the wives of their deceased husband nor are their right to any property which was acquired during their life time. These factors cause hardship when they try to claim their rights.

According to customary law, marriage should be registered, but the challenge arises because the majority of women live in rural areas and in unregistered marriages by their marriage, and if it their husbands dies his relatives take advantage of her by chasing her away because there is no evidence that the parties are had contracted a marriage under customary law.

The head of the legal department in Kivulini Women’s Rights Organisation also raised this point that unregistered marriages create a lot of difficulties for widows after the death of their husbands. She said that relatives of the deceased act as if they suddenly do not recognise them, and therefore, exclude from any inheritance.

The Coordinator of the Foundation of Sheikhs and Islamic Scholars of Tanzania Sheikh (Muslim leader) stated that:

“In Islamic law, for a woman in to be recognized as a widow of deceased, and thus to be entitled to inherit from the deceased property, she should not have been divorced from the husband...and their marriage should have been contracted according to Islamic law and procedures.”

The Sheikh also added that if the marriage was not contracted in accordance with Islamic law and procedures, the woman is not considered an heir of the deceased’s estate and she is, therefore, not entitled to inherit anything from the estate of the deceased.

76 18th December 2015, Head quarter of Foundation of Shekhs and Islamic scholars of Tanzania
In the case of **Hussen Mbwana vs. Amiri Chongwe**, it was stated that there are two systems of law which may apply to people living in the African Muslims Community. Religious law applies in matters peculiarly personal, such as marriage, and customary law may apply in all other spheres of life. It cannot be held that while the rights of an African Muslim 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. Spry J accordingly held that the law to be applied in the distribution of the deceased’s estate is Muslim law. Therefore, even though the division of the deceased estates is governed by the kind of marriage which the parties had contracted during their life time, the court also looked at the intention of the deceased husband.

### 4.4 WOMEN INHERITANCE IN LAND: CUSTOMARY AND ISLAMIC LAWS

This section deals with widows and their inheritance to land under customary and Islamic laws. The inheritance laws in Tanzanian society preserve property, especially land for male heirs under both Islamic and customary law. In practice, intra-family allocations are located in a culture of patriarchy rooted in patrilineal inheritance while Islamic laws are rooted in faith and beliefs.

#### 4.4.1 ISLAMIC LAW

In the Al-Mawarith (inheritance), God has explained in detail the ways to distribute the deceased’s estate between the beneficiaries and their portions under Islamic succession. Also, God has determined rulings and methods to distribute inheritance among beneficiaries. The aim is to act fairly and justly toward heirs and avoid discrepancies among the beneficiaries. The Islamic law of succession is based on the system of beliefs of the Holy Quran and practices prophet of Muhammad (P.B.U.H).

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77 Civil Appeal No 1 of 1963 (T) unreported.
78 Chapter 4 Verse 11-12 of the Holy Quran
79 Allah (SW)
Women are not excluded from inheritance only on the basis of their sex. They have equal rights to share the property of the deceased even though it is only small portion. In Islamic law, the belief is governed by the Holy Quran, which is comprises different chapters (Sura) and verses which govern the whole inheritance system and cannot be influenced by any changes in the community because of faith. District Sheikh of Islamic Reconciliation Board in Tanzania stated:

'The Holy Quran and Sunnah are the main fundamental principles which guide us or direct any authority to make distribution of deceased estates according to the fundamental principles.'

The Sheikh continued:

'God’s (Allah S.W.T) has already distributed the deceased estates according to Quran which led out women’s rights (widow) to inherit under Islamic inheritance upon their husband death.

Islamic authorities in resolving disputes we have a duty to implement or enforce Islamic laws as guided by the Holy Book (The Holy Quran).'

Apart from that, the Islamic law of inheritance is remained unchanged. No single or separate peace of land is capable of being as a separate entity. Land and all other property left behind by the deceased are taken together as one indivisible whole. This statement was supported by the Chairperson of the Muslim Reconciliation Board. When I interviewed him, he observed:

'Islamic laws do not base land inheritance only. They are based on the whole total of the deceased estates. Women have a right to be inherited from that wholesome of their deceased husband’s properties.'

The General Secretary of the Board concurred with the chairperson and agreed:

'Widow is entitled to get ¼ if the deceased husband does not have any child and 1/8 if the deceased does have a child'

According to Islamic law, a non-Muslim is not entitled to inherit the property of a deceased Muslim. For instance, a non-Muslim woman married to a Muslim man, the woman is not entitled
to inherit any property of the deceased Muslim person.\textsuperscript{84} This is because Islamic law states clearly and systematically determines that beneficiaries are entitled to receive a portion of the inheritance and their respective portions as described by the Holy Quran. The share may include people, such as a wife, the second is residue who were close to the deceased person, such as master and slaves and the last distant kindred who have a blood relationship with deceased.

The Islamic law of inheritance insists on payment of the deceased’s debts before the distribution of the deceased estate among the beneficiaries. If deceased left more than one wife in a polygamous marriage, these wives divided the share equally between them, and each wife is entitled to receive 1/3 instead of 1/8 if she remains.\textsuperscript{85}

I interviewed a Hon: Magistrate at Nyamagana Primary Court who stated:

\begin{quote}
'Islamic laws do not discriminate women right to own land but the problem is that, they have given small portion of land from their deceased husband according to the Holy Quran and practices of Prophet (P.B.U.H).\textsuperscript{86}
\end{quote}

Therefore Islamic laws do at least accept women’s right to inherit in the distribution of a deceased husband’s estate although they cannot inherit land directly because inherited land cannot be partitioned. However, the challenge arises in practice when injustices are committed by different authorities like the family, regardless of their faith and beliefs. Also, they take advantage of most women who are not conversant with Islamic laws of inheritance and/or the intention of the deceased husband during his life time.

4.4.2 CUSTOMARY LAW

In Tanzania, there are many customary laws according to ethnic group or communities but all of these customary laws are circumscribed by the Local Customary Law (Declaration) Order (No. 4) of 1963 and they apply to different communities different areas and they vary according to

\textsuperscript{84} Under Islam that male Muslim person is not husband because of the provision of the Holy Quran
\textsuperscript{85} Chapter 4:12
\textsuperscript{86} 27\textsuperscript{th} November 2015, at Nyamagana Primary Court
their practices. According to the Order widows have no share in their deceased husband’s estates. However, husbands can inherit from their wives’ estates if the matrimonial property has acquired during their life time. On this one of respondents from a NGO said:

‘Under customary laws do not give women right to access an, control and own they can use only, but they can inherit either by will or gift from her deceased husband before his death.’

The above statement was supported by Magistrates who said that in experience they noticed that the laws provide different ways for women to inherit land. Yet, new laws are introduced every year and existing ones are amended. The Hon. Magistrate stated further that if a woman sees that customary laws do not favour her right to inherit and own land from the family level, she can file a case with the court to seek her rights. The court determines the matter on the basis of laws and precedent available and it makes sure that justice is seen to be done, ‘justice should not only be done, but it should been seen to be done.’ The Hon. Magistrate concluded if there is any contradiction between customary law and the Constitution, the Constitution takes precedent.

4.5 CHALLENGES THAT WOMEN FACE IN CLAIMING THEIR RIGHT TO INHERITANCE OF LAND UNDER CUSTOMARY AND ISLAMIC LAWS

This part sets out the challenges that women face in the context of claiming their rights to inheritance both under customary and Islamic laws in relation to land in Tanzania. This section also identifies the position of women in the context of the laws, customs and practices and the challenges that women face in accessing justice institutions that regulate inheritance matters. A gender perspective of the subject is used to help examine challenges or strategies enabled to the application of women’s land inheritance.

4.5.0 Accessibility and ownership in land inheritance

Women’s access to land may be derived from informal traditional from the family unit and communal decision-making. Women’s ownership or rights to use (usufruct right) can only be

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87 15th December 2015, Nyamhongolo- Ilemela District
guaranteed through an enforceable claim to land, and ensure women freedoms to land is given to them through inheritance from their deceased husband. Majority of women in Tanzania have difficulties in accessing and owning land due to different challenges, like customs and practices. These traditional practices treat women as property or a minor in society, hence, women are not considered to be heirs. Members of societies which I interviewed, especially members of the sukuma tribe, widows are not allowed to inherit clan land. However, women are allowed to use it, no more.

One Sukuma respondent stated:

‘Women themselves are property. This is because their husbands have paid them cows as bride price. Thus, women are property of their husbands.’

This statement was supported by the legal officer with Kivulini Women’s Rights Organisation who pointed out:

‘According to customs and practices of Sukuma, women are taken to be minor who are not entitled to inherit land of their husbands, but they can use only for their developments upon death of their husband.’

The Legal Officer added that to be a woman under Sukuma customs and practices is a problem. Bride price is recognition of women values, but under Sukuma customs, that dowry payment leads women being treated as the property of their husbands. This tradition in this community has made women dependant human beings and, therefore, they cannot manage to own land themselves. The same applies to widows; they must depend on their husband’s side of the family once their husbands have lost their lives.

The status of women in the family remains lower in any position due to the misconception that women are property and inferior to men. This shows gender stereo-typing and reinforces male domination determines gender status within the societies through custom and practices.

The Islamic point of view is that women are human beings and not pieces of properties, since Islamic law points out the rights and duties of both parties within a marriage. However,

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88 9th November 2015 at Gederi-Busweru
89 1st December 2015 at Kivulini Women’s Rights Organisation
challenges rest on women themselves to think that men are the major source of authority and have capacity to own land. This has resulted in the subordination of women by men; hence, the challenges women face owning and inheriting land.

4.5.1 Lack of capacity or knowledge of laws among the implementers of the laws

Knowledge of both Islamic and customary laws in Tanzania and within traditional communities is very low. Most societies are profoundly rooted in the socio-economic complexities of their customs. As far as Islam is concerned, Muslim communities lack awareness about Quranic Verses, statutory laws and the legal conception of the inheritance of land. In the urban centre of Mwanza city, customs and traditions of the sukuma tribe have influenced many men. It is possible to say that the majority of men are more knowledgeable about the laws than women. The following partly reveals this phenomenon:

I interviewed the Chairman in charge of the District Land Tribunal who stated:

‘Majority of women do not know the law like the Law of Limitation Act, which sets limits of time to file any claim... the mentioned specific is aimed at limiting litigations out of time...and the court must abide with it. Again, Inferiority complex on the part of women is another stumbling block. Most women believe that the laws give more rights to men over women. So, women tend to leave everything to husbands’ relatives without making any follow up.’

One of the Muslim widows interviewed stated:

‘Islamic laws have already in conformity with the Holy Quran and Hadith (practices of Prophet Muhammad (P.B.U.H), so majority of widow cannot challenge the religious due to the fact that that is what they believe and fear of Allah (God) (S.W) who is the creator of this world.’

This statement is not far from what was stated by Sheikh of Islamic Reconciliation Board. To quote his words:

‘The majority of Muslims are unknowledgeable of Islamic law, almost 90%. They do not know their religion. They are unfaithful to Islam and not fearing Allah (S.W) God. They think Islamic

90 16th November 2015 In the Land and Housing Tribunal for Mwanza at Mwanza
91 9th November 2015 at Gederi-Busweru
Boards have powers to divide deceased’s estates. Quran has already distributed portions for them.\textsuperscript{92}

The Chairperson of Ward Land Tribunal at Bugogwa stated that:

\begin{quote}
‘The majority of men remain conservative and do not want any changes in practices and customs of widows’ inheritance in land under customary laws even though sometimes customary laws do allow women to inherit land.'\textsuperscript{93}
\end{quote}

The above practices and interviews shown depict that male domination is still rampant within Sukuma societies through its practices and customs.

\subsection*{4.5.2 Witchcraft accusations and the killing of widows}

Ignorance and illiteracy are among the big biggest challenges to the Sukuma tribe of Mwanza. Upon the death of a husband, his wife is the first person to be suspected. Even if the death is due to natural causes, a widow may be accused of causing or contributing to it by witchcraft. This is the first step in denying women the right to inherit the land of her husband. My fifth assumption relied on the challenges faced by widow when they start to claim their rights. Some interviewees said that the deceased’s relatives used false allegations of this nature to deny widows the right to inherit. The legal officer with Women’s’ Rights Organisation in Mwanza supported this observation and stated:

\begin{quote}
‘The deceased relatives do spread rumours that the widow killed her husband in order to inherit properties of the deceased, including land. Sometimes, unknown people may kill the widow to discourage her rights to inheritance. This in a way, discourages other widows to think of claiming their rights once their husbands pass away.'\textsuperscript{94}
\end{quote}

This situation has created fear among widows of the sukuma tribe in Mwanza. While the state is taking measures on laws and customs, other dangerous practices emerge. For Mwanza, a lot has to been done for the rights of women to inherit land of their deceased husbands.

\textsuperscript{92} 26\textsuperscript{th} November 2015 at District Muslim Council Office of Tanzania – Ilemela District

\textsuperscript{93} 18\textsuperscript{th} November 2015 at Bugogwa Ward Tribunal

\textsuperscript{94} 15\textsuperscript{th} December 2015 at Kivulini Women’s Rights Organization- Nyamhongolo
4.5.3 Property Grabbing

In property, grabbing takes various forms. It may include actual physical taking away or eviction of the widow and her children from the matrimonial home which have been acquired together with her deceased husband. One of the widow interviewed at Ilemela District described the behaviour of her brother in law after the death of her husband and stated that, “a widow is not entitled to deceased husband’s property.” This was attributed to the inferiority complex of the deceased’s relatives. These relatives think that a widow may be remarried to another man apart from their family and their family will be disadvantaged. This is because her husband’s land will be taken by another husband hence, a shift of land from their clan to another clan. The widow interviewed testified that after death of her husband, her brothers in law decided to take her husband’s land without any care for her or her children.

The tendency of grabbing land is based on the socio-economic status of the deceased and other members of the family. The absence of a will makes most widows to suffer challenges on the administering deceased’s estate and own land. As result, administrators who are mostly brothers in law are abusing their powers because of insufficient supervision at the time of the division of the deceased’s property. To some extent, they use the land for their own benefit or interest and forget the widows and children. In some instances, they transfer the right of occupancy into their own names without considering the widow and her children.

These practices show that any form of land grabbing detrimentally affects widows and their land rights and it causes them psychological torture. In excessive cases of indiscriminate grabbing, the widow’s personal land could easily be seized violated using on the common patriarchal pretext that all land in the home belongs to the male dominance (i.e the deceased husband family), especially elder or young brother of the deceased relatives. Depriving widow of their rights to matrimonial land amount to violations of their rights to shelter and dignity. Therefore, urban and rural area livelihoods are a challenge to women’s inheritance to land.
4.5.4 Widow Inheritance

In the Sukuma tribe, a widow may be inherited like any other property. After the death of her husband, one of the brothers of the deceased may ask the widow to re-marry him. If the widow refuses, she is considered not to be part of the family and therefore cannot be allowed to inherit her husband’s land. This practice to re-marry the brother of the deceased husband is called ‘wife inheritance’. This system may cause epidemic diseases such as HIV/AIDS and Sexual Transmitted Diseases (STD’s). Wife inheritance is an acceptable practice among the Sukuma. However, HIV/AIDS pandemic and Sexual Transmitted Diseases causes widows to run away to avoid being inherited after their husband’s death. Confirming the above statements, one widow from Buswelu area at Ilemela state:

‘After my husband’s death the family meeting appointed one of the brothers in law to be the administrator of the deceased estate...and asked me to re-marry (inherited) the brother in law. So, he wanted to administer me like any other in the family property. The family told me that the intention is to protect and develop the deceased land and prevent it from being transferred to another clan. I agreed and lived with my brother in law for almost five years, but later on I decided to separate from him. I then left all properties including land. I therefore did not benefit anything from such other marriage. Finally, my brother in law took all properties, including the land until today.’

The widow added that nowadays people do not practice this custom of widow inheritance in order to avoid catching HIV/AIDS and Sexual Transmitted Diseases (STD’s). The motive behind of customs and practices initially seemed to be a form for protection to the widow and her children. This ensured that the widow and her children enjoyed continued maintenance and support and easy access to her deceased husband’s land and properties. The brother in law becomes responsible for the well-being of the widow and her children. On the other hand, the respondent said that a widow’s refusal to be inherited can cause conflict between the deceased’s relatives and the widow and this may cause them to chase her away.

All key informants reported that widow inheritance is an old tradition that is no longer practised. In Mwanza, where HIV/AIDS is one of the principal causes of death, a widow choosing to re-marry one of the brother’s in-law is risky because it can cause systemic deaths to all family

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95 9th November 2015 at Gederi-Busweru
members or the contraction of HIV/AIDS. Tanzania criminalised the deliberate transmission of HIV/AIDS in 1998, but has taken no steps to regulate wife inheritance. Penal legislation is also silent on the subject. However, to infect someone with HIV/AIDS is an offence punishable under the HIV/AIDS legislation.

4.6 POSITION OF A GIRL CHILD’S RIGHTS IN RELATION TO LAND INHERITANCE UNDER CUSTOMARY AND ISLAMIC LAWS

The position of a daughter under customary laws is portrayed in negatively. A girl child is not entitled to inherit from her father’s side since she is a girl. Where a father wishes to make his daughter his heir, he has to do so by means of a written will. Otherwise, in the absence of the will, family clan members would never include her as an heir. This emerged in a group discussion with widows who stated:

*With the father’s will, a daughter can be a beneficiary. If there is no a will, the clan will never choose her to be part of legal heir under customs and practices.*

Legal representation to administer the estate of the deceased in the case of a girl child is allowed by statutory law. According to Sukuma customary rights, orphans are entitled to a share of the deceased’s property. However, boys’ shares are always larger than those given to the girls. The guardian has the responsibility to look after the deceased’s property (which includes land) before or after distribution to the widow, child or other heirs. One of the widows interviewed said that nowadays these guardians try to claim full powers to the land and later on abuse it without taking care of the children.

There is gender inequality in the division of the deceased’s land between sons and daughters, daughters take second place to all sons. The Hon. Magistrate I interviewed said that nowadays Tanzania has several laws which protect the rights of child, such as best interests of the child, hence when a guardian is appointed to be administrator of the child, he should act in the best interest of the child, he cannot act against the best interests of a child.

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96 23rd November 2015 Sengabuye Ward Executive office at Sengabuye
According to customary law, the daughter are the third degree heirs which is normally smaller than the heirs in the other two degrees, compared to the son who inherits the biggest share from their deceased father. In the case of *Clementine Tikengwa and another v. Traseas Kabogi*, where the dispute involved the right of women to inherit clan land, Lugakingira, J, (as he then was) applied Rule 20 to deny the daughter and widow of the deceased full inheritance of a portion of clan land held by the deceased.

In the case of children born outside or inside of wedlock, customary laws are not strictly applied. So long as the child is known to the family members, the child will be recognised and allowed to inherit the clan land. Under Islamic laws the position of a daughter is stipulated in the Quran Surat Nisa*, which provides that a daughter is entitled into a ¼ share of the deceased’s estate if the deceased left only one son. Where the deceased has left a son and sister, a daughter is entitled to a 1/8 share and if there are two daughters she is entitled 2/3 of the whole property. Therefore, Islamic law considers the child right of both sexes in inheritance which is not the case under customary law. Islamic laws and practices consider a child who born is outside and inside of wedlock differently. One of the Muslim widows interviewed claimed that the Islamic laws do not recognize children who are born out of the wedlock. These children may not have any legal right to inheritance of their deceased fathers’ estates. In practice, relatives normally give the child some of the shares, but it has been stated by Sheikhs that such a practice is against Allah’s (SW) wishes. The Chairperson of the Muslim Reconciliation Board stated that:

> 'If the deceased father had a child outside of marriage that child is not entitled to inherit because there was no legal marriage between the parties during their life time. This restricts the child to be one of the heirs of the deceased estates. However, she can get a gift from her father during his life time. '*

Therefore, under Islamic law for a child to be entitled to inherit, his parents must have contracted an Islamic marriage in accordance with Islamic law and should be born within the marriage, and his or her share is stipulated in the Holy Quran.

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97(1978) LRT 49  
98Chapter 4:12  
9926th November 2015 at District Muslim Council Office of Tanzania – Ilemela District
4.7 POSITION OF WOMEN IN DECISION MAKING IN RELATIONS TO LAND INHERITANCE

The majority of women are excluded from decision making from the family level, right through to the religious, legal (such as courts of law) and land tribunal level. Family meetings, which are the first point at which a decision is made, the majority of them, are men and they have power to distribute the land of deceased person. In customs and practices, widows are not given the chance to contribute their views in clan meetings. Once the clan meeting decides the matter, a widow cannot oppose it. In support of this statement, a Programmer Office of Kivulini observed:

‘Clan meeting decision is a final and last. The meeting has all authorities to decide on any family matters. This is a first stage of distributing deceased land and resolving disputes. Since women have no any chance to give their ideas or views in the clan meeting, it is difficult to claim their rights.'

Islamic communities are characterized by a dominated built on the basis of hierarchy which is a class structure. Authority in Islam belongs to men and not women. The Sheikh from BAKWATA stated:

‘Any Muslim Reconciliation Board should be governed by men and not women. In our Board we are three and all are men not women. Traditions in Islamic do not consider women to be part of the Kadhi due to various aspects.’

The Hadith (practice) of Prophet Muhammad (P.B.U.H) corroborates this statement of Sheikh during his life time.

‘The prophet (S.A.W), he was not positive when a woman was appointed as a King.’

This justifies the position in Islam. Although Islam and customary laws differ in several respects, the laws share some common characteristics when it comes to decision making. Both systems exclude women from participation and decision-making; even in matters that directly affect their rights.

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100 15th December 2015 at Kivulini Women’s Rights Organization- Nyamhongolo
101 26th November 2015 at District Muslim Council Office of Tanzania – Ilemela District
102 26th November 2015 at District Muslim Council Office of Tanzania – Ilemela District
CONCLUSION:

This chapter provides the study’s major findings which show that inheritance laws are discriminatory against women, especially clan and family land. This chapter exposed the challenges women face within the various dispute resolution mechanisms when they claim their right to inherit land, especially land jointly acquired by them and their husband during his lifetime.

The following chapter tackles the strategies and dissemination of information programmes that are aimed at empowering women fight for their rights to inherit land.
CHAPTER FIVE

STRATEGIES AND DISSEMINATION OF INFORMATION AS A TECHNIQUE TO EMPOWER WOMEN IN DISPUTE RESOLUTION AND LAND INHERITANCE SYSTEMS.

Mehdi and Shaheed Quotes Sobhan (1997:60)

"Without ‘power’ women’s freedoms amount to very little. The basic tenet of empowerment is that women not only have a right to make decisions concerning the fundamental issues affecting their lives, but they also need to determine the nature of their choices."

INTRODUCTION:

Several challenges encumber women’s ability to claim their rights to land ownership and inheritance, especially in relation to clan land. In Tanzania, there is no specific legislation regulating women’s rights, let alone women’s rights to inheritance of land like men. Women are partially regulated by various pieces of legislation. Yet, those pieces of legislation apart from being scattered and confusing, are insufficient, inherited discriminatory and their enforcement mechanisms are weak. Since the causes which have made women inferior and unequal in gender relations are deeply rooted in history, religion, culture, the legal system and the psychological and social attitudes within the society, the solution necessary to resolve these problems may include strategies and dissemination of information.

In Tanzania, there is still only a few women who have come to own land through purchase, donation or inheritance, women still face challenges from customary and Islamic laws at different levels, like in their families and clans, courts, tribunals, and the Muslim Reconciliation Boards. Based to the findings, discussion and analysis I have come up with different strategies approach and dissemination of information, which can help to improve the conditions of widows to claim their land rights upon death their husbands. These include: empowering women through law (both customary and Islamic law): empowering women (widows) widows to enforce their right to inherit land, especially clan lands a task which has many challenges; empowering the
various authorities adjudicating land and inheritance disputes, and empowering other actors in other structures women’s empowerment helps widows to claim and enforce their rights more effectively within the relevant authorities.

5.0 LEGAL RIGHTS STRATEGIES AND EMPOWERMENT OF WOMEN

In order understand legal literacy as a process of self and social empowerment, it is useful to study for a moment the meaning and dynamics of empowerment.

5.0.1 LEGISLATION AND REFORM

There is general urgent need to review and codify customary law in order to make it consistent with the Constitution and human rights standards. Islamic Conciliation Boards, on the other hand, must interpret Quran according to God’s will and not men will those who used religions to undermine women. In the case of various statutory laws, which are insufficient and inadequate to safeguard women, must be reviewed and amended to protect women’s rights. If necessary, specific legislation may be enacted new policies enforced to regulate women’s right to inherit land.

5.0.2 REFORM AND REVIEW OF CUSTOMARY LAW

The customary laws on land inheritance are discriminatory against women. The laws are biased on issues of sex and, as a result, the contravene the provisions of the Constitution and international human rights standards set out in various instruments to which Tanzania is a party. Corroboration with the statement of Hon: Kiama who said:

‘The Constitution of United Republic of Tanzania should be amended, and provides specific Articles which clearly states the right of women to own land and not “any person who is any person?”’

103 17th Nov 2015 at Nyamagana Residence Magistrate Court at Mwanza
Thus, Tanzania needs to review and reform its customary laws to protect the rights of daughters and widows to inherit the land of their deceased fathers and husbands.

Reformation is needed based on educating and informing the public, especially men, to change their attitudes. The notion of women being inferior and subordinated to men must be eliminated.

Conducting campaigns that combine duty of traditional rulers, Muslim leaders, community leaders and heads of families who are regarded as gatekeeper of the culture of their people, they need to be consulted about how to amend the laws for the improvement of women’s rights in their communities. Conferences for prominent traditional leaders of various tribes groups and Muslim leaders. The objectives are to notify people aware of the challenges and injustices faced by women under customary laws. Contemporary in changes on universal attitudes to women’s rights will help them to aspire to international human and women rights standards. Workshops will also give rise women’s awareness about their rights to inherit land. These conferences and workshops may be organized at the state and local levels for the benefit of community leaders and the head of families. Hon Magistrate Ndolezi

Customary and traditions which undermine women should be changed, even some provisions or sections which undermine women should be amended so as to give women their rights to inherit land.

The head of legal Department and programmer office state:

‘The laws which undermine women should be amended in order to give women chances to use, own and inherit land without any challenges or obstacles’.

Islamic law allows Muslim scholars (Mujtahid) with knowledge and understanding of Islam to give interpretation (legal reasoning) in matters that are not directly covered by the Quran or practices of the Prophet Muhammad (P.B.U.H). In other words, they can interpret the Quran to cover new circumstances, including a widow’s inheritance of a share 1/8 share of her deceased husband’s estates, especially when husband left four wives. Among of the widow state:

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104 27th Nov 2015 at Nyamagana Primary Court
105 15th Dec 2015 at Head Quarters Kivulini Women Organizations at Nyamangolo
‘Women should fight their own rights in relation to land inheritance for instance Islamic law; in the issue of marriage which allowed men to marry four wives, and all wives are entitled to inherit once their husband died without considered matrimonial properties which acquired during life time among of his wives before he had married another wives. That is challenges facing widow especially Muslims when it become of resolving disputes it will be difficult to be considered.”

Therefore Islamic law should consider matrimonial land which acquired both husband and first wife in the situation before he had not got another marriage which they will be included in the distribution after the death of their husband.

5.0.3 STATUTORY LAWS

Reform of statutory legislation is important in order to recognize the elements of customary laws that benefit a significant part of women’s lives and promote understanding of society in land matters. Statutory laws influence widow’s right to inherit clan land. Since women are entitled to inherit land, their participation in land inheritance issues should be encouraged. Efforts should also be made to link land laws, marriage laws and inheritance laws in order to ensure certainty and consistency in the entire body of inheritance law.

Provisions of statutory laws may also be reformed to correspond with the Constitution and international human rights obligations.

5.0.4 ENACTMENT OF WILL AND ADMINISTRATION OF ESTATE LAWS

Tanzania’s parliament should amend its laws pertaining to the Law of Succession and Administration of Estates to put in place special protections for widows. It is suggested that that once a will is written in favour of a widow, courts of law should avoid unnecessary technicality of the laws, interpret and apply them in a less strict or more permissive or lenient way in order to

\[106\] Buswelu area, 9th Nov 2015
protect widows as far as from discrimination and injustice. The Director of Rehhma Foundation observed that:

“Important of writing Will, it can help widow to get their rights without taking long time without any unreasonable delayed within the disputes mechanisms”.

Inheritance laws in Tanzania are currently silent on the matter of widows and the administration of their deceased’s estate husband. Widows are treated just like any other person who applies administers an estate. It is desirable that widows should be awarded special treatments when it comes to their inheritance of their deceased husband’s land. However, the proposed new laws or amendments to current inheritance laws should operate with fairness in relation to Islamic law of inheritance that already recognize widows and their right to shares of their deceased husband’s estate.

5.0.5 DISPUTE RESOLUTION BY RELEVANT AUTHORITIES

The legal system has a profound impact on the lives of women in Tanzania. Women do little if nothing to do with the decision-making and dispute resolution mechanism in relation to land inheritance. Thus, it is necessary to modify this situation in order to respond to women’s needs.

A widow states:

_to provide education both Islamic Law, Customary law and ordinary law, it can help them to enforce their rights and resolve their matter once the dispute arises within the families and choose another which is better for them to get their rights easily without taking long time._

The above statements corroborated with Head Department of Rehhma Foundation state:

‘Eliminate or reduce cost such as filling fee from the authorities which resolve these disputes, it encourage widow to enforce their rights like claiming their land and owned

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107 19th November 2015 Rehhma head office Buswelu
108 Gederi, 11th November 2015
from their deceased husband since their dependant and they have no any source of income.\textsuperscript{109}

It is absolutely necessary to enlarge the analytical framework for understanding the Islamic and customary law and structure of legal system that are most relevant to women’s daily lives. This will minimize or remove some of the challenges women face when claiming their rights, in relation to Hon: Kiama state:

\begin{quote}
If a woman see the laws do not favor her right to inherit and own land from the family level she can decided to file application before court to seek her rights, because court sometimes rely on precedent and other laws which given women different rights which entitled to get \textit{“Justice should not been done, but it should be seen done”}.\textsuperscript{110}
\end{quote}

Respondents insist on the issue of government should be taken serious for those series authorities which deal on resolving disputes in relation to women land inheritance in order to prevent corruption and make sure provides justices within reasonable time, so it can help women to get their rights without abusing the trial procedure, which is among the challenges which women suffered once they claim their rights to inherit land. One of the widows who I made interviewed she said:

\begin{quote}
‘Time consideration, it is better to take two months or three because these matter or cases the evidence do not takes long time as well as witnesses are there waiting for summons from the court to come to adduce their evidence, differed from criminal matters which takes more time because of investigations.’\textsuperscript{111}
\end{quote}

However, government authorities have a duty to provide educations and awareness to the communities on the concept of inclusion and full participation in the decision making.

5.0.5 MASS MEDIA CAMPAIGN

Tanzania’s Parliament, Judiciary and Ministry of Women and Children Affairs can all play a role in providing necessary materials that easily reach women at the lower levels of communities.

\begin{flushright}
\textsuperscript{109} Rehmma Head office at Buswelu 19\textsuperscript{th} Nov 2015
\textsuperscript{110} 17\textsuperscript{th} Nov 2015 Nyamagana Resident magistrate Court at Mwanza
\textsuperscript{111} 9\textsuperscript{th} November at Gederi
\end{flushright}
Things like pamphlets, posters, theaters reproductions, audio visual, and radio, newspapers printed in English, Swahili and traditional (vernacular) language may be created in order to reach a wide range of both illiterate and literate members of the community. The chairman in charge observed:\textsuperscript{112}

\begin{quote}
‘Legal awareness, especially NGO’s provides seminars, dialogue which makes people especially women to be aware of the court procedure. NGO’s to provides legal aid especially rural areas most people who are affected with procedures of claiming their rights to land inheritance’
\end{quote}

The aim is to build understanding on part of communities their or what women’s rights to inherit land and how to enforce them under customary and Islamic law. Workshops can also be set up to bring together women, men and professionals to provide various services to women at the community level.

\begin{quote}
‘Chairman and member of ward tribunal they do not have legal education, they resolve land disputes through their knowledge, skills, opinion and reading different laws themselves through seminars, law books and brochures which help us to resolve land disputes.’\textsuperscript{113}
\end{quote}

This strategy will help to change the social attitudes of people, particularly men and encourage them to respect the personality of women and the existing thinking that women are inferior to men and depend on them.

\textbf{5.0.8 ESTABLISHMENT OF ISLAMIC COURTS}

Muslims in Tanzania form the majority in citizens. Therefore, the government in Tanzania must enact specific laws to establish Islamic courts in order to bring the jurisdiction of Islamic courts under one authority. Sheikh Mohamed Yusuph state:\textsuperscript{114}

\begin{quote}
The existing challenge at this moment is that it is very difficult to distinguish Islamic courts from customary courts or ordinary courts. Islamic courts will be manned by Islamic legal professionals and will have jurisdiction over Islamic personal law on succession and matrimonial matters.
\end{quote}

\begin{flushleft}\textsuperscript{112} 16\textsuperscript{th} Nov 2015 Land and Housing Tribunal court at Mwanza city \\
\textsuperscript{113} 19\textsuperscript{th} Nov 2015 Sengabuye Ward tribunal office \\
\textsuperscript{114} 17\textsuperscript{th} Dec 2015 BAKWATA head office –Ilemela District\end{flushleft}
The court will be bound by the provision of the Quran, and the practice of the prophet and Constitution of Tanzania. This court will be beneficial to women.

This is because their rights are recognized, it is easy for women to access the court, and it is easy for them to enforce their rights. At present, women go to courts of law with doubts and uncertainty about whether they will succeed in enforcing their rights. They do not know which test is going to apply in their dispute will it be the ‘mode of life’ test or the intention of the deceased person’ before his death test.

5.0.9 ECONOMIC EMPOWERMENT OF WOMEN

In addition, this research recommends that women should be empowered economically so that they can have capital or income that will make them less dependent on men. This can be done through different forms of poverty lessening programmers’, such as those encouraged by women’s associations and non-government agencies. Through economic empowerment help women to run their claim on the relevant authority once their husband died. The Director of REHHMA Foundation state:

‘Majority of women are dependant from their relatives and husband and once their husband died they have no any source of income to run their trial and manage to pay advocate fee. So it’s better to empower them by introducing different sources of income such as loan with low penalties so they could manage to run their cases within the relevant authorities.’

It can also be done through the formation of small co-operative groups which can secure loans from the government. Thus, women will have the capacity to take care of themselves and their children rather than depending on their husbands.

CONCLUSION:

This chapter provided recommended solutions to help to the respondent economically, socially and legally to improve their efforts to claim their right to land inheritance.

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115 19th Nov 2015 Rehmma Foundations head office Buswelu
The following chapter will finally deliver the study’s conclusion and recommendations based upon the discussion, analysis and findings of the research.
CHAPTER SIX

6.0 CONCLUSIONS AND RECOMMENDATIONS
This chapter discusses the conclusions and recommendations reached and based upon the findings of the research. The recommendations include strategies for the amendment of a cohesive law and empowerments of women enable them to claim their rights to inherit land from their deceased husbands.

6.1 CONCLUSIONS
From the assumptions and findings of the research, the following conclusions are drawn:

1. That there are differences between the dispute resolution processes relating to women’s right to inherit land under customary law and Islamic law.
   The major research finding revealed that there are different authorities that resolve land inheritance disputes in Tanzania. This is attributed to the existence of the multiplicity of laws regulating the subject. Each authority has its own laws, jurisdiction and procedures in determining an inheritance dispute. Under customary and Islamic law, family meetings have no proper formal procedure. Dissatisfied widows under Islamic law have to make their appeal to the District Muslim Council for a further interpretation of Islamic law on land inheritance matters and distributes of the deceased’s estates. On the other hand, widows under customary law, appeal to primary courts. The primary court also receives appeals from the District Muslim Council. The primary court has powers to determine matters in relation to inheritance in respect of both registered and unregistered land, provided that the laws that apply are customary or Islamic law.

2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women must make their claims through a series of disputes resolution authorities.
   Widows who attempt to enforce their rights to inherit their deceased’s husbands land in Tanzania are considered trouble makers by their families. It is unfortunate but true that attitude extends to the men who are in charge of those relevant authorities. Family
interference, cumbersome in legal procedures, and the high costs involved (transport, court fees and lawyer’s fees), corruption and bribery cause widows to give up their rights. Even if they succeed in their claim, the enforcement of court order is a cumbersome, expensive and lengthy.

3. That there are processes used to determine the choice of law (Customary or Islamic law) should be applied to a women’s right to inherit land.

The findings show that there are two tests that are employed by the courts of law. The first is the ‘mode of life’ test and, secondly, ‘the intention of the deceased, before his death. Test with the ‘mode of life’ test the court looks at the particular practices and customs of the husband before his death. In the intention of the deceased before his death test, the court looks at what exactly was intended by the deceased husband. This is normally based on the statutory and Islamic law. It depends on whether the deceased professed and lived by Islamic law before his death, or whether his marriage was contracted under civil, customary or Islamic law. The widow’s right to inherit the land of her deceased husband will depend on the above mentioned factors.

4. That there are laws that give women the right to inherit land under both customary and Islamic law.

The Islamic law of succession is based on the system of beliefs set out in the Holy Quran and the practices of prophet Muhammad (P.B.U.H). A widow is entitled to inherit one-quarter(¼)of her deceased husband’s estate if the deceased husband does not have any children and one-eighth (1/8) if the deceased does have a child and is in a polygamous marriage (i.e has other wives). These wives share this 1/8 share equally between them. Under customary law, widows have no specific share in their deceased husband’s estates. In some instances, widows do not inherit anything, let alone land, from their deceased husband’s estates.

5. That there are challenges which women face in claiming a right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.
Findings in this respect showed that in Tanzania women face challenges in claiming a right to inherit land under both substantive and procedural law (i.e. various processes). Widows’ accessibility to and ownership and inheritance of land are problematic. This is because land is owned by the clan or family members who consider women as second-class members of the family, minors or piece of property. So, widows are not entitled to inherit land. Widows lack the knowledge or understanding of relevant laws and the legal systems to enforce their rights. This applies to both in Islamic knowledge and understanding and customary law. Again, the duality of the legal system and the lack of a uniform law of succession are further challenges preventing women from accessing their right to inherit land.

6. That there is a need to develop strategies to empower widows effectively to participate in dispute resolution processes to inherit land under Islamic and customary laws. Based on the research’s discussion and analysis, the research found that there is a need for a strategic approach and for the dissemination of information within the communities of Mwanza. This can help to improve the condition of widows in claiming their right to inherit land upon the death of their husbands.

**RECOMMENDATIONS**

From the above findings and conclusions, the following recommendations are made:

1. That there are differences between the dispute resolution processes relating to women’s right to inherit land under customary law and Islamic law.

Tanzanian courts should be courageous and declare null and void all those customs and traditions that are unconstitutional and in violation of principles of natural justice, equity and fairness. The Judiciary can also create precedents that correspond to international human rights standards. In Islamic law, Islamic leaders need to play a role in interpreting Islamic law in modern systems settings.

2. That disputes arising from land inherited under customary and Islamic law take a long time to be resolved because women take their claims through a series of dispute resolution authorities.
It is recommended that courts must give priority to cases involving widows’ inheritance to land. This will minimise court cost and reduce chances of the chance bribes and corruption infecting cases. Cumbersome procedures should be interpreted and applied in such a way as encourage widows’ to access courts with confidence. The Ministry of Constitutional and Legal Affairs should establish a Legal Aid Council for matters relating to women’s rights of land inheritance. This will specifically help women, especially poor widows, to seek remedies in court where their rights have been violated. Education should be provided to both men and women to eradicate attitudes of female inferiority.

3. That there are processes used to determine the choice as to which system of law (Customary and Islamic law) should be applied to a women’s right to inherit land.

It is recommended that uniform law be applied and made known. If the ‘mode of life test’ and/or ‘intention of the deceased’ before his death are accepted and established principles of law, then a law should be enacted to recognise that. This will eliminate the intra-family misunderstandings that exist when family members of the deceased differ about what system of law should govern the administration and distribution of the deceased’s estates. The uniform law must be consistent with the Constitution and international human rights standards.

4. That there are laws which give women the right to inherit land under both customary and Islamic law

It is recommended that the state of Tanzania reviews, amend and reforms its customary laws (rules) to protect the rights of widows and daughters. It should also reform through educating and informing the public, especially men, to change their attitudes towards women. Islamic leaders, on other hand should interpret Islamic laws in accordance to the Holy Quran and sunnah which protect both men and women. Men should be educated and encouraged to write a will to protect their widows and children without any challenge or interference from other family members after their death.

5. That there are challenges which women face in claiming their right to inherit land under substantive customary law and Islamic law as well as the dispute resolution processes applying to each.
It is recommended that communities be educated to eliminate cultural and negative attitudes of treating women as a piece of property or a minor. Women should be given special cultural education to reduce. The government must also provide education and awareness on the inclusion and full participation of both sexes. Legal education should be provided for magistrates, land tribunal chairpersons, judges as justice providers. Again, education targeting the understanding of Islamic law and its dispute resolution mechanisms is necessary for justice providers and stakeholders. This will assist leaders and justice providers to be aware of substantive Islamic and customary law to overcome challenges through engaging in informal dispute resolution processes.

6. That there is a need to develop strategies to empower women effectively to participate in dispute resolution processes to inherit land under customary and Islamic laws.

It is recommended that women should be empowered economically. This will assist them to be more independent. The majority of women in Mwanza are economically poor. Poverty alleviation programmes of government which train both rural and urban women to become independently wealthy are to be encouraged. If their husbands die, it will be easy for economically independent widows to prosecute their rights to inherit land (pay transport costs, lawyers and court fees). Empowerment can also be done through providing knowledge and understanding of customary and Islamic law, employing women in various authorities adjudicating land inheritance disputes, such as land chairperson, magistrates and judges. These personnel are the ultimate justice providers.

In this final chapter the study’s conclusions and are summarised its recommendations are presented. The recommendations focus on the different ways to reform land inheritance laws, especially in relation to clan land. One of them involves enacting a new gender and sex sensitive law of inheritance which will eliminate the existing system confusing and contradictory of pluralist laws.
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