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**THE VALIDITY OF WOMAN TO WOMAN CUSTOMARY MARRIAGES IN KENYA  
TODAY**

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# VALIDITY WOMAN TO WOMAN CUSTOMARY UNIONSIN KENYA

## INTRODUCTION

The institution of woman-to-woman marriage, which has existed at least as early as the eighteenth century,<sup>1</sup> still exists in some societies today<sup>2</sup> and is embraced in Kenya as a cultural practice.<sup>3</sup> Culture, in Kenya, is recognized as the foundation of Kenya as a state and the cumulative civilization of the Kenyan people<sup>4</sup> and the state is mandated to promote all forms of its expression.<sup>5</sup> Woman to woman customary marriages are such form of cultural practice in Kenya.<sup>6</sup> These arise where a woman is barren and she then marries another woman for the sole purpose of having children and those children become the children of the barren woman who is the husband in the relation.<sup>7</sup> This marriage can take place whether the husband of the barren woman is alive or dead. If the husband is alive the other woman is allowed to have sexual relations with the husband for the purpose of having children. Any children out of this relationship will be regarded as the children of the barren woman. Where the husband is dead she must select a man from the husband's family or leave the decision to the woman to select whom she wants to have children with. This is common among the Kisii, Taita and Kuria tribes.

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<sup>1</sup> Njambi Wairimu Ngaruiya, and William E. O'Brien. 'Revisiting "woman-woman marriage": Notes on Gikuyu women.' (2000) Vol. 12 No. 1 *NWSA Journal*: 1-23. At page 109

<sup>2</sup> Amadiume Ifi. *Male daughters, female husbands: Gender and sex in an African society*. Palgrave Macmillan, 1987 at page 103

<sup>3</sup> Cotran Eugene. '*The Law of Marriage and Divorce*.' Vol. 1. Sweet & Maxwell, 1968.

<sup>4</sup> Constitution of Kenya 2010, Article 11 (1)

<sup>5</sup> Ibid, Article 11(2)

<sup>6</sup> Burton Clare. 'Woman-Marriage in Africa: A Critical Study for Sex-Role Theory?' (1979) 15.2 *Journal of Sociology*: 65-71.

<sup>7</sup> Krigs Eileen Jensen. *The social system of the Zulus*. Shuter & Shooter, 1974.

*Eugene Cotran*<sup>8</sup> described woman to woman customary unions under the kikuyu customs in the following manner;

*“WOMAN-TO-WOMAN MARRIAGE: - where a husband dies leaving a childless widow, who is past child – bearing age, the widow may marry a wife. The widow pays ruracio (marriage consideration) to the family of the woman selected, and arranges for a man from her deceased’s husband age set to have intercourse with her. Children resulting from such intercourse are regarded as the children of the widow’s deceased husband.”*

The court, in the case of *Eunita Anyango Geko & Another v Philip Obungu Orinda*<sup>9</sup> the court held that in Luo customs, woman to woman marriages are defined in the same manner as that under the Kikuyu Customs aforementioned, with the slight difference being that under the Luo customary law, if the widow is left without a male child, and not necessarily without a child at all, then she may marry another wife as under the Kikuyu customary practice. The consequence of such marriages is that once the woman marrying dies, then under succession, the married woman is an entitled beneficiary of the estate of the deceased.<sup>10</sup> Further, such succession is governed by rules of customs of the marrying woman ’ s tribe.

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<sup>8</sup> *Eugene* (n.1)

<sup>9</sup> Kisii High Court Misc. C.A No.1 Of 2013, [2013] eKLR

<sup>10</sup> *Agnes Kwamboka Ombuna –vs- Birisila Kerubo Ombuna*, Kisii High Court Civil Appeal No.132 of 2008.

## APPLICABLE LAW

The law applicable to woman to woman customary marriages has been a question of discussion before the Kenyan courts on more than one occasion, for instance, in the case of *Eliud Maina Mwangi v Margaret Wanjiru Gachangi*.<sup>11</sup> The courts have applied before and continue to apply the rules of customary laws in establishing the validity and applicability of woman to woman customary marriages. This is premised on the basic reasoning that the practice is one of customary nature hence best approached from this perspective. However, such customary rules and/or laws must not be inconsistent with the provisions of the Constitution of Kenya 2010;<sup>12</sup> neither must they be repugnant to justice and morality.<sup>13</sup> A *locus classicus* is the case of *Kimani vs. Gikanga*<sup>14</sup> where Duffus JA expressed himself while applying customary law to proof and validation of woman to woman customary unions;

*“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to*

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<sup>11</sup> Civil Appeal No. 281 (A) OF 2003 [2013] eKLR

<sup>12</sup> Constitution (n.2) Article 2(4)

<sup>13</sup> Allot, Antony N, ‘What is to be done with African Customary Law,’ (1984) Vol. 2 *Journal of African Law* 56-71.

<sup>14</sup> (1965) EA 735, at page 739

*call evidence to prove that customary law, as would prove the relevant facts of his case.”*

The High Courts at Kisii, while applying customary law to woman to woman marriages, took this position in the case of *Sakina Sote Kaityany & another Vs Mary Wamaitha*<sup>15</sup> and the case of *Atemo vs. Imujaro*.<sup>16</sup> The application of African customary laws to woman to woman marriages is envisaged under Probate and Administration Rules. The said rules state thus;

*Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.*<sup>17</sup>

When the court has to establish the existence of such customary law, the courts are guided by the opinion of persons likely to know of its existence or practice. Such persons are normally elderly men and women of the tribes whose customary rules are in question. This is codified under the *Evidence Act*.<sup>18</sup> In the case of *Eliud Maina Mwangi*<sup>19</sup> the court opined that the interpretation of Section 51 of the Evidence Act<sup>20</sup> and Rule 64 of Probate and administration Rules makes the writings of E. Conran<sup>21</sup> pertaining to customary law and practice in Kenya, among other works, admissible before the Kenyan courts. The court further demonstrated that this writing and other works on African customary practice in Kenya, have been used by the courts before in making

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<sup>15</sup> Civil Appeal NO 108 OF 1995

<sup>16</sup> (2003)KLR 435

<sup>17</sup> Probate and Administration rules, Rule 64

<sup>18</sup> Cap 80 Laws of Kenya, Section 51(1)

<sup>19</sup> Eliud (n.7)

<sup>20</sup> Evidence Act (n14)

<sup>21</sup> Eugene, (n1)

determinations in the cases of *Karanja Kariuki vs Kariuki*<sup>22</sup> which involved distribution of the land of a deceased person during his lifetime), *Gituanja vs Gituanja*,<sup>23</sup> which entailed life interest of a widow, *Kanyi vs Muthiora*,<sup>24</sup> which involved inheritance rights of unmarried daughters, and *Njuguna vs Njuguna*,<sup>25</sup> which was about the duties and obligations of the “*Muramati*”

## **VALIDITY OF WOMAN TO WOMAN CUSTOMARY UNIONS**

The issue of validity of woman to woman customary marriages has been presented for determination before courts on numerous occasions. Frequently, the courts have held that for customary woman to woman marriages to be valid, the following requirements must be fulfilled;

- a) The marrying woman must be childless
- b) Dowry must be paid
- c) The husband to the marrying woman must have been deceased
- d) The marriage must not be repugnant to the constitution and to justice and morality
  - i. There must be capacity to marry
  - ii. There must not be coercion

In the event that these requirements are not met, or the applicant fails to prove that these requirements were met, the no claim brought under this form of union stands a chance of remedy.

This had been the position of the courts in *The Estate Of Priscilla Nduta Gitwande (Deceased)*,<sup>26</sup>

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<sup>22</sup> (1983) KLR 209

<sup>23</sup> (1983) KLR 575

<sup>24</sup> (1984) KLR 712

<sup>25</sup> (1984) KLR, 527

<sup>26</sup> [2006] eKLR

where Rawal J, as she then was, and in *Millicent Njeri Mbugua Vs Alice Wambui Wainaina*,<sup>27</sup> where Makhandia J, as he then was, declined to recognize alleged customary Kikuyu woman-to-woman marriages which did not satisfy the essentials of such marriages as identified herein above.

### **MARRYING WOMAN MUST BE CHILDLESS OR PAST CHILD BEARING AGE**

The main purpose of woman to woman customary marriages is child bearing.<sup>28</sup> It follows therefore that for the marriage to be valid within the context of African Customary law, the woman marrying must be childless.<sup>29</sup> In light of this, Regina Smith Oboler opines that a female husband is one who pays bride wealth for, and thus marries but does not have sexual intercourse with another woman so as to become the social and legal father of the other woman.<sup>30</sup> While asserting that the female husbands assume the formal role of father to their wives' children, She expounds further thus;

*The demographic reality is that not every woman gives birth to a son. Woman/woman marriage is one solution to this problem. The intention is that the wife of a female husband should bear sons who will become their female father's house's male heirs in the property system.*<sup>31</sup>

Further to this, the court, in the case of *Monica Jesang Katam v Jackson Chepkwony & another*,<sup>32</sup> held that woman to woman marriages are within the application of the *Law of*

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<sup>27</sup> Nyeri High Court Civil Appeal No 50 Of 2003

<sup>28</sup> See Burton (n.4) and Krige (n.5)

<sup>29</sup> Eugene (n.3)

<sup>30</sup> Regina Smith Oboler, 'Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya.' (January, 1980) Vol. 19 No. 1 in *Ethnology*, pp. 69-88

<sup>31</sup> Regina (*Id*) at page 73

<sup>32</sup> Mombasa HCSC No. 212 of 2010, [2011] eKLR

*Succession Act*,<sup>33</sup> placing the petitioner and her children in the *first line of inheritance*: the petitioner herself for being “*wife of the deceased*”, and her children for being the *children of the deceased*. The conclusion is to be drawn that the petitioner herein is entitled to the grant of letters of representation. As such children born of such relations are regarded in law as children of the marrying wife and so is the married wife.

In *Re The Estate of Priscilla Nduta Gitwande*<sup>34</sup> revoked the grant of representation made to the Administratrix who was a traditional wife in a woman to woman marriage on the grounds that the marriage had not satisfied the customary requirements in order to be recognized as a valid marriage under customary law since the deceased (a woman) had a biological daughter hence was not childless at the time of the alleged marriage.

### **DOWRY MUST BE PAID**

In woman to woman marriage, all aspects of normal ordinary man to woman marriage must be observed.<sup>35</sup> It follows therefore that dowry must be paid to the girl’s father<sup>36</sup> and in some instances; there must be ceremony of marriage. The courts have demonstrated the essentiality of this requirement in the case of *Millicent Njeri Mbugua v Alice Wambui Wainana*<sup>37</sup> where Justice Makhandia held that the woman to woman marriage in the circumstances was not valid because the dowry of the woman to be married had not been paid as was required by custom since the other woman had been accompanied by her husband

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<sup>33</sup> Cap 160 Laws of Kenya.

<sup>34</sup> *Re The Estate of Priscilla* (n.24)

<sup>35</sup> Herskovits (Infra n. 36)

<sup>36</sup> Herskovits Melville Jean. *Acculturation: The study of culture contact*. JJ Augustin, 1938 at page 335; See also Regina (n.28)at page 69.

<sup>37</sup> *Millicent Njeri* (n.25)

Eugene Contran, while elaborating the requirement for dowry and ceremony of marriage, illustrates this in context of Luo customs by stating thus;

*WOMAN-TO-WOMAN MARRIAGE (chi mwandu); Where a husband dies leaving a childless widow or a widow with no male children, the widow may marry a wife by giving dho Ikeny (marriage consideration) to her family in the usual way. The widow then selects a man from her late husband's clan to have sexual intercourse with her wife, and any children resulting from such intercourse will be regarded as those of the widow's deceased husband*

In *Agnes Kwamboka Ombuna –vs- Birisila Kerubo Ombuna*<sup>38</sup> the court asserted that in a woman to woman marriage under African Customary practice, once the marriage consideration has been paid in accordance with the custom, then in the case of death of the woman-husband, issues of succession arise and such issues must be dealt with in accordance with the custom under which the marriage was celebrated.

In *Re Joseph Mose Okemwa*<sup>39</sup> the court particularly declined the validity of woman to woman marriage for the instance that whereas all other requirements of such marriage were met, there was no dowry paid to the family of the wife to the Female husband. That lack of this dowry was a fundamental defect upon the marriage thus the wife and the children were not regarded as beneficiaries of the estate of the deceased under Section 29 of the Law of Succession Act.<sup>40</sup>

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<sup>38</sup> Kisii High Court Civil Appeal No.132 of 2008; See also Kisii High Court Miscellaneous Civil Application NO.1 of 2013(Ruling) NO.780

<sup>39</sup> Nairobi High Court Succession Cause No. 1206 Of 1995 [2001] eKLR

<sup>40</sup> Succession Act (n.33)

## **THE HUSBAND TO THE MARRYING WOMAN MUST HAVE BEEN DECEASED**

The husband of the woman must have been deceased at the time of the marriage.<sup>41</sup> This is because if the husband were alive, then in the instance of lack of children from the woman in question, the husband was permitted in custom to marry another woman. This is owing to the polygamous nature of the African customary marriage. Eugene Cotran elaborates that woman to woman marriage only occurs when the husband of the female husband died leaving the female husband childless, and where the female husband is past child bearing age.<sup>42</sup> Regina also elaborates that in such an instance, the female husband selects a man from the clan her deceased husband to bear children with the married wife and which children are to be regarded as the children of the female husband.<sup>43</sup> The African customs have solutions for instances where the husband and the wife are both alive and cannot bear children, hence the woman to woman marriages was adopted to cure instances where the husband is dead leaving the female husband childless and past child bearing age.

## **CUSTOMS MUST BE CONSISTENT WITH THE CONSTITUTION**

Generally, the provisions of African customary law which are inconsistent with the constitution are regarded null, void and invalid to the extent of their inconsistency.<sup>44</sup> This is because the constitution is the supreme law of the land.<sup>45</sup> Where a court is faced with the issue of

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<sup>41</sup> Re The Estate of Priscilla (n.24)

<sup>42</sup> Eugene (n.3)

<sup>43</sup> Regina (n.28)at page 73

<sup>44</sup> Constitution (n.4) Article 2(4)

<sup>45</sup> Constitution (n. 44) Article 2(1)

inconsistency of African Customary practice with the constitution, then the court is guided by the precedence stated out in the case of *Schachter vs. Canada*<sup>46</sup> where the court stated thus;

*“Generally speaking, when only a part of a customary law or requirement violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define carefully the extent of the inconsistency between the custom in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the subjects to the custom would have adopted it without the inconsistent portion. In the case of interpreting a custom, the inconsistency is defined as what the custom wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the custom excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down.”*

## **WOMAN TO WOMAN CUSTOMARY UNIONS & SUCCESSION LAWS IN KENYA**

The Law of succession in Kenya is governed by the *Law of succession Act of 1982*. Woman to woman marriages are covered under *Section 9* of the *Law of Succession Act*<sup>47</sup> at they are mainly conducted for the sole purpose of getting a heir to inherit the property of the widowed female husband who,<sup>48</sup> as a requirement for the validity of this marriage, is usually childless.<sup>49</sup> As stated

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<sup>46</sup> [1992] 2 S.C.R. 679

<sup>47</sup> Herskovits (n.36)

<sup>48</sup> Regina (n.30)

<sup>49</sup> *Ibid.*

there earlier,<sup>50</sup> woman to woman customary marriages in Kenya are solely for the purpose of child bearing where a woman who past child is bearing age is deceased by the husband and left childless.<sup>51</sup> It follows therefore that if the children bore in such marriages are regarded as the children of the female husband, then the question of succession must be handled in line with the interest of these children and the wife.

It is a generally accepted position in both in fact and law, that under woman to woman marriages where all the requirements thereto have duly been fully met, the institution is within the application of the *Law of Succession Act*,<sup>52</sup> and it therefore translates to placing the petitioner and her children in the *first line of inheritance under succession of the estate of the female husband*: the petitioner herself for being recognized as a valid “*wife of the deceased*”, and her children for being regarded as the children of the *children of the deceased*. The conclusion is to be drawn that the petitioner herein is entitled to the grant of letters of representation. As such children born of such relations are regarded in law as children of the marrying wife and so is the married wife.

The court, in the case of *Monica Jesang Katam v Jackson Chepkwony & another*,<sup>53</sup> expressly stated that once a woman to woman customary marriages has been conducted with all requirements fulfilled and in accordance to customary laws that are not inconsistent with the constitution, then the subjects of such marriages become beneficiaries of the estate of the female husband upon her demise. Their rights are covered under *Section 29* of the Said succession act and they are entitled to claim benefit in the estate of the deceased person. It therefore means that even in an instance that a will is left behind by the deceased, such will must cover the subjects of

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<sup>50</sup> Njambi Wairimu Ngaruiya, and William E. O'Brien. 'Revisiting "woman-woman marriage": Notes on Gikuyu women.' (2000) Vol. 12 No. 1 *NWSA Journal*: 1-23. At page 109

<sup>51</sup> Amadiume Ifi. *Male daughters, female husbands: Gender and sex in an African society*. Palgrave Macmillan, 1987 at page 103

<sup>52</sup> Cap 160 Laws of Kenya.

<sup>53</sup> Mombasa HCSC No. 212 of 2010, [2011] eKLR

the woman to woman marriages; the children born of the relationship and the wife to the female husband.

The said *Section 29* of the *Law of Succession Act* states that for the purposes of this Part, “dependant” means the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death. The children born to in a woman to woman customary union are regarded by law as children under this definition, and the same applies to the word wife.

Further, under section 3(5) of the said act, it is stated thus; “Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.” Should therefore the female husband contract another marriage to another man even after such woman to woman customary union, the children from such unions are regarded as children under the acts.