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CHALLENGES IN LITIGATING WOMEN'S LAND AND PROPERTY RIGHTS

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Acronyms

ACHPR	African Commission on Human and Peoples' Rights
Banjul Charter	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
ECtHR	European Court of Human Rights
FAO	Food and Agriculture Organization of the United Nations
FSL	Feminist strategic litigation
HRC	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISLA	Initiative for Strategic Litigation in Africa
KELIN	Kenya Legal and Ethical Issues Network on HIV& AIDS
OECD	Organisation for Economic Co-operation and Development
WLPR	Women's land and property rights
WLSA	Women and Law in Southern Africa Research Trust
WPI	Women's ProBono Initiative

Foreword

Women in Africa depend on land and other natural resources for economic development, social inclusion and realisation of other human rights. In recognising this important aspect of human rights, many countries across the region have put in place enabling constitutional and legislative frameworks to promote women's land and property rights. In addition to progress at the national level, countries have made commitments at the regional and international level to end all forms of discrimination and promote women's ownership, control and use of land and other productive resources.

Despite these gains, discriminatory customary and religious laws continue to influence how women enjoy their land and property rights. Societies assign multiple roles and identities to women, including wives, mothers, daughters, unmarried, cohabitee, married in a polygamous or monogamous union, widowed, separated or divorced. These roles and identities directly influence how women realise their land and property rights.

Division of matrimonial property, succession and inheritance, and participation of women in decision-making spaces in large scale land-based investments are spaces majorly controlled by discriminatory customary practices and beliefs. This happens even in situations where constitutions and enabling laws prohibit discrimination. As an important tool that can promote equality and realise norm change, the law can be applied strategically to fill in the social, legislative, policy and institutional gaps that hamper the realisation of women's rights to land and property. This is evident from the increased number of court decisions across Africa that have affirmed these rights.

Strategic and public interest litigation at the national, sub-regional and continental levels have been instrumental in pushing for the most urgent reforms aimed at protecting the rights of women and girls in Africa. However, it is important to note that litigating cases that go against social norms or religious beliefs comes with a myriad of challenges. This coupled with unresponsive and corrupt access to justice and administrative processes makes it difficult for women to affirm their rights.

We hope that this INSIGHTS will assist lawyers in understanding and appreciating the challenges they are likely to encounter when litigating cases on women's land and property rights and identify ways of building resilience to mitigate the challenges. In doing so, lawyers will have the valour to litigate high impact cases and contribute to the prevention of violations of women's rights to land and property in Africa.

Julianna Nnoko-Mewanu

1. Introduction

1.1. Project overview

This INSIGHTS is developed as part of ISLA's objective to use the law, through strategic litigation, to achieve policy and legal outcomes that advance economic, social and cultural rights, including women's legal rights to material resources such as land, housing or property.¹

Land occupies an important place in African society as it is viewed as a primary measure of wealth, source of political power and evidence of social status.² Land ownership is also instrumental with respect to food production, shelter provision and cultural identity.³ However, women's ownership and access to land rights has been hampered by varied factors, including patrilineal understandings of land ownership which either exclude women⁴ or accord them secondary rights to land through their link with male relatives, such as husbands, sons or in-laws.⁵

Additionally, land disputes are mainly determined by patriarchal judicial institutions which may be discriminatory towards women's rights.⁶ This situation may be exacerbated where women experience multiple vulnerabilities, including education, economic and social.⁷

Together, these vulnerabilities and challenges in accessing the justice system and seeking relief or remedy result in limiting women's access and use over land and productive resources making them further susceptible to higher rates of poverty.⁸

Although there have been recognisable land reforms in several countries across Africa providing for, among others, equality and non-discrimination provisions in national constitutions and statutes,⁹ these reforms have failed to ensure substantive change in

¹ ISLA 'Women's Socio-Economic Rights' <<https://www.the-isla.org/thematic-areas/womens-socio-economic-rights/>>.

² For more information, see K Tafira 'Why land evokes such deep emotions in Africa' (The Conversation, 27 May 2015) <<https://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125>>.

³ Ibid. Also see Y Adarkwah Antwi 'Property Rights and the African Concept of Land Ownership' (African Liberty, 23 December 2007) <<https://www.africanliberty.org/2007/12/23/property-rights-and-the-african-concept-of-land-ownership/>>.

⁴ ED Kuusaana, JK Kidido & E Halidu-Adam 'Customary Land Ownership and Gender Disparity: Evidence from the Wa Municipality of Ghana' (2013) 10(1-2) *Ghana J of Development Studies* 63.

⁵ Ibid.

⁶ For more information, see J Jarpa Dawuni (ed) *Gender, Judging and the Courts in Africa* (2022).

⁷ JW Bruce 'Evolving Land Rights, Policy and Tenure in Africa' (2000) 101 *African Affairs* 264.

⁸ C Dowuona-Hammond 'State Land Management Regime: Impact on Rights of Women and the Poor in Ghana' Attorney General and Ministry of Justice Access to Justice, Series No. 2, Ministry of Justice, Ghana and GTZ (2003).

⁹ See, for example, the African Union (AU) Specialised Technical Committee on Agriculture and Rural Development, Water and Environment Recommendation (2015) which, among others, provided that states should move towards allotting 30 per cent of land to women by 2025.

actualising equitable land governance and necessary protections of women's land and property rights (WLPR).¹⁰ Research has shown that gender-neutral land law reform has in fact led to sex disparities in implementation, further worsening the disadvantaged position of women.¹¹ And despite international human rights commitments towards improving the status of gender equality and non-discrimination, a number of African countries still fail to recognise women's equal rights to land and property.¹²

This INSIGHTS takes all this into account and sets out as its main objective to highlight legal, political and social obstructions to achieving gender equality in access to and use of land, and develop strategic and gender-sensitive approaches to enhance protection and realisation of WLPR in Africa.

In addition, this INSIGHTS seeks to provide a deeper analysis of the hurdles that present in litigation through examination of the feminist legal theory accompanying case selection, purported theory of change, the laws being challenged, the justice system within which some of the cases exist and the processes involved in sourcing these cases in order to develop ways in which litigating WLPR can be improved.

It is intended for legal practitioners who provide assistance to women seeking judicial relief or remedy in actualising their land and property rights. It is also targeted at donors to provide guidance on how to increase funding structures to help women overcome varied impediments in their quest to access justice, including financial hurdles, barriers to access to justice and patriarchal socio-cultural norms. It will therefore be useful for donors to understand the challenges that surround strategic litigation on WLPR to better inform their assessment of proposals for grants in a more contextual manner.

1.2. Methodology and structure of paper

The development of this research project involved a combination of intensive desk research, key informant interviews conducted in 2021 and information-gathering from an in-depth seminar on cohabitation that took place from 4 to 6 May 2022 in Diani, Kenya.

Desktop research was used to inform the first aim of the research to provide a comprehensive review of the existing situation as regards WLPR in Africa by conducting a critical mapping of relevant legislative, jurisprudential and socio-economic frameworks.

Key informant interviews were conducted with network members. Network members included organisations and institutions for whom ISLA had acted either as technical advisors to counsel on a case, or who acted as ISLA's representative where ISLA intervened as *amicus curiae*, or for whom ISLA intervened as *amicus curiae*.¹³ All interviews were conducted over Zoom.

¹⁰ PS Malla 'Upholding Women's Right through Litigation' Panel paper submitted during the 45th Session of United Nations Commission on the Status of Women (2010) <https://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf>.

¹¹ Ibid.

¹² H Ghebru 'New challenges for women's land rights in Africa' (International Food Policy Research Institute, 11 November 2019) <<https://www.ifpri.org/blog/new-challenges-womens-land-rights-africa>>.

¹³ *Federation of Women Lawyers (FIDA-Kenya) v Attorney General (Amicus Curiae: Initiative for Strategic Litigation)* Civil Appeal Number 164B of 2018.

Partners from the following countries were interviewed: Kenya, Uganda, Cote D'Ivoire, Malawi and Burkina Faso. In Uganda two network partners, FIDA-Uganda and Women's ProBono Initiative (WPI), were interviewed.

In Kenya three partners were interviewed: FIDA-Kenya, KELIN-Kenya and CREAW. FIDA-Kenya and KELIN-Kenya are the only non-governmental organisation partners who were able to source cases and on two occasions were able to file the cases in court. Other partners include Voix des Femmes in Burkina Faso, GEPALEF in Cote d'Ivoire and WOLREC in Malawi.

This publication also benefitted from reflections drawn from an in-depth seminar convened by ISLA in May 2022 titled 'Protection of Various Forms of Families and Distribution of Property Upon Dissolution of Cohabitation Relationships, De Facto Unions and Customary or Religious Marriages'. The main objective of the seminar was for participants to share information on their cases and knowledge on the human rights framework, which allowed lawyers to develop clear litigation strategies in their respective cases and which could be useful in future litigation of similar cases. Other objectives included clarifying the scope of relevant rights in developing effective remedies in each case and determining the best practices for when the case is an amicus intervention or where ISLA is acting as advisor to counsel.

To effectively consolidate all the data emanating from these sources, this publication is divided into seven sections. Section one expounds on the objectives and overview of the guide, and the methodology and approach used in developing the publication. Section two provides the contextual background of the research by identifying and describing the relevant legal standards that exist related to WLPR in Africa, and highlights ISLA's model of strategic litigation, generally, and in respect to economic, social and cultural rights.

Section three highlights general challenges encountered by lawyers during litigation of WLPR, including ideological contestations on which woman's rights are to receive primary attention, engagement with patriarchal judicial institutions, logistical challenges and discriminatory socio-economic and cultural undertones surrounding WLPR matters.

The next sections provide more context-specific challenges relevant to litigating specific issues on the African continent. Section four deals with women's right and access to inheritance; section five highlights challenges emerging from non-traditional familial arrangements, such as cohabitation; section six examines WLPR and division of matrimonial property; and section seven focuses on WLPR in the extractives industry. The focus on this industry is precipitated by ISLA's ongoing and potential cases in the area, including in Sierra Leone, Uganda and Malawi. Therefore, this publication will help in setting out the organisation's strategic response to these issues by discussing its theory of change.

This publication concludes with suggestions and opportunities for reform.

2. Strategic Litigation and Women's Land and Property Rights _____.

2.1. Women's land and property rights

Situating WLPR in the law requires a cross-cutting approach which includes provisions in international and regional human rights instruments, national laws including estate property and succession, marriage and family, and voluntary standards and goals related to development and food security. For example, the 2030 Agenda for Sustainable Development's Sustainable Development Goal (SDG) 5¹⁴ provides that realising women's land rights requires states to 'undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws'.¹⁵

This Goal encompasses many overlapping themes, some of which are discussed below.

2.1.1. Non-discrimination, matrimonial property and intersectionality

Both international and regional human rights instruments provide for general prohibitions on gender discrimination. Article 2 of the Universal Declaration of Human Rights (UDHR) sets out the principle of non-discrimination, including based on sex, in the enjoyment of rights guaranteed in the Declaration.¹⁶ This should be read in conjunction with provisions on, among others, the rights to property, food and housing and education.¹⁷

Similarly, the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination based on sex,¹⁸ while art 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states parties to 'undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights' and prohibits discrimination based on sex.¹⁹

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) goes further by requiring governments to prevent and provide all women and

¹⁴ UN General Assembly 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 <<https://www.refworld.org/docid/57b6e3e44.html>>.

¹⁵ Ibid Goal 5.

¹⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 2.

¹⁷ Ibid art 17.

¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 3.

¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 3.

girls protection from all types of discrimination, specifically its art 2 calls for a prohibition of discrimination on the basis of sex, including with respect to rural women and in marriage.²⁰ Additionally, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted that 'the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family'.²¹

Moreover, the CEDAW Committee found that 'women's right, same as men and regardless of marital status, to share in redistributed land should be carefully observed' and that '[o]ften inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished'.²²

To that end, the CEDAW Committee has called on specific state parties to align their domestic legislation with CEDAW. For example, in 2017, it recommended that Kenya recognise the principle of equality in all areas of marriage, including property, reinstate the requirement of spousal consent for any transactions related to marital property in the Land Laws (Amendment) Act of 2016, repeal the Law of Succession and ensure equal rights between men and women with regard to inheritance.²³

The African Union has adopted important provisions guaranteeing equality in access to land and property for both women and men. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) mandates state parties to ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage, promote women's access to and control over productive resources such as land and guarantee their right to property.²⁴

Certain human rights provisions have taken note of intersectionality that may possibly aggravate existing gender-based vulnerabilities and have specifically proffered additional protection to particular groups of women. Article 21 of the Maputo Protocol, for example, provides that a widow has the right to an equitable share in the inheritance of the separately-held property of her deceased husband, and that women and men have the right to inherit, in equitable shares, their parents' properties.²⁵

Additionally, the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas recognises that 'peasant women and other women working

²⁰ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

²¹ CEDAW Committee 'General recommendation No. 21 Equality in Marriage and Family Relations' (1994) para 35.

²² Ibid para 31.

²³ CEDAW Committee 'CEDAW Concluding Observations: Kenya, 2017' (2017) CEDAW/C/KEN/CO/8.

²⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Maputo Protocol) arts 7, 16 and 19.

²⁵ Ibid.

in rural areas enjoy without discrimination' the right to 'equal access to, use of and management of land and natural resources, and to equal or priority treatment in land and agrarian reform and in land resettlement schemes'.²⁶

However, it is the CEDAW Committee which has made informative recommendations regarding vulnerable women. In its General recommendation No. 34 on the rights of rural women,²⁷ the Committee noted that state parties have legal obligations to, among others:

Take all measures, including temporary special measures, necessary to achieve the substantive equality of rural women in relation to land and natural resources, and design and implement a comprehensive strategy to address discriminatory stereotypes, attitudes and practices that impede their rights to land and natural resources ... pay special attention to customary systems, which often govern land management, administration and transfer, and ensure that they do not discriminate against rural women ... raise awareness about rural women's rights ... ensure that legislation guarantees rural women's rights to land, water and other natural resources on an equal basis with men, irrespective of their civil and marital status or of a male guardian or guarantor, and that rural women have full legal capacity.²⁸

With regard to indigenous women, the CEDAW Committee has previously recommended that these women should have equal rights with indigenous men to use, manage and control land, water, forests, fisheries, aquaculture and other resources that they have traditionally owned, occupied or otherwise used or acquired. This includes by protecting indigenous women against discrimination and dispossession.²⁹

In addition, the CEDAW Committee has also taken specific note of the vulnerabilities faced by widowed women and has provided that discriminatory provisions that prevent widows from enjoying equal ownership of property acquired during marriage contravene the CEDAW and should be abolished.³⁰ To that end, the Committee called on state parties to, among others, 'adopt laws relating to the making of wills that provide equal rights to women and men as testators, heirs and beneficiaries' and further to 'ensure the prohibition of disinheritance of the surviving spouse and the criminalization of property dispossession/grabbing'.³¹

Additionally, in 2010 the Special Rapporteur on the right to food articulated states' obligations to respect, protect and fulfil in the context of the right to food and land and noted that '[t]here remain laws and social customs such as those ensuring that the

²⁶ United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (adopted by the Human Rights Council on 28 September 2018) A/HRC/RES/39/12.

²⁷ CEDAW Committee 'General recommendation No. 34 on the rights of rural women' (2016).

²⁸ Ibid paras 57-59.

²⁹ Ibid para 59.

³⁰ CEDAW Committee 'General recommendation No. 21' (note 21 above) para 35. See also paras 7-8, 26-29 and 30-34, as well as CEDAW Committee 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 paras 26, 34, 47-48 and 51-53.

³¹ CEDAW Committee 'General recommendation No. 29 General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)' (2013) CEDAW/C/GC/29.

land of a deceased husband belongs to his sons, not to his widow, despite the flagrant violation of women's rights to which this leads. As a result, women still represent a significant minority of the total number of titleholders'.³²

2.1.2. Land tenure and forced evictions

One of the existing threats to women's access to land and property relates to the question of land tenure, that is, 'the reasonable guarantee of ongoing duration of land rights, supported by the certainty that one's rights will be recognized by others and protected by legal and social remedies when challenged'.³³

Land tenure comprises several rights,³⁴ including completeness of the bundle of rights, that is, to what extent are the various rights held by an individual or group; duration, that is, are the rights short- or long-term?; robustness, that is, are the rights known by the holders, accepted by the community, and enforceable?; and individual or shared rights, that is, to what extent are rights held individually or jointly and what are the relationships among the rights-holders?³⁵

Human rights standards and principles have also recognised the interconnectedness between the rights to property and an adequate standard of living, how it relates to land tenure and women's rights and have provided specific protections in this regard. For example, the Guiding Principles on Security of Tenure of the Urban Poor (2013), developed by the Special Rapporteur on the right to adequate housing,³⁶ which requires states and other relevant actors to strengthen diverse forms of tenure and prioritise the tenure arrangements of the most vulnerable and marginalised.³⁷ Specifically, Principle 6 mandates states to combat discrimination on the basis of tenure and promote women's de facto and de jure equality, 'regardless of age, civil, marital or social status and independent of the relationship with male household or community members'.³⁸

Similarly, the Framework and Guidelines on Land Policy in Africa, adopted by the African Union in 2009, states that 'better and more productive use of land requires that

³² UN General Assembly 'The Right to Food: Note by the Secretary-General' (2010) A/65/281 paras 2 and 31.

³³ Food and Agriculture Organization of the United Nations (FAO) 'Governing Land for Women and Men: a Technical Guide to Support the Achievement of Responsible Gender-equitable Governance of Land Tenure' (Governance of Tenure Technical Guide No. 1) (2013).

³⁴ For further discussion on overlapping rights, see E Schlager & E Ostrom 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) *Land Economics* 249; R Meinzen-Dick & E Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2009) 26(1) *Land Use Policy* 36.

³⁵ F Place, M Roth & P Hazell 'Land tenure security and agricultural performance in Africa: overview of research methodology' in J Bruce & SE Migot-Adholla (eds) *Searching for Land Tenure Security in Africa* (1994) 15-39.

³⁶ UN General Assembly 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context: Note by the Secretary-General' (2018) A/73/310/Rev.1.

³⁷ UN General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (2013) A/HRC/25/54.

³⁸ Ibid 6.

the land rights of women be strengthened through a variety of mechanisms including the enactment of legislation that allows women to enforce documented claims to land within and out-side marriage'.³⁹

Forced eviction 'constitutes a gross violation of human rights, in particular the right to adequate housing, with severe impacts on women and children'.⁴⁰ The United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement (2007)⁴¹ encourages states to 'adopt and implement special measures to protect women from forced eviction' and to take into account the differential impacts of forced evictions on women when conducting an impact assessment.⁴²

2.1.3. Ancillary rights: right to food and food security

Both international and regional instruments have also recognised ancillary rights related to ensuring gendered access to land and property such as the right to food and access to productive resources. A 2012 UN report on women's rights and the right to food identified areas that demand the most urgent attention, such as ensuring women's access to productive resources⁴³ and noted that '[i]n order to make a stronger contribution to poverty alleviation and to women's empowerment, agriculture research and development could take into account the specific constraints faced by women and their preferences'.⁴⁴

2.2. Strategic litigation and ISLA theory of change

Strategic litigation is understood as legal action on a public interest case that will have broad impact beyond the specific interests of the parties involved. It is particularly well suited 'where there is a situation of social marginalisation and there is a need for deliberate and careful planning aimed at long-term change that will improve the situation of marginalised groups'.⁴⁵ It is the use of litigation along with other legal and non-legal methods to seek legal and social change.⁴⁶ While strategic litigation uses the courts as an avenue to create broad social change, the utility of the legal processes must

³⁹ African Union, African Development Bank & Economic Commission for Africa 'Framework and Guidelines on Land Policy in Africa' (2010).

⁴⁰ Committee on Economic, Social, and Cultural Rights 'General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced Evictions' (1997) E/1998/22.

⁴¹ Special Rapporteur on Adequate Housing 'Basic Principles and Guidelines on Development-based Evictions and Displacement' (2007) A/HRC/4/18.

⁴² Ibid para 43.

⁴³ UN Human Rights Council 'Report submitted by the Special Rapporteur on the Right to Food : women's rights and the right to food' (2012) A/HRC/22/50.

⁴⁴ Ibid para 36.

⁴⁵ A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' unpublished PhD thesis, University of Pretoria (2018) 25.

⁴⁶ CC Barber 'Tackling the evaluation challenge in human rights: assessing the impact of SL organisations' (2012) 16 *The Int J of Human Rights* 411; S Tamale & J Bennett 'Legal voice: Challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 1.

be understood in relation to other out-of-court processes which together increase the potential for creating long term positive impact.

ISLA's approach to litigation incorporates a deliberate inclusion of feminist analyses of existing laws. This approach, known as feminist strategic litigation (FSL), employs legal tools in advancing protection of women and centres women's experiences in its analysis to promote a systematic removal of patriarchal structures in society.⁴⁷

Inherently then, FSL requires a socio-legal approach, where impugned laws are measured against their socio-political and cultural impact on women in the relevant society. FSL is also suspect of gender-neutral laws and their gendered impact on women, including in access to justice and the outcomes of justice processes.⁴⁸

FSL utilizes several approaches, including provision of arguments in court that are grounded in feminist theory; analysis of power relationships and systems; presentation of a variety of voices to help shape a case; centring the client's story in the legal action and bringing it to the attention of the court; and drawing on a broad array of expertise and experiences to help guide the litigation.⁴⁹

In using FSL, ISLA recognises that for sustainable change to occur, both legal machinery and environmental factors should be considered. This theory of change locates legal change in a wider context that also encompasses social, policy and institutional change. To that end, therefore, ISLA sets out these three overarching goals:

- To develop jurisprudence through the courts to hold state and non-state actors accountable.
- To create an enabling environment for strategic litigation to take place with the focus on strengthening feminist lawyers, social movements and institutions that work on strategic litigation; and
- To strengthen civil society to respond to threats and attacks that weaken civil space and human rights broadly and to organise to maximise the potential embedded in sudden political or social opportunities.

ISLA engages in FSL by using domestic, sub-regional and regional courts and international human rights bodies to advance women's rights across the African continent. This model is guided by the belief that strategic litigation is a powerful tool for social change as it helps to reframe the understanding of entitlements before the law, and challenges the legal discourse on women's human rights.

ISLA's FSL model has two critical elements. First, the litigation is designed to be strategic, that is, the development of the case is not intended to address just the needs of one client and must yield a broader impact to bring about social change. Second,

⁴⁷ Ibid.

⁴⁸ African Feminism 'Feminist Strategic Litigation as a Tool for Confronting Gendered Exclusion and Silencing' (2021) <<https://africanfeminism.com/feminist-strategic-litigation-as-a-tool-for-confronting-gendered-exclusion-and-silencing/>>.

⁴⁹ Ibid.

the litigation must be conceived and run in a manner that holds true feminist values that challenge patriarchy, class and power relations by centring women's voices and their agency.

Using the FSL model, ISLA formed the Women's Human Rights Network (WHRN).⁵⁰ To guide the implementation of the WHRN, ISLA and partners entered a memoranda of understanding which described the agreed modalities of the partnership and obligations of the partners involved.

These include general clauses describing the partners involved, i.e. ISLA and the implementing partner; the purpose of the partnership, which is the objective of the WHRN described earlier; the duration of the partnerships; the obligations of the partners involved; staff engagement; programmes and case selection; work plans; fundraising; advocacy and communications strategies; reporting; monitoring and evaluation; termination; and other general matters such as exchange of knowledge, disputes, revisions, amendments and confidentiality.⁵¹

As an anchor organisation, ISLA provides coordination and technical support to case theory and legal expertise. The lawyers in the WHRN, having received the benefit of ISLA's capacity strengthening training, would gain expertise in strategic litigation on women's rights, and thus, serve as a valuable resource to other human rights organisations, human rights defenders and activists in strategic litigation on women's rights. Therefore, viewed cumulatively, ISLA aims to build a pool of feminist litigators in the African continent.

⁵⁰ The Women's Human Rights Network was remodelled and is now referred to as the Feminist Legal Network (FLN).

⁵¹ ISLA 'Feminist Litigation Network: Proof of Concept 2017-2019' 17.

3. Challenges in Litigating WLPR: An Overview

Due to the breadth of WLPR, specific challenges exist for women within the different issue areas, including inheritance, matrimonial property, cohabitation and large-scale land deals such as in the extractives industry. This section, however, attempts to isolate overarching hurdles that feminist litigation lawyers may encounter in bringing cases on WLPR. These obstacles cut across every phase of the lawyering process and include ideological contestations, client management; patriarchal legal systems; and gender-discriminatory traditional and religious norms and conventions as explained below.

3.1. Ideological contestations and competing interests

Diverse partner relationship arrangements are a common feature defining families in contemporary Africa. These types of partnerships vary as regards legal recognition and actual practice, and include monogamous unions, cohabitation, same-sex partnerships and plural marriages.⁵² These arrangements have received varying levels of legal attention and protection, raising ideological contestations on interests between women involved in these partnerships. Some of these ideological contestations include competing interests between marriage in law and marriage as fact; normative validity and religious/customary recognition; and singular (monogamous) versus plural (polygamous) marriages.

The institution of marriage in sub-Saharan Africa is governed by designated laws and policies. The majority of these laws require registration before recognition of marriage. However, as noted by UN Women, these formal marriages are declining in favour of cohabitation with varying entitlements for women in terms of social protection, inheritance, custody and maintenance.⁵³ Cohabitation may occur where both partners are either unmarried or where one has an existing formal marriage outside the cohabitation arrangement. The latter set-up often raises ideological questions on whose interests are required to be protected, i.e., the spouse in a civil partnership or the one outside of it.

In most of the case study countries, as in Kenya, cohabitees do not have a right to any acquired property in case of separation. However, s 3(5) of the Succession Act created an uneasy compromise in inheritance by providing, in part, that '[n]otwithstanding 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

⁵² UN Women 'Progress of The World's Women 2019–2020: Families in a Changing World' (2019) <<https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women>>.

⁵³ Ibid.

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'.⁵⁴

This section was designed to protect women who were in unregistered partnerships with married men. In 2021, following sustained complaints from aggrieved civil partnership wives, and in a veiled attempt to settle moral arguments,⁵⁵ the President assented to the Law of Succession (Amendment) Act, 2019. The amendment, among others, limits the definition of 'spouse' to husband or a wife or wives recognised under the Marriage Act.⁵⁶ This effectively excludes cohabitees from any claims to their married partner's property in the event of death. Any litigation approach on WLPR rights for cohabitees may require an assessment of possible contestations between wives in a civil partnership and other partners outside of it.

Another contestation relates to competing interests between normative validity and customary/religious recognition. Unrecorded and unregistered marriages are common in Africa for various reasons, including inadequate laws on registration of religious or customary marriages, lack of awareness of consequences of non-registration and onerous requirements, as in Zimbabwe, where foreign nationals are required to provide a police clearance certificate absolving them of previous criminal conduct before a marriage will be registered.⁵⁷

In Ethiopia, although polygamy is punishable by law, it is still widely practised as evidenced in the Ethiopian Demographic and Health Survey Report of 2011, where it found that 'eleven percent of married women in Ethiopia are in polygamous marriage, with nine percent having only one co-wife and two percent having two or more co-wives'.⁵⁸ This situation is compounded by the socio-economic status of the women involved, where rural women (who typically face persistent structural constraints) are more likely to be involved in polygamous marriages than urban women.⁵⁹ Despite this, the law is silent on these unions, which in essence provides that only the first wife's rights are recognised, meaning any subsequent marriages are illegal and incapable of apportioning any matrimonial claim of property.

Non-recognition of unregistered marriages leaves women vulnerable to disinheritance.⁶⁰

⁵⁴ The Law of Succession Act, Chapter 160, Laws of Kenya.

⁵⁵ See, for example, the Memorandum of Objects listed in the Bill as to prevent 'opportunistic schemers successfully claim a stake in a deceased person's estate hence disenfranchising the legitimate heirs of the deceased'.

⁵⁶ Marriage Act (2015), Laws of Kenya s 2.

⁵⁷ See United Nations Economic Commission for Africa 'Report on the status of civil registration and vital statistics in Africa: outcome of the Africa programme on accelerated improvement of civil registration and vital statistics systems monitoring framework' (2017) <<https://repository.uneca.org/handle/10855/24047>>.

⁵⁸ S Gebretsion 'Is there division of property in polygamous marriage?' (The Reporter, 24 March 2018) <<https://www.thereporterethiopia.com/4618/>>.

⁵⁹ Ibid.

⁶⁰ Centre on Housing Rights and Eviction 'Shelter from the Storm: Women's Housing Rights and the Struggle against HIV/ AIDS in Sub Saharan Africa' (2009).

3.2. Patriarchal social norms and judicial process

Land is an asset and given how access to it positively influences social status and patriarchy, it is not surprising that discriminatory social norms and hierarchically gendered relations in society result in challenges in litigating WLPR.⁶¹ It is thus necessary to interrogate these norms and practices regarding property rights for men and women and how they impact WLPR.

Social norms impact the legitimacy of WLPR by influencing whether women are viewed as culturally capable of possessing property. Therefore, while a woman may be legally eligible to inherit property, she may face societal backlash, including stigma and ostracization, in attempting to do so. Such pressures discourages women from asserting any such rights in order to maintain familial ties.⁶² Even in contexts where women may be deemed culturally capable of possessing land rights, social norms may exclude other women. For example, in patrilineal systems, wives may lose the right to inherit property from their natal village.⁶³

Perceptions of the value of women's work in the family may also bear consequences in litigating WLPR. Generally, where women are viewed as helpers, homemakers, caregivers and dependents, it may be more difficult to litigate WLPR as these gender roles shape perceptions of women as non-owners, and women's positionality in land issues.⁶⁴ Tied to this is the fact that women's voices in discussing land matters may be excluded due to norms that view land as a male issue.⁶⁵

Access to WLPR using formal systems may also be discouraged in favour of customary dispute resolution mechanisms which 'may be seen as advantageous to particular groups based on their social status, wealth, ethnicity, or gender'.⁶⁶ Disputes over a deceased person's estate are considered family matters and are, thus, adjudicated at the local level without due regard for fairness and equality.⁶⁷ According to Human Rights Watch, in most sub-Saharan countries including Malawi, Mozambique, South Africa, Tanzania, Zambia and Kenya, widows in rural areas have limited access to justice and discriminatory traditional practices operate by default.⁶⁸

⁶¹ FAO (note 33 above).

⁶² R Pradhan, R Meinzen-Dick & S Theis 'Property Rights, Intersectionality, and Women's Empowerment in Nepal' International Food Policy Research Institute (IFPRI) Discussion Paper No. 1702 (2018).

⁶³ United Nations Human Settlement Programme (UN-Habitat) 'Progress Report on Removing Discrimination Against Women in Respect of Property & Inheritance Rights' Tools on Improving Women's Secure Tenure Series 1 No. 2 (2006).

⁶⁴ A Galie, J Jiggins and PC Struik 'Women's identity as farmers: a case study from ten households in Syria' (2013) 64-65(1) NJAS: Wageningen J of Life Sciences 25.

⁶⁵ J Twyman, J Muriel & MA García 'Identifying women farmers: informal gender norms as institutional barriers to recognizing women's contributions to agriculture' (2013) 1(2) *J of Gender, Agriculture and Food Security* 1.

⁶⁶ R Giovarelli, A Richardson & E Scalise 'Gender & Collectively Held Land: Good Practices & Lessons Learned From Six Global Case Studies' (2016).

⁶⁷ J Nnoko-Mewanu & N Abdi 'Securing women's land rights in Kenya' (Human Rights Watch, 7 March 2020) <<https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya>>.

⁶⁸ Ibid.

Women still encounter numerous hurdles when they choose to pursue formal legal channels due to the discriminatory nature of the system. In situations of human rights violations, in essence, a potential victim should be able to institute proceedings for appropriate redress before a competent court in accordance with the rules and procedures provided by law.⁶⁹ In theory, therefore, the judiciary checks and balances the actions of other state agencies and private persons.⁷⁰ To its credit, selected judicial contexts such as in Kenya, Uganda and Botswana have issued progressive judgments affirming WLPR in, among others, inheritance and matrimonial property cases.⁷¹

However, more often than not, court decisions have demonstrated limited appreciation of nuanced gendered impact of land and property law, including intersectional nature of discrimination. Some court decisions are still influenced by discriminatory social norms.⁷² In *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others*,⁷³ the Constitutional Court of Lesotho upheld a provision in the Chieftainship Act giving the exclusive right to inherit customary title of Chief to the firstborn male offspring, denying female children the same rights on the basis of gender.⁷⁴

In *ES and SC v United Republic of Tanzania*,⁷⁵ the CEDAW Committee faulted the domestic courts in Tanzania which failed to protect the claimants, two widows who were evicted from their homes by their husband's families. Specifically, the Committee criticised the domestic courts' reasoning that implementing the widow's right to her home after her husband's death would disturb the social order in the country.⁷⁶

Even in cases where women are successful in their suits, they are often stigmatised, ostracised and disowned by their communities making it difficult for them to enforce any favourable court decision.⁷⁷ For example, in *Thoko Mkhatswa-Dlamini*, an only daughter who sought redress at the Chief's Council to affirm her inheritance rights, both the Council and the Swaziland Traditional Appeal Court ruled against her and their failure to issue a written ruling hampered her efforts to appeal to the Supreme Court of Eswatini.⁷⁸

FLN partners reported that in some cases where a potential client was identified, they experienced pressure from their family and community to withdraw instructions. In Kenya, KELIN shared a case where a widow was disinherited by her mother-in-law because she

⁶⁹ United Nations 'A Human Rights-Based Approach To Women's Rights To Land And Other Productive Resources' (2013) <<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/11/OHCHR-UNWomen-land-rights-handbook-WEB%20pdf.pdf>>.

⁷⁰ Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) & the Katiba Institute 'A Guide to Public Interest Litigation in Kenya' (2014) <<http://www.katibainstitute.org/images/publications/PIL%20Guide%20In%20Kenya.pdf>>.

⁷¹ Ibid.

⁷² United Nations, 'A Human Rights-Based Approach' (note 70 above).

⁷³ *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* Constitutional Case No. 5/2010 [2013] LSHC 9 (03 May 2013).

⁷⁴ Ibid.

⁷⁵ *ES and SC v United Republic of Tanzania* Communication No. 48/2023 CEDAW/C/60/D/48/2013 (2015).

⁷⁶ Ibid.

⁷⁷ C Doss & R Meinzen-Dick 'Land tenure security for women: A conceptual framework (2020) 99 *Land Use Policy* 105080.

⁷⁸ *Mkhatswa v The King* (316 of 2018) [2019] SZHC 275 (16 January 2019).

was a cohabitee. Later the client withdrew instructions citing no interest in the deceased family's property and that she needed to be allowed to remarry. KELIN stated 'the client has informed me that she is not willing to pursue the case anymore. She states that the land in issue is small and, in her view, not worthy of any of her efforts. She has also indicated that she would like to re-marry someday and that the case would cause her some difficulties in that regard since she would be tied up to her late husband's family hence making it hard for her to marry someone else'.⁷⁹

3.3. Colonial legacies and legal pluralism

An additional challenge faced by women in WLPR contexts relates to legal pluralism. Traditional legal anthropology views legal pluralism as a system of different legal orders, conceived of as separate entities coexisting in the same political space.⁸⁰ It consists of different bodies of law that form part of the state legal system.⁸¹ As Dow and Kidd note, '[s]tate law is not the only body of rules governing social behaviour, and ... there exists in a society elaborate and complex and sometimes competing rules that govern people's actions and behaviour'.⁸²

Legal pluralism, especially in the context of family and succession laws, is a result of colonialism. Colonialists imposed their countries' systems of law and placed them above existing traditional and religious legal approaches. In addition, especially in Anglophone Africa, these imperialists codified religious laws, by also permitting marriages arranged under Christianity or Islam (as the case may be). Following independence, most states attempted to harmonise these plural laws in their statutes, with varying levels of success. For example, due to remnants of French colonial elevation of its civil law system, many of its former colonies in Africa do not legally recognise customary or religious marriages, despite actual practice where many marriages are concluded under Islamic or traditional regimes.⁸³

Understanding the interplay between different laws, including national laws, customary laws and religious laws, is important in designing litigation strategies for women's inheritance and matrimonial property rights. In commenting about the Malawian legal system in respect to inheritance, von Benda Beckmann noted that:

The law that is applied in Malawi has different foundations of validity. Although it is now common to speak of a legal dualism, this is a clumsy characterisation of the co-existence of different laws, that is 'English' law is composed of different kinds of law, it is more appropriate to speak of legal pluralism. On the whole, four complexes can be distinguished: local statutory law, English law, the customary law of the Malawian tribes and the religious law ...⁸⁴

⁷⁹ Zoom discussion with one of the network lawyers (identity withheld).

⁸⁰ B de Sousa Santos 'Law : A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *J of Law and Society* 279, 293.

⁸¹ Ibid.

⁸² U Dow and P Kidd 'Women, Marriage and Inheritance Research Report' (1994) 4.

⁸³ M Kane 'The Status of Married Women Under Customary Law in Senegal' (1972) 20(4) *The American J of Comparative Law* 716.

⁸⁴ F von Benda Beckmann *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues* (2007) 55 .

Similarly, in Nigeria, due to lack of uniformity of laws on succession, where a person dies intestate, customary law is considered the primary reference point.⁸⁵ On the other hand, in South Africa, four statutory regimes are used in succession and inheritance cases.⁸⁶ These plurality of laws have also been recognised in many constitutional provisions.⁸⁷ Some of these provisions have extended customary law to all personal matters as in Botswana⁸⁸ and the Gambia.⁸⁹ This extension has borne mixed results on women's ability to access their land and property rights. See, for example, *Susan Badjie v Isatou Secka*,⁹⁰ a Gambian case involving a dispute between two women over the estate of a deceased man.

The contentious issue was whether a man married under a monogamous marital regime had capacity to enter into a polygamous marriage; and if upon his death the subsequent 'wife' is entitled to his estate as a widow. The trial and appeal courts ruled that the subsequent wife could not be regarded as a wife since the deceased lacked the capacity to enter into any other marriage during the subsistence of a monogamous marriage. The Supreme Court overturned this decision, and in the process upheld religious laws as superior to any other laws concerning marriage.

In Botswana, the courts have relied on international human rights regime to interpret the impact of gender equality. In *Mmusi and others v Ramantele and another*,⁹¹ both the Court of Appeal and High Court held that the Ngwaketse customary law, which denied women the right to inherit the matrimonial residence intestate, violated their constitutional right to equality.⁹² The High Court held that the prioritisation of the male in customary inheritance was not in keeping with the undertakings of gender equality, enshrined in the constitution of the country. The court further noted that the violation was a disregard of Botswana's obligations under the CEDAW.⁹³ Similarly, in Kenya the Court of Appeal affirmed daughters' inheritance rights despite the practice going against customary law and practices.⁹⁴

Despite these positive outcomes, in most cases, judicial recognition of different types of marriage exacerbates how widows are treated upon the death of their spouses despite

⁸⁵ AC Diala 'Reform of the customary law of inheritance in Nigeria: Lessons from South Africa' (2014) 14(2) *African Human Rights LJ* 633.

⁸⁶ Law of Succession Amendment Act 43 of 1992; Intestate Succession Act of 1987; the Wills Act of 1953; the Reform of Customary Law of Succession Act (Reform Act) of 2009.

⁸⁷ Constitution of Kenya, 2010 art 2.

⁸⁸ Constitution of the Republic of Botswana art 15(4).

⁸⁹ Constitution of the Republic of the Gambia, 1996 with amendments through 2004.

⁹⁰ *Susan Badjie v Isatou Secka* SC 15/2012 (November 2014).

⁹¹ *Mmusi and others v Ramantele and another* (2012) 2 BLR 590 HC (11 October 2012).

⁹² Ibid.

⁹³ Ibid.

⁹⁴ *Rono v Rono and Another* (2005) AHRLR 107.

substantial constitutional reforms on promoting equality and non-discrimination.⁹⁵ In practice, the plural legal system leans heavily on customary or religious laws to manage family issues, and as a result women as wives, mothers and daughters are restricted from enjoying their right to inherit land, leaving them vulnerable to dispossession even when statutes recognise their rights.

In certain communities, a marriage is valid upon payment of requisite bride price, hence making it difficult for widows in cohabitating relationship or civil marriages to receive equal treatment in inheritance. In civil law countries, while customary law is prohibited it is widely practiced without taking note of the necessary precautions required to ensure gender equality.⁹⁶

Legal pluralism may also have adverse effects on gender equality in matters regarding land governance. In a plural legal system that leans heavily on customary or religious laws to manage family issues, most judicial actors may promote the use of patrilineal customary laws and practices in land governance and distribution of a deceased person's estate even when progressive statutes are available.⁹⁷

Failure of litigants to understand the impact of legal pluralism on succession rights, the interplay between the law and women's experiences with the law and how intersectionality exacerbates women vulnerabilities may all give rise to unfavourable results in strategic litigation efforts.⁹⁸

3.4. Broad litigation portfolios, inadequate subject matter expertise and client management

Strategic litigation has several benefits, including the potential for broader societal impact compared to ordinary litigation; and changes to legal and regulatory frameworks. As Solvang notes, '[s]trategic litigation projects seek not only to win individual cases and provide redress to individual victims, but also to affect greater, lasting change by winning cases that have an impact beyond the case concerned'.⁹⁹

⁹⁵ In the last ten years there has been a shift to amend constitutions and subsidiary legislations to reflect a rights-based discourse. For example, Zimbabwe and Kenya have new constitutions which are reflective of a rights-based approach. In Malawi since 2006 laws have passed to respond to women's rights which are the Prevention of Domestic Violence Act, 2006; the Gender Equality Act, 2013; and the Deceased Estate Administration (Wills and Inheritance) Act, 2019.

⁹⁶ ISLA 'WLPR Module Comprehensive Reading List on Women's Matrimonial property and Inheritance Rights' (2021).

⁹⁷ The International Women's Human Rights Clinic Georgetown University Law Center and The Federation of Women Lawyers: Kenya 'Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation' (2009) 40 Georgetown J of International Law 127 <<https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/05/4-Kenya-Report-508.pdf>>.

⁹⁸ A Manji 'Imagining Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa' (1999) 8(4) *Social and Legal Studies* 435.

⁹⁹ O Solvang 'Chechnya and the European Court of Human Rights: The Merits of Strategic Litigation' (2008) 19(3) *Security and Human Rights* 208.

However, significant challenges still exist, one of which is broad litigation portfolios with limited subject matter expertise. As discussed above, WLPR interacts with several legal aspects, including, among others, land and property laws, marriage and family laws, and laws on compensation in extractives industry. Other laws may include an apprehension of human rights law, conflict of laws (where the property is situated outside the country of primary jurisdiction) and taxation laws. The inability to define the scope of strategic litigation portfolios may be detrimental to potential strategic litigation.¹⁰⁰ In cases where the area of law and policy are broad, and require subject matter expertise unavailable at ISLA and its partner, increased collaboration among relevant stakeholders is necessary. Emerging difficulties in attaining these collaborations include different theories of change and coordination hurdles.

Another key challenge, as in any other strategic litigation, is regarding managing the client's expectations. While the client should ideally have the same goals as ISLA or its partners, this may not always be the case for various reasons. For example, the client may be primarily interested in resolving their personal problem, while the organisation may be interested in a broader legal reform. Additionally, the protracted nature of strategic litigation may be draining to the client.¹⁰¹

3.5. Access to justice and inordinate court delays

Access to justice is recognised as a right in international, regional and domestic contexts.¹⁰² This right comprises several dimensions, including information, social, geography and cost.¹⁰³ The Organisation for Economic Co-operation and Development (OECD) and the Open Society Foundation extend these dimensions to also include 'substance of the law, the availability of legal institutions; and their quality; the availability and quality of legal assistance; the quality of outcomes; and legal capability or empowerment'.¹⁰⁴ Quality of legal institutions includes the length of time it takes for court systems to fully and completely adjudicate on the cases.

While certain laws provide specific timelines, it is a general rule that cases should be concluded within a reasonable time. Section 1A of the Kenya Civil Procedure Act sets out the statute's overriding objective 'to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act' and further stated

¹⁰⁰ ISLA has had to let go of identified cases due to the lack of any potential strategic litigation direction, such as a WSER case referred by Association des femmes juristes de Côte d'Ivoire (cohabitation and access to property) on 21 October 2021 and a WSER case walk-in client (common property under separation regime) on 29 October 2021.

¹⁰¹ B Schokman, D Creasey & P Mohen 'Short Guide –Strategic Litigation And Its Role In Promoting And Protecting Human Rights' (Advocates for International Development, 2012) <<http://www.a4id.org/wp-content/uploads/2016/04/Strategic-Litigation-Short-Guide-2.pdf>>.

¹⁰² See, for example, ICCPR art 2; Constitution of Kenya, 2010 art 48.

¹⁰³ A Levai Deseau & M Schmiegelow 'Access to Justice and Economic Development: Evidence from an International Panel Dataset' No 2019009, LIDAM Discussion Papers, Université catholique de Louvain, Institut de Recherches Economiques et Sociales (IRES) (2019).

¹⁰⁴ OECD & Open Society Foundations 'Legal Needs Surveys and Access to Justice' (2019) <<https://doi.org/10.1787/g2g9a36c-en>>.

the duty of the court to include ‘the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties’.¹⁰⁵ Delay in the court process has several drawbacks, including disproportionate increase in costs, client fatigue and public distrust in the court system.¹⁰⁶

Regrettably, despite provisions on access to justice and timely disposal of cases, WLPR cases are sometimes subjected to protracted litigation. ISLA has documented several delayed divorce proceedings in Republic of Tanzania, including, the *Flora Mhule* case, a divorce proceeding contesting, among others, division of matrimonial assets.¹⁰⁷ In this instance, the trial court took more than a year to conclude the proceedings. An appeal made by the husband was countered with the Notice of Preliminary Objection whose ruling was given three years after its filing, without any reference to inordinate delay.

Similarly, in *Elizabeth Malilo*, a 2006 case, a trial court in Tanzania took two years to deliver a judgment for a Petition of Divorce. This judgment was appealed and only concluded in August 2016. This ten-year delay was not addressed by the court.

Whether occasioned by litigants’ own culpabilities or backlogs in the court system, inordinate delays have adverse effects on parties’ ability to effectively participate in the process and public trust in the justice system.

¹⁰⁵ Civil Procedure Act, 2010, Laws of Kenya s 2A.

¹⁰⁶ J Nagtegaal & Y Jooste ‘A Future of Justice Inclusion: Examining Access to Justice in South Africa through the “Ethic of Care” and “Complexity”’ (2022) 14(3) *African J of Legal Studies* 306.

¹⁰⁷ ISLA ‘Interim Report on Delays in Divorce Proceedings in Tanzania’ (2022).

4. Context-Specific Challenges: Women's Access to Inheritance

4.1. Legislative, constitutional and judicial approaches

Despite many progressive reforms in related to women's property rights in many African states, we can still trace a pattern of exclusion as regards inheritance rights. Although the Tanzania Land Acts included a provision that any rules of customary law that deny women lawful access to ownership, occupation or use of land be held as void,¹⁰⁸ the said Land Acts retained provisions recognising customary law and its application with respect to inheritance.¹⁰⁹

In neighbouring Uganda, '[i]ssues surrounding the inheritance of family land have been kept quite separate in law reform agendas'¹¹⁰ despite numerous recommendations from the CEDAW Committee for substantive reform.¹¹¹ Similarly, in Kenya, as in Uganda, land law reform which followed constitutional reform did not address the discriminatory aspects of its Law of Succession Act of 1972.¹¹² As the state has itself recognised, '[t]he area in which most customary laws disadvantage women is in respect of property rights and inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land and must live on the land as a guest of male relatives by blood or marriage'.¹¹³

On the contrary, Rwanda has been explicit in its recognition of gender equality in respect of inheritance by noting in art 50 of the Matrimonial Regimes, Liberalities and Succession Law of 1999 that '[a]ll legitimate children under civil law shall inherit equally without any discrimination between male children and female children'.¹¹⁴ This provision was buttressed by the Organic Land Law, 2005, which prohibited discrimination based on sex or origin and enshrined the equal rights of husband and wife, including widows and widowers over land.¹¹⁵

¹⁰⁸ Land Acts, 1999, Laws of Republic of Tanzania s 20(2).

¹⁰⁹ H Dancer 'An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania' (2017) 26(3) *Social and Legal Studies* 291.

¹¹⁰ Ibid 296.

¹¹¹ CEDAW Committee 'Concluding Observations of the Committee on the Elimination of Discrimination against Women' (2010) CEDAW/C/UGA/CO/7 para 14.

¹¹² Kenya Land Alliance 'The National Land Policy in Kenya: Critical Gender Issues and Policy Statements' Issues paper 1/2004 (2004).

¹¹³ Republic of Kenya 'Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women' (2006) CEDAW/C/KEN/6 para 81 <<http://www.un.org/womenwatch/daw/cedaw/39sess.htm>>.

¹¹⁴ P McAuslan *Land Law Reform in Eastern Africa: Traditional or Transformative?* (2013) 210-214.

¹¹⁵ Ibid.

International human rights law sets out guidance for states to make progress. For example, art 16 of CEDAW provides for the elimination of discrimination against women at the inception of marriage, during marriage, at separation and at death.¹¹⁶ Its General Recommendation No. 29 noted that the economic consequences for women upon the death of their spouses is far more dire and substantial than for men, and recommended that states adopt inheritance laws which provide equal rights between women and men in testate succession.¹¹⁷ More specifically, the CEDAW Committee recommended that laws should ensure equal treatment of surviving male and female spouses, prohibit disinheritance of a surviving spouse and criminalise dispossession or grabbing of deceased persons estate.¹¹⁸

Further, in its Resolution 262 on Women's Right to Land and Productive Resources, the African Commission on Human and Peoples' Rights (ACHPR) called for state parties to ensure widows' right to inheritance, including the right to inherit the movable and immovable property that was acquired during the marriage, as well as their right, irrespective of the matrimonial regime, to own the matrimonial house.¹¹⁹

4.2. Challenges in litigating WLPR and inheritance

In general, and as evidenced above, relevant laws and policies provide a mixed outlook on protections over women's inheritance of property. In turn, this produces several challenges in litigating around inheritance and WLPR, including legal gaps that exist in the content of current laws on inheritance. These gaps raise difficulties in designing and implementing a legal strategy that can successfully be followed by potential litigants.

4.2.1. Existing gaps in content of relevant laws

The first gap is the lack of harmonisation between customary law and statutory provisions on equality. While many constitutions in sub-Saharan Africa expressly provide for gender and sex equality, continued recognition of customary law, without non-discrimination clauses, such as in inheritance, leaves women vulnerable to prejudice and unfair outcomes.¹²⁰

The customary law of several communities follow a patrilineal system where 'women are incapable of owning or inheriting property'.¹²¹ Furthermore, married daughters are not

¹¹⁶ CEDAW (note 20 above).

¹¹⁷ CEDAW Committee 'General Recommendation No. 29' (note 31 above).

¹¹⁸ Ibid.

¹¹⁹ ACHPR 'Resolution 262 on Women's Right to Land and Productive Resources' (2013) ACHPR/Res.262(LIV)2013 para 6.

¹²⁰ A Nzioki 'The Effects of Land Tenure on Women's Access and Control of Land in Kenya' in AA An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) 214-228.

¹²¹ Georgetown International Women's Rights Clinic 'Women's Land And Property Rights In Kenya— Moving Forward Into A New Era Of Equality: A Human Rights Report And Proposed Legislation' (2009) 40 *Georgetown J of International Law* 1, 69.

considered to be part of the family line and therefore do not have rights to their father's property.¹²²

While disinherited women may attempt to use formal institutions for redress and citing discrimination, these efforts may not always be successful. In *Thoko Mkhatswa-Dlamini*, the Swaziland Court of Appeal rejected the claimant's appeal and favoured an overt discriminatory decision by the traditional judicial structures steeped in patriarchal understandings of women's role and their presumed incapacity to hold property.¹²³

In addition, the possibility for success before the courts is strained by the fact that the law fails to define the contours of widowhood. This ambiguity is often left up to societal/customary interpretation of the meaning of widowhood, which presents significant problems. For example, in some parts of Sub-Saharan Africa widowhood is not an automatic position that arises out of the death of a spouse. Instead, it is socially constructed and bestowed on the woman by the community and, more specifically, validated by her deceased husband's family.¹²⁴

Some factors which are considered in bestowing this status range from their perception of her 'good conduct' towards her in-laws and husband, and fulfilment of marriage formalities, such as payment of dowry. This has a direct implication for women in cohabitating relationships and their ability to inherit.¹²⁵ In other words, certain customary law provisions and traditional institutions (council, elders, families) can deny women the right to inherit from their husbands because their marriage was not formalised by a civil status registrar and they have not catered to the demands and behavioural prescriptions of in-laws and their community.

As a FIDA-Kenya representative pointed out, in the so-named *Bungoma* case, a woman was dispossessed of her land by her mother in-law upon the death of her spouse, on the justification that that cohabitation between the two did not amount to marriage.¹²⁶

4.2.2. Challenges in developing effective legal strategies

One of the distinct hurdles in developing effective legal strategies in conducting FSL in this area is the difficulty in locating clients. Interviews with network partners revealed the difficulty in onboarding and retaining clients. As noted by one respondent from FIDA-Uganda, 'I went to leaps and bounds to get an individual client, but she withdrew because courts are considered spaces of confrontation'.¹²⁷

¹²² Ibid.

¹²³ *Mkhatshwa v The King* (note 79 above).

¹²⁴ T Kachika, D Nyakaunda Kamanga & S Venekai-Rudo White *Dispossessing The Widow: Gender Based Violence in Malawi Kachere* (2002) 60.

¹²⁵ See section 5 on cohabitation and WLPR for further discussion.

¹²⁶ This case has not been filed and hence has no citation (FIDA-Kenya Online Interview (2017)).

¹²⁷ Zoom discussion with Susan Baluka, Strategic Litigation Advisor at FIDA-Uganda, 13 August 2021.

Even where a client has been located, challenges exist in understanding the specific applications of multiple legal regimes, including marriage, succession and property frameworks. In developing a legal strategy, strategic litigation lawyers may be inclined to presume that property owned by the respective spouses should be subjected to succession processes without taking note of other intersecting regimes to ensure the best forms of protection are secured for the widow. Understanding these cross-cutting regimes is also important in designing public engagement and empowerment strategies for women at risk of dispossession.

5. Cohabitation and WLPR_____.

5.1. Right to a family: factual and legal approaches

There is no singular definition of family in international human rights law. The question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors.¹²⁸ In General Comment No. 16, the Human Rights Committee affirmed that '[r]egarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned'.¹²⁹

To further affirm this point, in *Ngambi and Nebol v France*, in which the parties were seeking refugee status on the ground of family reunification and claimed to have been married in Cameroon, despite the French authorities' belief that the certificate was not genuine, the Human Rights Committee (HRC) noted, in part, that '[t]he protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations'.¹³⁰

Additionally, the HRC noted in its General Comment No. 19 that:

[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and ... it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. ... Where diverse concepts of the family, 'nuclear' and 'extended', exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.¹³¹

In General comment No. 14, the Committee on the Rights of the Child expanded the term 'family' to include biological, adoptive or foster parents, or, where applicable,

¹²⁸ F Nicholson 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification' UN High Commissioner for Refugees (UNHCR) Research paper 2nd edn (2018) <<https://www.refworld.org/docid/5a902a9b4.html>>.

¹²⁹ UN Human Rights Committee (HRC) 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (1988) HRI/GEN/1/Rev.9 (Vol. I).

¹³⁰ *Benjamin Ngambi and Marie-Louise Nébol v France* (16 July 2004) CCPR/C/81/D/1179/2003.

¹³¹ UN Human Rights Committee (HRC) 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (1990) <<https://www.refworld.org/docid/45139bd74.html>>.

the members of the extended family or community as provided for by local custom in accordance with art 5 of the Convention.¹³² Also, in *Winata v Australia* the HRC found that the longstanding relationship between applicants, which has resulted in the birth of a son as a de facto relationship akin to marriage, and extended protections usually reserved for married persons, to the complainants.¹³³

5.2. Non-traditional families: cohabitation and WLPR

Patterns of cohabitation and other ways of living together without marriage have changed and evolved over the last few decades. Cohabitation, defined as the co-residence of unmarried partners who live like husband and wife with or without children, has become a prominent feature of family transition in sub-Saharan Africa.¹³⁴ In a study conducted by Odimegwu, Ndagurwa, Singini and Baruwa, they found that cohabitation is becoming an integral feature of the family system in Sub-Saharan Africa.¹³⁵ This study also found that the odds of cohabitation were highest among young adults aged between 20 and 24. The study also suggested that the potential impact of cultural practices like payment of bride price may hinder marital formation among the poor.¹³⁶

This is not unique to Africa. In Sweden, nine out of ten couples marrying for the first time already live together, while in Denmark, more than one-third of women in their early twenties are living with a partner without the ties of marriage. As a rough estimate, around one million heterosexual couples are living together without being married in Britain,¹³⁷ while in France the number has reached two and a half million.¹³⁸ Various reasons have been proposed for this development. These include choice, migration for labour purposes, poverty and unemployment, economic conditions, the avoidance of the traditional obligations of marriage, avoidance of traditional roles, inability to conclude marriages and ignorance of the law.¹³⁹

Traditionally, the law tied the formal status of being married to an extensive range of rights, duties, burdens and responsibilities.¹⁴⁰ This approach has been criticised by some researchers that it involves unfair discrimination on the grounds of marital status, by disapproving non-marital relationships. To this end, various societies have been moving

¹³² UN Committee on the Rights of the Child (CRC) 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14 <<https://www.refworld.org/docid/51a84b5e4.html>>.

¹³³ *Hendrick Winata and So Lan Li v Australia* (2001) CCPR/C/72/D/930/2000 para 2.1.

¹³⁴ C Odimegwu, P Ndagurwa, M Singini & OJ Baruwa 'Cohabitation in Sub-Saharan Africa: A Regional Analysis' (2018) 18(1) *Southern African J of Demography* 111, 118-158.

¹³⁵ *Ibid* 118.

¹³⁶ *Ibid* 158.

¹³⁷ J Sinclair & J Heaton *The Law of Marriage: Based on H. R. Hahlo The South African Law of Husband and Wife* (1996) 270.

¹³⁸ *Ibid*.

¹³⁹ South African Law Reform Commission 'Domestic Partnerships' Discussion paper 104, Project 118 (2003) <<https://justice.gov.za/salrc/dpapers/dp104.pdf>>.

¹⁴⁰ D Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' (2010) 3(1) *Constitutional Court Review* 295.

towards a more functional approach to family law, focusing on the substance of the relationships and the needs of the parties in these relationships, instead of on the form of the relationship or the official status.¹⁴¹

In *X, Y, and Z v United Kingdom*, the European Court of Human Rights (ECtHR) considered the notion of family life as provided for in art 8 of the European Convention on Human Rights.¹⁴² In this case, where the court considered whether a relationship can be said to amount to 'family life', the court held that '[a] number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means'.

The ECtHR has also determined that marriages that are not in accordance with national law are not necessarily a bar to family life. In *Abdulaziz, Cabales and Balkandali v UK* one of the three women in the case had entered a religious marriage, not recognised in domestic law. In finding for the claimant, the court found that 'Mr. and Mrs. Cabales had gone through a ceremony of marriage... and the evidence before the Court confirms that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. And indeed, they subsequently did so. In the circumstances, the committed relationship thus established was sufficient to attract the application of Article 8'.¹⁴³

Additionally, in *Atala Riffo*,¹⁴⁴ the Inter-American Court of Human Rights (IACtHR) provided that 'the concept of family life is not limited only to marriage and must encompass other de facto family ties in which the parties live together outside of marriage'.¹⁴⁵

This position has also been upheld in multiple national courts. In *Dawood and Another v Minister of Home Affairs and Others* the Constitutional Court has observed that '[f]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms'.¹⁴⁶

In *Keticia Bgumba v Thadeo Maguma and Anor*,¹⁴⁷ the High Court in Tanzania recognised non-monetary contribution of a woman during the two years she had cohabited in

¹⁴¹ J Millbank 'The Role of "functional family" in same-sex family recognition trends' (2008) 20(2) *Child and Family Law Quarterly* 155.

¹⁴² *Marckx v Belgium* Application no. 6833/74 ECtHR 13 June 1979 para 31; *Keegan v Ireland* Application no. 16/1993/411/490 ECtHR 19 April 1994.

¹⁴³ *Abdulaziz, Cabales and Balkandali v UK* Application nos. 9214/80; 9473/81; 9474/8 ECtHR 28 May 1985 para 63.

¹⁴⁴ *Caso Atala Riffo y Niñas v Chile* IACtHR 24 February 2012.

¹⁴⁵ *Ibid* para 142.

¹⁴⁶ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* CCT35/99 2000 (8) BCLR 837 (CC) South Africa Constitutional Court 7 June 2000 para 31 <<http://www.refworld.org/docid/58501f464.html>>. All three joined cases concerned the circumstances in which foreign spouses of South African residents are permitted to reside temporarily in South Africa pending the outcome of their applications for immigration permits.

¹⁴⁷ *Keticia Bgumba v Thadeo Maguma and Anor* 1989 High Court High Court, Mwanza, Mwalusanya J., Civil App. No. 8/89 (18 July 1989).

a consensual union with her husband. To that end, the court found that as she had established a marriage by cohabitation and repute, she could claim her share in a house by virtue of s 160(2) of the Law of Marriage Act.¹⁴⁸

This position has also been adopted in Malawi. Section 13 of the country's Marriage, Divorce and Family Relations Act 2015¹⁴⁹ permits the court to make a determination on cohabitation based on factors such as the length of the relationship (not less than five years); the fact of cohabitation; the existence of a conjugal relationship; ownership, use and acquisition of property; whether the parties mutually have, care for, or support children; and the reputation of the parties in the community as being married and the public display of aspects of their shared relation.

This statute, which defines cohabitation as 'the fact of a man and a woman, not married to each other in accordance with this Act, living together as, or as if they were, husband and wife',¹⁵⁰ equally recognises and protects marriage by repute or permanent cohabitation. Although the provisions on marriage by repute or cohabitation were imported from the 1902 Marriage Act No. 3,¹⁵¹ the 2015 Amendment gave meaning and clarity to cohabitation relationships and outlined the determinants for cohabitation.

5.3. Challenges in litigating WLPR on cohabitation

Protection of cohabitation in the law is a continuum which stretches from full-on protection to complete exclusion. At the middle of this continuum is partial recognition through presumption of marriage. Rarely does any judicial or legislative approach fully protect cohabitation as is. Instead, for a (more-often-than-not heterosexual) partner to receive any legal protection, he/she must prove that the said relationship was akin to a marriage. In that case, one must prove by fact and adduced evidence that there is an existing presumption of marriage between the persons involved in the relationship.

One of the earliest cases on cohabitation in Kenya is *Hortensiah Wanjiku Yaweh v Public Trustee*¹⁵² where the court established that lengthy cohabitation can establish a presumption of marriage by stating, in part, that '[t]he presumption does not depend on the law or a system of marriage. The presumption is just an assumption based on a very long cohabitation and repute that the parties are husband and wife'.

Subsequently in 2014, the High Court also found in *Joseph Gitau Githongo v Victoria Mwihaki*¹⁵³ that:

It [presumption of marriage] is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing

¹⁴⁸ Ibid.

¹⁴⁹ Marriage, Divorce and Family Relations Act 2015, Laws of Republic of Malawi.

¹⁵⁰ Ibid s 2.

¹⁵¹ Marriage Act No. 3 (1902), Malawi.

¹⁵² *Hortensiah Wanjiku Yaweh v Public Trustee* Civil Appeal 13 of 1976.

¹⁵³ *Joseph Gitau Githongo v Victoria Mwihaki* Civil Appeal 227 of 2005 (2014) eKLR.

that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the 'husband', or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of 'wife' upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased 'husband'.¹⁵⁴

This need to interpret one's familial arrangement may inadvertently create a legal hierarchy of relations in which marriage is considered the gold standard to the exclusion of other arrangements and contrary to well-enunciated recommendations given by the CEDAW Committee on the necessary requirement to protect all forms of families.

Whatever the case, proof of cohabitation through establishing a presumption of marriage may be further complicated by a requirement for registration of marriage, such as has been enunciated in s 3 of the Marriage Act (Kenya) which states that '[m]arriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act'.¹⁵⁵

On the other end of the continuum is the complete exclusion of cohabitation as a legally protected family arrangement. In Uganda, relevant legislation does not recognise cohabitation as marriage by repute and hence does not accord any legal protections. Efforts to enact legislation that provides for the presumption of marriage have been unsuccessful.¹⁵⁶

This non-recognition of cohabitation raises a second challenge to litigating these rights, that is, division of property in the event of death or conclusion of the cohabitation arrangement. The added layer of discrimination on women living in jurisdictions where cohabitation is not recognised (as in Uganda) is that their property rights must be proven contractually, instead of being treated under the equitable sharing notion in family law and in the Maputo Protocol.¹⁵⁷

As noted by the South African Constitutional Court in *Bwanya v The Master of the High Court and Others*,¹⁵⁸ a court tasked with considering whether to grant matrimonial property access to unmarried cohabitantes or persons in de facto unions has to take into consideration whether unmarried cohabitantes could have 'a cognisable interest which founds a constitutional right to equal benefit of the law'.¹⁵⁹ Where their interest cannot in any way affect the object of the protection proffered by the law to married women, there is no reason for this right and the protections therein not to be extended.

¹⁵⁴ Ibid.

¹⁵⁵ Marriage Act, 2015, Laws of Kenya.

¹⁵⁶ J Ddamulira Mujuzi 'Presumption of Marriage in Uganda' (2020) 34(3) *International Journal of Law, Policy and the Family* 247.

¹⁵⁷ Maputo Protocol (note 24 above) art 7(d).

¹⁵⁸ *Bwanya v Master of the High Court, Cape Town and Others* (CCT 241/20) [2021] ZACC 51; 2022 (4) BCLR 410 (CC); 2022 (3) SA 250 (CC) (31 December 2021) para 35.

¹⁵⁹ Ibid para 60.

6. WLPR and Division of Matrimonial Property

6.1. Legal theories on division of matrimonial property

Division of matrimonial property has its historical roots in both civil and common law systems which provided for community of property and separation of property or partial community of property respectively. Community of property requires automatic equal sharing of property acquired during marriage.¹⁶⁰ However, in most common law jurisdictions, women's rights to own property in or out of marriage are interpreted using a dual approach to property rights in marriage. Applicable legal tests in this respect include intent (tacit or by clear conduct), fairness and non-monetary contribution mostly by women.¹⁶¹

These tests, however, are not interpreted in a social vacuum. Customary and religious beliefs continue to influence these rights, especially in countries with no substantive laws on matrimonial properties, and where patriarchal courts fail to challenge the structural discrimination.¹⁶² Taking note of this inherent discrimination, international instruments have provided more express protection for women, including the General Comment by the ACHPR on art 7(d) of the Maputo Protocol in which states parties are called upon to enact appropriate legislation to ensure that women and men enjoy the same rights in cases of separation, divorce or annulment of marriage.¹⁶³ In this regard, state parties are required to ensure that '[i]n case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage'.¹⁶⁴

Despite this pronouncement, judicial systems in common law jurisdictions in Africa have, by and large, refrained from implementing these principles.¹⁶⁵ It is only in the Roman Dutch law common law system practised in Botswana, South Africa, Lesotho and Swaziland that laws have been amended to reflect a default marital regime in community of property. These countries have also provided for a clear alternative of an out of community of property regime for those who wish to opt out.

¹⁶⁰ World Bank Group 'Women, Business and the Law 2016: Getting to Equal' (2015) <<https://ppp.worldbank.org/public-private-partnership/library/women-business-and-law-2016-getting-equal>>.

¹⁶¹ Ibid.

¹⁶² ISLA 'Litigation Manual Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2022) <<https://www.the-isla.org/books/>>.

¹⁶³ ACHPR 'General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D))' (2020).

¹⁶⁴ Ibid 5.

¹⁶⁵ Dancer (note 110 above).

In judicial systems where the legal tests regarding community of property have been used, courts have grappled with three main questions: judicial measurement of contribution, meaning of 'equitable sharing' and what amounts to jointly held property.

6.1.1. Judicial measurement of contribution

ISLA has intervened in selected cases to offer more clarification on how to understand and measure contribution with respect to division of matrimonial property. In *Federation of Women Lawyers (FIDA) Kenya v Attorney-General*, the applicant launched a petition in the High Court of Nairobi to challenge s 7 of the Matrimonial Property Act, 2013.¹⁶⁶ This section provides '[s]ubject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved'. In the said Act, 'matrimonial property' is defined as 'the matrimonial home or homes, household goods and effects in the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage'.¹⁶⁷

ISLA successfully petitioned to be added as an amicus curiae and was granted leave to submit written argument and to make oral submissions at the hearing of the case. However, on 14 May 2018, the High Court dismissed the petition. The appeal by the applicant was also unsuccessful. The appellate decision, in particular, held that due to lack of monetary contribution to acquisition of the property, the woman was only entitled to ten per cent of the property.¹⁶⁸

The court rejected the correct position by ISLA that while the impugned section was facially neutral in its terms, in that it speaks about 'spouses' generally, in application the law impacts more significantly upon women's rights to ownership of matrimonial property. To that point, ISLA highlighted that women's rights to own matrimonial property was historically non-existent.¹⁶⁹ Despite slight progress and agitation by legislatures, courts and law reform committees across the continent, these efforts have not translated into better laws or initiatives that have yielded stronger and enforceable property rights for married women.

On the contrary, in *Tewesa v Tewesa*,¹⁷⁰ the Malawian court held that where one of the spouses had upgraded himself and obtained an academic degree with support from the former wife, she had a beneficial interest in the impact of the degree. This submission also highlights the position of the Matrimonial Property Act of South Africa where 50/50 is a default position.¹⁷¹

¹⁶⁶ *Federation of Women Lawyers (FIDA) Kenya v Attorney-General, the Initiative for Strategic Litigation in Africa as amicus curiae* High Court of Nairobi, Constitutional and Human Rights Division, Petition 164B of 2016.

¹⁶⁷ Matrimonial Property Act, 2013, Laws of Kenya s 7.

¹⁶⁸ *Federation of Women Lawyers (FIDA) Kenya v Attorney-General* (note 169 above).

¹⁶⁹ These submissions are drawn from ISLA's written argument as lodged in the High Court.

¹⁷⁰ *Tewesa v Tewesa* Matrimonial Cause No. 9 of 2012.

¹⁷¹ *Federation of Women Lawyers (FIDA) Kenya v Attorney-General* (note 169 above) (amicus brief, ISLA).

Countries with laws on matrimonial property do recognise productive work, including running the family business, and reproductive labour, including taking care of children, older relatives and the sick within the household, as contribution, and the courts enjoined to consider this type of contribution while distributing matrimonial property. For example, Ghana, with no comprehensive laws on matrimonial property, have seen courts use common law principles to determine if non-monetary contribution should influence property distribution of matrimonial property.

The ACHPR General Comment No. 16 requires state parties to recognise women's reproductive labour as contributions towards matrimonial property. In the celebrated Ghanaian case of *Mensah v Mensah*,¹⁷² the court considered the non-monetary contributions by a wife and awarded her 50 per cent shares of the property. However, in 2020, the gains were reversed when the Supreme Court in *Adjei v Adjei*¹⁷³ dismissed an appeal that ruled that since the wife had not proven that she contributed towards acquisition of the property she was not entitled to the property.

Lack of laws governing matrimonial property which includes recognition of non-monetary contribution, and guidance on proving and valuing non-financial contributions, presents a litigation challenge since the fate of cases is left to the courts. Otherwise, it is evident that more weight will continue to be given to monetary than non-monetary contributions.

Since women are most likely to have contributed indirectly, they are most likely to be disfranchised due to lack of guidance in quantifying these types of contribution. In Kenya for example, the case of *FIDA-Kenya v Attorney General* sought to affirm equality rights during division of matrimonial property. The court failed to properly infer in its judgment the prejudices women go through in proving non-monetary and indirect contribution to acquisition of matrimonial property despite the petitioner and amicus curiae making comprehensive submissions on the same.¹⁷⁴

In addition, in the case of *JOO v MBO*¹⁷⁵ the trial court awarded a wife 30 per cent of prime property (among others) and the husband 70 per cent citing that the wife's indirect contribution could only amount to 30 per cent. The wife appealed and the Court of Appeal set aside the orders of the trial court and awarded both parties a 50 per cent share of the property in dispute. Aggrieved by the decision, the husband filed an appeal at the Supreme Court.¹⁷⁶ The case is still ongoing.

¹⁷² *Mensah v Mensah* [1998-99] SCGLR 350, Supreme Court (recognition of indirect contribution of matrimonial property as contribution and principle of equality in marriage).

¹⁷³ *Adjei v Adjei* (J4/06/2021) [2021] GHASC 5 (proof of contribution towards acquisition of matrimonial property).

¹⁷⁴ *Federation of Women Lawyers (FIDA) Kenya v Attorney-General* (note 169 above).

¹⁷⁵ *JOO v MBO* Supreme Court of Kenya Petition 11 of 2020 [2023] KESC 4.

¹⁷⁶ *JOO v MBO* (2017); Civil Appeal 81 of 2017 [2018] eKLR (trial court and Court of Appeal respectively).

6.1.2. Meaning of joint property

Courts have also grappled with the meaning of jointly-held property. In *Sikwese v Banda*,¹⁷⁷ where the appellant and the respondent got married under customary law in 1997 and remained married until 2013, the court had to determine whether a particular property belonged to the former husband as there was no proof of intention and contribution by the former wife. After unsuccessful petitions, the wife appealed to the Supreme Court and argued that on dissolution of marriage, the principal consideration on the disposition of matrimonial property held jointly is fairness and that the constitution, being supreme, clearly overrides any other criteria on the disposition of matrimonial property which impeaches the principle of fairness.

On the issue of the meaning of jointly held property, the court stated as follows:

We do not share the view that, on a close reading of section 24 of the Constitution, all property, even if acquired independently, 'held by a husband and wife is joint property and the wife is entitled to have it fairly shared'; nor do we share the view that such property can 'be considered as joint property, as long as it is brought into the marriage'; such interpretation would defeat the principal purpose of section 24 of the Constitution which is to accord women, and by necessary implication men, the right to acquire and maintain property rights independently or in association with others. For property to be 'held jointly', there must be an intention by the parties, either express or implied, that the property will be held jointly, or some contribution to the acquisition by the party claiming a beneficial interest in the property.¹⁷⁸

A similar view was also held by the Ugandan Supreme Court in *Julius Rwabinumi v Hope Bahimbisomwe*¹⁷⁹ where the court found, in part:

While I agree that Article 31(1) (b) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases, be shared equally upon divorce. It was therefore erroneous for the Court of Appeal to hold that all individually held property of persons who contract religious marriages under the Marriage Act becomes matrimonial property upon marriage and joint property of the couple and that it should be shared equally on divorce by virtue of their marriage vows and Article 31(1) of the Constitution of Uganda (1995). The Court's holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage instalments or its development; or indirectly through payment of other household bills and other family requirements including childcare and maintenance and growing food for feeding the family.¹⁸⁰

Tied to this, the courts have also been categorical that not all property acquired during a marriage should be subjected to joint ownership. In the *Sikwese* decision, the court found, in part, that '[s]imilarly, where a man, in exercise of the right conferred by section 24 (1) (a) (ii) of the Constitution, acquires property independently, such property belongs to the man, and such property would not be held jointly, unless there are compelling

¹⁷⁷ *Sikwese v Banda* MSCA Civil Appeal No. 76 of 2015.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Julius Rwabinumi v Hope Bahimbisomwe* (Civil Appeal-2009/10) [2013] UGSC 5.

¹⁸⁰ *Ibid.*

reasons to the contrary. Consequently, what is distributable upon dissolution of marriage is only property that is held jointly by the spouses'.¹⁸¹

6.2. Challenges in litigating division on matrimonial property

Beyond inconsistencies raised in defining and applying the concepts as elucidated above, other additional barriers include gaps and ambiguity in the legal frameworks and availability of clients. As noted above, selected countries across the continent do not have a systematic method in ensuring equitable division of property. Typically, international human rights law attempts to fill these gaps in national laws to ensure protection of women who may otherwise be excluded from legal redress. The African Charter on Human and Peoples' Rights (Banjul Charter), for example, provides, in part, that state parties 'shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage ... In this regard, they shall ensure that ... In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage'.¹⁸²

Similarly, in General Comment 6 on art 7(d) of the Maputo Protocol, the ACHPR noted, in part, that "'Equitable Distribution" is defined as the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family'.¹⁸³

One of the strategies employed by ISLA in their amicus intervention is by way of directing the court towards international and regional standards, as in the *FIDA-Kenya* case where ISLA made submissions on regional and international law related to distribution of matrimonial property upon the dissolution of marriage, comparative jurisprudence on distribution of matrimonial property upon dissolution of marriage and relevant law reform initiatives in comparable jurisdictions and examine the proposed legislative changes.

While an overall correct strategy, use of international human rights frameworks have not been universally accepted in these cases, especially in interpreting the meaning of jointly held property. While the General Comment, for example, calls on states to interpret 'joint property' as a matter of law, many domestic cases still interpret this issue as a question of fact.

In *Siskwe*, for example, the Malawi Supreme Court noted that '[i]n our view, whether or not in any particular case property is held jointly is a matter of fact, and will depend on the circumstances of the case, including the conduct and intention of the parties in

¹⁸¹ Ibid.

¹⁸² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter) <<https://www.refworld.org/docid/3ae6b3630.html>>.

¹⁸³ ACHPR 'General Comment No. 6' (note 166 above).

relation to the acquisition of the property; it is not a mere conclusion to be drawn from the existence of marriage'.¹⁸⁴

Therefore, it is important to problematise how effective international legal frameworks can be effectively incorporated in the overall case delivery before the courts.

Another challenge relates to client selection and identification. As we have noted in preceding sections, locating clients is an ongoing barrier in litigating WLPR. Legal claims on division of matrimonial property is no exception. While it is near-impossible to onboard a perfect client, use of walk-in clients may hinder ISLA in accessing a diverse class of potential women. Some important guidelines include intersectionality of violations, socioeconomic status and education levels.

¹⁸⁴ *Sikwese v Banda* (note 180 above).

7. WLPR and the Extractives Industry _____.

7.1. Gendered impacts of the extractives industry

The ever-expanding extractives industry provides specific challenges in respect of WLPR. In general, 'extractives industry' describes non-renewable resources, such as oil, gas and minerals.¹⁸⁵ It is estimated that Africa alone is home to about 30 per cent of the world's mineral reserves, 10 per cent of the world's oil and 8 per cent of the world's natural gas.¹⁸⁶ The extractives industry can exponentially contribute to expansion of a country's economy from both a macrolevel and microlevel position.¹⁸⁷ However, when investigated by way of a gender lens, varied aspects of gender discrimination are revealed. As the World Bank notes, '[f]or women in particular, extractive industries can provide opportunities for a better life, including increased employment opportunities, access to revenues, and expanded investment in the local community'.¹⁸⁸

However, more often than not, women are marginalised and systematically excluded from the benefits of the extractives industry.¹⁸⁹ Some authors posit the emerging development of a 'feminisation of mining' based on increasing presence of women in the formal mining sector and hence call for better recognition of women's agency in the sector.¹⁹⁰

Despite this, women remain side-lined since the impacts of this industry are gendered and are more likely to affect women negatively than they do men. See, for example, the World Bank's 2009 guidance volume on gender and the extractives industries which states that '[m]en have most access to the benefits, which consist primarily of employment and income, while women and the families they care for are more vulnerable to the risks created by Extractive Industries, which consist of mostly harmful social and environmental impacts'.¹⁹¹

¹⁸⁵ C Macdonald 'The role of gender in the extractives industries' WIDER Working Paper 2017/52 (2017) <https://www.wider.unu.edu/sites/default/files/wp2017-52_0.pdf>.

¹⁸⁶ K Muigua 'Regulating the Extractives Industry in Kenya: Challenges and Prospects' (The Lawyer, 9 March 2022) <<https://thelawyer.africa/2022/03/09/regulating-extractives-industry-in-kenya/>>.

¹⁸⁷ Ibid.

¹⁸⁸ The World Bank, 'Gender in Extractive Industries' Policy Brief (2013).

¹⁸⁹ Macdonald (note 188 above).

¹⁹⁰ K Lahiri-Dutt & G Burke 'Gender Mainstreaming in Asian Mining: A Development Perspective' in K Lajiri-Dutt (ed) *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (2011).

¹⁹¹ The World Bank 'Mainstreaming Gender into Extractive Industries Projects: Guidance Note for Task Team Leaders' World Bank Guidance Volume (2009).

Research from the Niger Delta, for example, evidence that women are more affected by pollution and gas flaring because their livelihoods are dependent upon the land and the water.¹⁹²

7.2. Barriers in litigating WLPR in the extractives industry

Conceptual barriers in litigating WLPR in the extractives industry relates to compensation. Due to the possibility of land dispossession and other aggravations, laws governing the extractives industry call for community consent and compensation.¹⁹³

In *Mohamed Hussein Haji v Issa Kuno & 4 others*,¹⁹⁴ the petitioner argued that the community was entitled to information from the respondents to verify and confirm whether constitutional and statutory regulatory requirements were complied with before the first and second respondents began their mining activities in the Ali Jibril area, within Wabari Ward in Garissa County. In finding for the petitioner, the court held that in the case of a community land which falls within the ambit of customary law ownership which is neither public nor private, before any interest is acquired by any individual, the persons who ordinarily use that particular land must be consulted.

Additionally, in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*,¹⁹⁵ the Constitutional Court of South Africa prohibited the forced eviction of a community as the members had not been consulted nor had consented, nor were mechanisms for resolving disputes under the Mineral and Petroleum Resources Development Act exhausted.¹⁹⁶

Similarly, in *Baleni v Minister of Mineral Resources*,¹⁹⁷ the Pretoria High Court ruled that companies must first seek permission from local communities if they plan to mine on their ancestral land.¹⁹⁸ In this case, the Leaders of the Umgungundlovu community had for the last five years been concerned about the impacts of titanium mining proposed in the Xolobeni area of the Eastern Cape and were refused access to the mining rights application. In finding for the community, the court found that the community must be furnished with a copy of an application for a mining right to have meaningful consultation.

While outwardly progressive, these judgments fail to understand how gender dynamics in society may impact women's access to compensation. As Cheryl Doss and Ruth Meinzen-Dick note, '[c]ommunity women's relationships are embedded in the communities to

¹⁹² A Eftimie, K Heller & J Strongman 'Gender Dimensions of the Extractive Industries: Mining for Equity' Extractive Industries and Development Series #8 (2009).

¹⁹³ Muigua (note 189 above).

¹⁹⁴ Mohamed Hussein Haji v Issa Kuno & 4 others Environment and Land Petition 1 of 2018 [2018] eKLR.

¹⁹⁵ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) [2018] ZACC 41.

¹⁹⁶ Ibid.

¹⁹⁷ *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

¹⁹⁸ Ibid.

which they belong'.¹⁹⁹ Often, these communities are patriarchal and relegate land issues, including division of compensation, to solely the issue of men. Therefore, while women may be disproportionately affected by the impact of the extractives industry, they may nevertheless be unable to receive direct compensation.

The latter also has bearing on access to justice for women for two main reasons. First, as impacted women are often excluded from decision-making structures, they may not be aware of formal avenues for legal redress or compensation.²⁰⁰ As noted by representatives from WPI, compensation is usually done from a community or household level.

In the case of the latter, where there is no proof of marriage, compensation is usually awarded in accordance with societal norms of patrilineality.²⁰¹ Under this system, the wife leaves her village and resides in the husband's village. Therefore, the man is considered the owner of the land and not the woman and in any case the land tenure customary as most extractives target customary land settings.

Men migrate after getting the money and leave the women stranded. Once the women move, they lose sources of livelihood, and in the new places there is a lack of social amenities. As indicated above, in Uganda cohabitation is not recognised by law as a form of marriage and yet many people choose to cohabit for a number of reasons, one of which is the avoidance of dowry payment.

In any event, social norms may often discourage the use of formal judicial structures, hence, many women may be less inclined to seek assistance from these avenues. Invariably then, all these create a barrier to strategic litigation organisations which are unable to source relevant clients.

¹⁹⁹ Doss & Meinzen-Dick (note 78 above).

²⁰⁰ MP Candido 'Understanding African Women's Access to Landed Property in Nineteenth-Century Benguela' (2020) 54(3) *Canadian Journal of African Studies* 395.

²⁰¹ Ibid.

8. Canvassing Possible Recommendations and Opportunities

Throughout this research, numerous challenges to litigating WLPR have been identified. These include cross-cutting challenges, such as ideological contestations and competing interests, discriminatory social norms, client management and patriarchal judicial structures and specific challenges, including legislative inadequacies in respect of cohabitation and judicial disharmony as in division of matrimonial property.

In this section, we attempt to isolate specific recommendations as follows.

8.1. Intersectionality, substantive equality and feminist legal reimagination

One of the major findings in this research work has been the recognition of ideological contestations and competing interests on which women require primary protection of the law. Successful litigation on WLPR extends beyond positivist interpretations of the relevant legal frameworks to patriarchal cultural ideals on the role of men and women, and increased vulnerabilities on particular types of women.

Therefore, any holistic legal strategy must be cognizant of the impact of these social norms in making a successful WLPR case. One way to do so is by consciously applying substantive equality in the litigation process. In brief, substantive equality requires an interrogation of how social norms hamper full realisation of women's human rights.²⁰²

General Comment No. 6 from the ACHPR defines substantive equality as '[a]ny form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law'.²⁰³

Substantive equality is now a recognised principle in many African constitutions, including, art 27 of the Kenyan Constitution which guarantees both formal equality

²⁰² CEDAW Committee 'General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures' (2004) para 14 <<https://www.refworld.org/docid/453882a7e0.html>>.

²⁰³ ACHPR 'General Comment No. 6' (note 166 above); Ibid para 14.

(equality before the law) and substantive equality (equality of results).²⁰⁴ Anchoring arguments on substantive equality will suffice in providing legal understanding of how social norms may be deployed to violate women's access to their land rights.

Effective WLPR strategic litigation should also take note of non-traditional arrangements which have been marginalised in the law. Therefore, the next frontier of strategic litigation should include victims who are increasingly more vulnerable due to intersecting characteristics, including socio-economic status, disability, nationality or sexual orientation. These include partners in same sex relationships and single women who may be found incapable of holding land and property rights.

8.2. Harmonisation of competing legal regimes

WLPR encompasses different legal contexts, including property law, family law and laws on marriage. Each of these regimes interact in nuanced and complex ways in determining outcomes of issues regarding land rights. It is, therefore, important to be familiar with these frameworks and in providing guidance to clients in both common and civil law systems.²⁰⁵

In addition, a lawyer engaged in WLPR strategic litigation should be familiar with interactions between customary and formal laws. An effective litigation strategy must, therefore, involve conscious decision-making on 'the forum that they select to resolve the dispute' (customary or legal systems).²⁰⁶ Also, where necessary, strategic litigation must tap into other disciplines, such as historical knowledge of customary legal systems in order to properly engage with the legal questions emerging from WLPR.

8.3. Applied research and basket of care

This report also proposes the use of action research.²⁰⁷ This form of research may be understood as 'an approach in which the action researcher and a client collaborate in the diagnosis of the problem and in the development of a solution based on the diagnosis'.²⁰⁸ It is grounded on the generation of information and theory building (the research component) and practical action (the action component).²⁰⁹

In the first component, action research requires an intensive and continuous deep-dive exploration of women's lived realities in patriarchal contexts and making the link with the legal lacunas. The collected data should then be actioned through litigation and

²⁰⁴ Constitution of Kenya, 2010 art 27.

²⁰⁵ ISLA 'Litigation Manual Article 7' (note 165 above).

²⁰⁶ Doss & Meinzen-Dick (note 78 above).

²⁰⁷ B Gatenby & M Humphries 'Feminist Participatory Action Research: Methodological And Ethical Issues' (2000) 23(1) *Women's Studies International Forum* 89.

²⁰⁸ A Bryman & E Bell *Business Research Methods* 3rd edn (2011) <<https://research-methodology.net/research-methods/action-research/>>.

²⁰⁹ Gatenby & Humphries (note 210 above).

advocacy initiatives. For example, inspiration may be drawn from the Women and Law in Southern Africa Research Trust (WLSA).²¹⁰ In its research component of this process, WLSA was able to document several case studies which not only granted them direct access to potential clients but also provided important evidence for ongoing strategic litigation suits.²¹¹ Additionally, the case studies were also instrumental in providing important context for advocacy initiatives.²¹²

Feminist action research requires fidelity to centring women's experiences through standpoint epistemology²¹³ and properly employing effective research methods, while factoring in ethical needs in selection of participants.²¹⁴

Strategic litigation is a lengthy process, which may leave clients drained. Therefore, an effective legal strategy should encompass a basket of care comprising personalised needs for the client, including legal interventions, policy initiatives, public awareness, psycho-social support and financial empowerment.

Specific interventions may include effective and sufficient communication with the client throughout the process of litigation, continued and timely updates on the court process and management of the client's expectations.

²¹⁰ Women and Law in Southern Africa Research Trust 'Who We Are' <<https://www.wlsazim.co.zw>>.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Gatenby & Humphries (note 210 above).

²¹⁴ Ibid.

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