

Review Article

# Engaging with the Principle of Non-discrimination to Protect Women's Land Rights in Tanzania

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## Abstract

This article underlines how the principle of non-discrimination on the basis of sex has been applied as a tool for enhancing women's land rights in Tanzania. Despite the fact that the Constitution of the United Republic of Tanzania and various statutory laws guarantee equality and non-discrimination, implementation gaps remain and women continue to face barriers in land ownership and control, particularly in rural areas where customary law and patriarchal practices prevail. The research was motivated by persistent gender-based disparities in ownership and control of land, rooted in customary practices, patriarchal norms, and weak enforcement of relatively gender-sensitive statutory laws. Contribution is made through a review of current legal framework and scholarly documents relating to women's land rights in Tanzania. The study places particular focus on examining how courts have been engaging with the constitutional and human rights principle of non-discrimination to address the problem of gender discrimination which exists in customary law governing land relations. It also provides an overview of challenges associated with enforcement of women's right to non-discrimination in land rights and suggests some measures aimed at bridging the gap between legal guarantees and realities on the ground to alleviate gender-based discrimination in access to land and control over land. It is argued that advancing women's land rights in Tanzania requires not only legal reforms and sustained application of the non-discrimination principle, but also transformative approaches to address patriarchal norms, and intensified campaigns for imparting knowledge of land rights and human rights among men and women.

## Keywords

Gender Discrimination, Non-discrimination Principle, Women's Land Rights

## 1. Introduction

Discrimination on the basis of sex can be characterised as the unequal treatment of a person based solely on that person's sex. [1]. The right to non-discrimination on the basis of sex is a key principle of human rights law. The principle is essential for the effective protection of human rights as both universal and regional human rights instruments and many national constitutions recognise. In Tanzania, women have historically been victim of discrimination mostly within the

realm of property rights, particularly in accessing and owning land. The government of Tanzania has made various efforts in a bid to remove discrimination against women regarding access and ownership of real property. The said efforts include, *inter alia*, prohibition of discrimination on ground of sex, according the right to property the status of a constitutionally guaranteed right, and enacting gender-progressive land laws that give equal land rights to men and women.

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Tanzania has also signed and ratified a number of international and regional human rights instruments that uphold property rights for women, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Right of the Child (CRC); and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, (Maputo Protocol).

Yet, gender-based discrimination in property rights is a common face in spite of the progress made in the country to curb it. Women living in traditional settings in particular – and indeed the vast majority of women in Tanzania live in such settings – continue to face challenges in achieving equal treatment in land rights compared with their male counterparts [2]. Traditional attitudes and gender stereotyping militate against women's land ownership and inheritance rights, especially in rural areas where property rights are governed by customary law as dominant legal framework. Laws still exist which deny women the right to inherit landed property on an equal footing with men. Most customary laws of patrilineal tribes discriminate against women in ownership of landed property. This is notable in the Local Customary Law (Declaration) (No.4) Order, GN. No. 436 of 1963. Under such situations the legal profession may turn to the constitutional right to non-discrimination and international human rights instruments for guidance on the fight against laws and practices that discriminate against women's land rights.

This contribution underlines how the principle of non-discrimination on the basis of sex has been applied in Tanzania to enhance women's land rights. Particular focus is placed on how Tanzanian courts have been engaging with the constitutional and human rights principle of non-discrimination to address the problem of gender discrimination which exists in customary law governing land relations. It also provides an overview of challenges associated with enforcement of women's right to non-discrimination in land rights and suggests some measures to alleviate gender-based discrimination in land access and ownership. The contribution is basically desk research. It relies heavily on review of the current legal framework, case law, and scholarly documents in relation to women's land rights in Tanzania.

## 2. Why Focus on Women's Land Rights

Land is a critical issue for women. While both men and women farm land in Tanzania, time-use studies, economic data, census information and studies of the role of men and women in the agricultural cycle consistently show that women are more active in agriculture than men [3]. Most women in Tanzania are rural-based, relying on land to produce food and generate income to support their families in terms of health care, nutritional and educational needs [4]. This relationship is vital for women in general and more significantly when

women become the single head of the household due to divorce, abandonment, death of a spouse or male relative.

It can, therefore, be said that the livelihoods and welfare of women is inextricably linked to their secure rights to land and when they lack secure rights to land women are vulnerable to eviction (at the hands of family members, business actors or State) and dispossession and their fall into poverty. For women living in extreme poverty, secure rights to land is important in alleviating poverty through equalizing control and access to land including through inheritance.

Secure rights to land for women also helps to raise the status of women within their families and communities which is important step to achieving gender equality, as it leads to women's increased decision-making power, greater autonomy and economic independence, and greater participation in the community [5]. Women's secure rights to land also enhance their ability to enjoy many of other rights enshrined in the Constitution of the United Republic of Tanzania and international human rights instruments.

## 3. Women's Land Rights as a Human Right Issue

The term "human rights" as used here comprises entitlements that a person has or must have by virtue of his or her being born a human being (individual rights) or, in addition, by virtue of his or her being living in the community of human beings (collective rights). Traditionally, land rights have been conceived as falling within the categories of land laws of individual countries; they have not been strictly associated with human rights law [6]. One of the arguments against treating right to land as a human right is that individuals have different needs when it comes to land, and therefore unlike universally applicable human rights, the right to access land is defined differently by different people [7].

Behind the above facade, land rights, especially women's land rights, are a key human rights issue. Status and rights of women are a major human rights concern in all parts of the world following their (women's) consistent discrimination, oppression and denial of equality of rights by men [8]. Those who have had to bear the brunt of deprivation and denial of human rights the most are women. Women are usually discriminated against and experience inequality in many spheres, especially in situations involving a question of rights such as their rights to land, explicitly because of their gender.

Women's land rights are being looked at as a human right issue because of discriminatory practices against women in land ownership and inheritance. Since the major problem in relation to women's land rights is discrimination against women, appropriate measures to place issues regarding the land rights of women in the domain of human rights can help curb discrimination against women in relation to land. The use of human rights principles of equality and non-discrimination is important for protecting women against discrimination in

relation to land.

Acquiring land (property) rights is a particularly important human rights issue because without land and property rights women are unable to effectively exercise other human rights [9]. Indeed, there is close link between women's rights to land and their human rights. Secure land rights are seen as having a direct role in the full realisation of several other fundamental human rights of women, including the right to housing, the right to earn a livelihood, and the elimination of discrimination against women [10].

Women's access, use and control over land are also directly linked to protection and achievement of their human rights to equality, life, food and health [11]. In most developing countries, like Tanzania, the connection between the rights to land and the right to food and livelihood is very direct, as access to land is essential for survival. Indeed, right to land is very important for poor women who are utterly dependent on land for survival, and who have limited or no alternative means of subsistence. Women's access, use, and control over land are essential to ensuring their equality and to an adequate standard of living [12]. Inequality in ownership and control over land is a major hindrance to correcting problems women face such as generally inferior economic status and domestic violence.

The right to land could be seen as a human right in itself, because it is so intrinsically linked to the right to live in dignity. Supporters of human rights approach maintain that the advancement of women and the achievement of equality between women and men regarding land rights are a matter of human rights and a condition for social justice and should not be seen in isolation as a woman's issue [13]. It has been argued, from human rights perspectives, that the requirement of equality and non-discrimination is based on the ground that all individuals are equal and are entitled to their human rights relevant to access, use and control over land without discrimination of any kind [14].

Women's rights to land have increasingly turned out to be a human rights issue both at national and international level. At national level many countries, including Tanzania, have enacted laws that recognise and uphold women's equal land rights. It has been argued that to ensure full enjoyment of land rights the legal measures must be part of an ideology which removes issues regarding the land rights of women from private sphere of marriage and family, and places them in the public domain of human rights [15]. At international level, several human rights instruments, binding or persuasive, have been put in place for purposes of supporting the rights of women to land. Some of the most relevant instruments are discussed herein below.

## 4. International and Regional Commitments in Upholding Women's Equal Rights to Land

Over the years, international human rights regime has be-

come more insistent about women's basic rights, including rights to land and property, and has addressed the issue of removing obstacles to women's ability to exercise these rights [16]. One of the clear and firm features of international human rights legal regime, which is significant for protection of women's land rights, is the prohibition of discrimination on the ground of a person's sex, and the recognition of equal rights between men and women [17]. The human rights to equality and non-discrimination on the basis of sex imply that women's rights to land and property are to be equal with those of men.

Women's rights to property, including land, have been more explicitly laid down in international human rights treaties, regional conventions [18], the Platform of Action adopted at the 1995 Beijing World Conference on Women [19], and various resolutions of human rights treaty bodies. The then UN Commission on Human Rights (replaced by the United Nations Human Rights Council in March 2006) adopted several resolutions to support women's rights to land and property as well as their right to be free from discrimination. For example, the Commission's resolution entitled "Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and Adequate Housing", E/CN.4/Res/2003/22, affirms that discrimination in law against women in relation to accessing, acquiring and securing housing and land constitutes a violation of the human right to non-discrimination. The Resolution encourages governments to support transformation of customs and traditions that discriminate against women and deny them security of tenure and equal ownership of, access to and control over land and the equal rights to own property and adequate housing.

The primary international human rights instrument prohibiting discrimination on the basis of sex is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979. Article 16 of the CEDAW, for instance, requires States Parties to eliminate discrimination against women in all matters relating to marriage and family, and to ensure that both spouses have rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. The reference to ownership and property could be seen as relevant to property in land.

The CEDAW also imposes positive duty on States Parties to adopt all appropriate measures to abolish gender discrimination of whatever form; to accord to women equal treatment with men; and legal capacity to conclude contracts and administer property. This is stipulated in articles 2 and 15 respectively. Under its focus on rural women, article 14 of the CEDAW specifically requires States Parties to take all measures to eliminate discrimination against women in rural areas and to ensure that women have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform. Tanzania has ratified the convention without reservation.

The UN Committee on the Elimination of Discrimination

Against Women, the body that monitors States Parties compliance with CEDAW (hereinafter referred to as CEDAW Committee), has adopted an active approach to issue of land for women. In particular, in its concluding observations, the CEDAW Committee has demonstrated the centrality of land rights to fulfilment of women's human rights by citing land rights as an issue in most of the Committee's observations. The CEDAW Committee notes in paragraph 26 of its General Recommendation No. 21 of 1994 on Equality in Marriage and Family Relations, 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 is critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and her family. The CEDAW Committee further states, in paragraph 28 of its General Recommendation No. 2, 1 that:

".... Any law or custom that grants men a right to a greater share of property at the end of marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person".

As is evident, General Recommendation No. 21 of the CEDAW Committee has focused its attention on the equal right of women to access, own and inherit land. The Committee cautions that often prejudices and customary rights are hindering the implementation of the law even in countries where the law provides equality between men and women with regard to land.

In the context of Africa, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), which is an addition to the African Charter on Human and People's Rights, references land rights as a woman's rights issue. With its broad list of rights, the Maputo Protocol goes beyond the scope of other gender-related instruments such as CEDAW [20]. Article 15 of the Maputo Protocol makes explicit the States' obligation to secure women's access to land as part of efforts to ensure the right to nutritious and adequate food.

Maputo Protocol also promotes women's access to and control over productive resources such as land and guarantees their right to property as part of women's full enjoyment of their right to sustainable development. This is evident in article 19(c) of the Protocol. In addition, article 21 of the Protocol specifically recognises women's right to inheritance, and stipulates that a widow has the right to an equitable share in the inheritance of the property of her husband and that, women and men have the right to inherit, in equitable shares, their parents' properties.

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights also recognises the principle of women's equal rights to land and property. Among other provisions, they stipulate, in paragraph 55(viii), that the African States are obliged to "ensure equitable and

non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women. This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women from enjoying their rights to property, particularly in relation to housing and land".

In addition, some of the regional organisations have adopted regional instruments which are important for protection of women's land rights. For example, in 2008 the Southern African Development Community (SADC) adopted the Protocol on Gender and Development [21]. Tanzania is a party to this Protocol. Article 4 of the SADC Protocol on Gender and Development provides that, by 2015, member States are obliged to enshrine gender equality in their constitutions, and that their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.

The above instruments show how women's land rights are increasingly being accorded importance, as a human right issue, by the international community. In order to ensure that women enjoy their land rights in practice, a broad conceptualisation of land rights that is gender-inclusive and responsive to human rights is vital. Important for women is the fact that the international human rights norms that outlaw discrimination based on sex are slowly informing the development of national constitutions and laws governing women's land rights.

## 5. Principle of Non-discrimination in the Law Governing Women's Land Rights in Tanzania

Tanzania has put in some efforts to implement her international commitments in an attempt to ensure non-discriminatory access to and ownership of land rights by women. Clearly, the Bill of Rights section of the Constitution of Tanzania contains the right to non-discrimination on ground of a person's sex. The current land legislation also contains provisions outlawing gender discrimination in access to and ownership of land in line with the Bill of Rights in the Constitution and international human rights instruments. The paragraphs below highlight these facts.

### 5.1. The Constitution of the United Republic of Tanzania of 1977

Article 24 of the Constitution guarantees every person equal right to own property and declares deprivation of property unlawful unless it is authorised by law providing for fair and adequate compensation. It also prohibits discrimination on the basis of a person's sex. The Constitutional right to non-discrimination is clearly spelt out in Article 13(5) and not subjected to a "claw back" clause. The article defines discrimination as follows:



“... discriminate means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions...”

The effect of the above articles is a creation of important anti-discrimination principle that can be applied in a fight against various forms of discrimination, including discrimination that women face in property ownership simply because of their sex. A rule of customary law relating to land ownership and inheritance that discriminate against women can thus be said to have violated the Constitution.

## 5.2. The Land Act of 1999

The Land Act [Cap. 113 R.E. 2019] has adopted the spirit of equality and non-discrimination with regard to women's land rights. This is to implement one of the fundamental principles of the National Land Policy, which is to facilitate an equitable distribution of, and access to land by all citizens. This is intended to enable all Tanzanian men and women to have equal opportunities in accessing land and hence eliminate gender imbalance in this aspect. The Act has several provisions which protect women against gender discrimination in relation to land access, ownership and control.

Section 3(2) of the Act states that “the right of every adult woman to acquire, hold, use and deal with land shall to the same extent and subject to the same restrictions be treated as right of any man”. This provision enacts important gain for women because prior to the enactment of the current land legislation, women's rights to dispose of clan land were not equal to those of men. They were restricted by customary law, which dictated that women could not dispose of clan land while men could. The High Court had declared such customary law rule unconstitutional [22], and the current land legislation has corrected this anomaly by placing both men and women under the same restrictions.

The Land Act also provides for specific safeguards against sex discrimination in land transactions. These include provisions which recognise the right of a woman to give her consent in case of disposition of matrimonial landed property. Under section 114 of the Act, matrimonial home can only be sold or mortgaged if a spouse is genuinely informed and consents to the disposition. Furthermore, the Act protects the interests of a non-owner spouse who has contributed to the improvement of the land. Under section 161(2) of the Act, where the land held under a right of occupancy is held in the name of one spouse only but the other spouse(s) contributed by their labour to the productivity, upkeep and improvement of the land, that spouse(s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

## 5.3. The Village Land Act of 1999

The Village Land Act [Cap. 114 R.E. 2019] enhances the principle of non-discrimination against women as enshrined in the National Land Policy. This is clearly stipulated in section 3(2) that “the rights of every adult woman to acquire, hold, use, and deal with land shall to the same extent and subject to the same restrictions be treated as right of any man.” This section enacts gender equality in land holding. Commenting cautiously on section 3(2) of the Village Land Act, Sundet is of the view that:

“It is not likely that this important provision will lead to an overnight revolution in the rights of women to land in rural Tanzania. The capacities effectively to oversee and enforce the law are not there and, the established system of mediation, conflict resolution and enforcement are ill suited to tackle what are bound to be highly controversial issues. This notwithstanding, the fact that gender equality has been laid down firmly in law, also in reference to customary rights, represents an important advance. There is little doubt that it might have a real effect on the situation in the longer term.” [23].

The Village Land Act also seeks to protect women against discriminatory customs and, thus, give women more property rights than they enjoy under customary law. While section 18 of the Act gives customary regimes full protection, the Act also demands at the same time in section 20(2) that customary regimes may operate only in so far as they do not defeat the land rights of women, children or persons with disability. The Act provides for the application of customs, traditions and practices of the community concerned in the administration of village land, provided that the same are consistent with fundamental principles of the National Land Policy and of any other written law.

Section 20(2) of the Village Land Act provides in part that the law applicable to customary right of occupancy shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land.

Section 20(2) of the Act deals with two important issues: First, rules of customary law in respect of customary tenure have to be in accordance with the National Land Policy and with any written law. This other written law can also include the Constitution, which is the supreme law of the land. Since discrimination on the ground of sex is prohibited under the Constitution of the United Republic of Tanzania, one could argue that any rule of customary law in respect of customary land that discriminates on the ground of sex violates the Constitution. In addition, as shown above, section 3(2) of the Village Land Act stipulates that women have the equal right to acquire, hold, use and deal with land as men do.

The second issue is that rules of customary law in respect of

customary land are void and inoperative when they deny women, children or persons with disability lawful access to ownership, occupation or use of any such land. It is probable that the provision addresses the discriminatory customary rules of inheritance as well. However, the Act does not explicitly state that it outlaws discriminatory customary rules of inheritance. Moreover, inheritance matters are regulated by a separate branch of law.

Regarding application for customary right of occupancy, the law requires that the village council treat all applications equally regardless of the gender of the applicant, and forbids the council from adopting discriminatory practices or attitudes toward women applying for certificate of customary right of occupancy. It is clear that the Village Land Act seeks to cover in detail instances of conflict between customary and statutory law with regard to women's land rights.

It is evident from the discussion above that statutory law in Tanzania recognises women's land rights to a large extent. In rural areas, however, patriarchal practices predominate whereby men are considered heads of households and have greater customary rights to land than women [24]. This hinders realisation of women's statutorily supported land rights. Most women have land access (possession) but do not legally own or inherit it. Such access is also predicated on the relationship of women to male owners.

The law is still weak in regard to women's inheritance rights to land, and most of intestate inheritance practices in Tanzania tend to disproportionately favour the male heirs of the family. For instance, some of the gender-insensitive rules of inheritance still exist in a codified form in the Local Customary Law (Declaration) (No. 4) Order, G.N. No. 436 of 1963. The customary rules favour male heirs of the family and deny widows the right to inherit property on the death of their husbands. Of all categories of women, widows form the most marginalized group when it comes to property relations of many customary law communities in the country.

The discriminatory customary systems of inheritance operate contra the statutory protections for women as expressed in the Constitution, the 1995 National Land Policy, and the land legislation of 1999. The disturbing fact is that the Constitution of the United Republic of Tanzania of 1977 does not contain express direction related to customary laws inconsistent with women's equal rights to property. It is argued that the Constitution should be reviewed to enhance the protection of the right of a woman against oppressive customs and categorically place the land rights of women and men under similar restrictions.

## 6. Enforcing the Principle of Non-discrimination in Relation to Women's Land Rights

Enforcing the right to non-discrimination in a bid to strengthen women's land rights requires enabling environ-

ment as well as political will of stakeholders. Enabling environment include structures, laws and policies, while stakeholders include government, courts, women, law enforcement agents, media, religious leaders, traditional leaders and women's rights activists.

In general, Tanzania has enabling legal environment because its land policy and formal laws uphold equal rights for men and women to access and own land, and provides for safeguards against sex discrimination in land transactions. Women's land rights are also protected by the constitutional rights to equality and non-discrimination, as already stated above. Moreover, the country has a system of land dispute resolution machinery with lower and higher courts which can be used to enforce gender equality within the national land rights system.

In the period before the introduction of the Bill of Rights in the Constitution, Tanzanian courts used to take a static view of customary law and did little to mitigate its discriminatory operation against women. Following the introduction of the Bill of Rights in the Constitution, courts are authorised to construe the existing laws, including customary law, in a way that may bring them into conformity with the provisions of the Constitution [25]. This requirement has presented opportunity for the courts to use constitutional and human rights principles of equality and non-discrimination to make pronouncements on women's equal rights to land and property. Application of law that discriminates against women in land rights may be challenged on the ground that it violates both the land legislation and the Constitution.

Indeed, the above development has enabled some aggrieved women to summon courage by going to court to seek protection of their land rights by invoking the equality and non-discrimination provisions of the Constitution. In appropriate cases, the litigants have challenged the constitutionality of customary rules that deny them inheritance rights to land, basing their arguments on the constitutional provisions on equality and non-discrimination on ground of sex. By bringing their claims based on discrimination, the litigants give opportunity to the courts to reform the discriminatory law.

It is well documented that international human rights framework can be invoked in national contexts to ensure that laws and policies produce equitable outcome [26]. Where clarity is lacking in domestic laws, the international human rights instruments may be of immense aid in interpreting such domestic laws in a manner that ensures protection of women against discrimination in land relations. At times, Tanzanian courts have seized the opportunity to invoke the provisions of various international human rights instruments as aids in arriving at just decisions in support of women's rights to land. The following selected cases highlight the fact that courts, especially higher courts in the judicial hierarchy, have been engaging the constitutional principle of non-discrimination and international standards to protect women against discrimination in land rights.

A good example is decision of the High Court of Tanzania

in the case of *Bernardo Ephraim v. Holaria Pastory and Gervazi Kaizilege*, Civil Appeal No. 70 of 1989 (Reported in (1990) LRC (Const.) 757). In this case the High Court of Tanzania considered a customary law (Rule 20 of the Local Customary Law (Declaration) (No. 4) Order of 1963), where, although daughters were allowed to inherit clan land, unlike men, they could not dispose of the land. The court held this rule to be discriminatory and inconsistent with the Tanzanian Bill of Rights, which prohibits discrimination against any person. Relying on the international human rights instruments to strengthen its case against the customary law in question, the court further ruled that the constitution's incorporation of the Universal Declaration of Human Rights (UDHR), as well as Tanzania's ratification of the United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW), the African Charter on Human and People's Rights (ACHPR) and the International Convention on Civil and Political Rights (ICCPR) all required Tanzania to prohibit discrimination based on sex. The customary rule was declared unconstitutional and, therefore, null and void.

Another example of good literature about women's inheritance rights to land has been recorded by the High Court of Tanzania under the aid of the human rights principle of non-discrimination in the cases of *Elizabeth Mtawa v. Hassan Mfaume Risasi* [27], *Ndosi v. Ndosi* [28], and *Hyasintha Kokwijuka Felix Kamugisha v. Deusdedith Kamugisha* [29]. In *Elizabeth Mtawa v. Hassan Mfaume Risasi*, the Primary Court of the area permitted a widow (the appellant in the High Court) to continue to reside in a matrimonial home, after the death of the husband, until her death or re-marriage under rule 77(3) of the Local Customary Law (Declaration) Order G.N. No. 279 of 1963. The District Court set aside the order of the Primary Court. On appeal to the High Court, the court noted that Rule 77(3) and (4) did not provide for any possibility of a married woman asserting ownership over real property as she is only given usufruct rights. Further, the High Court, using human rights language and provisions of the land legislation, observed that the effect of Rule 77 (3) and (4) of the Law of Persons G.N. No. 279 of 1963 was discrimination against the woman on the basis of her sex and therefore, according to the court, contravened Article 2 and 17 of the Universal Declaration of Human Rights, the Tanzanian constitution, as well as section 3 (2) of the Land Act of 1999.

*Ndosi v. Ndosi* was a case involving a dispute between the widow and the brother of a deceased about administration of the deceased man's estate. The High Court confirmed a lower court's decision to replace the deceased's brother with the deceased's widow as the administrator of the deceased's estate. The High Court, per Munuo, J. (as she then was), held that the widow was entitled to administer the estate on behalf of her children under the Constitution of the United Republic of Tanzania, 1977, which provides that "every person is entitled to own property and has a right to the protection of that property held in accordance of the law". The court further held that Article 9(a) and (f) of the Constitution recognises

human rights by requiring that "human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights" explaining that this clause generally domesticated human rights instruments ratified by Tanzania, including the anti-discrimination principles contained in Article 2(b) and (f) of the CEDAW, and the best interest of the child principle found in Article 3 of the Convention on the Rights of the Child.

In *Hyasintha Kamugisha's* case, the High Court stated that while the court respects the customs of communities in Tanzania, those that are contrary to the Constitution of the United Republic of Tanzania and other laws should not be given the place in the administration of justice. The court insisted on the equality before the law stipulated by Articles 12 and 13 of the Constitution of the United Republic of Tanzania.

The decisions of the High Court in the above selected cases form a good example of how courts have sought to engage with international standards in order to redress the gender discrimination in customary law. What can be observed from the above cited cases is that the constitutional and human rights principle of non-discrimination can be a useful weapon in the hands of judges to invalidate discriminatory laws that militate against women's land rights in Tanzania. Historically, however, the judicial articulation of customary law in line with constitutional and human rights principles of gender equality and non-discrimination has not been easy in Tanzania. The use of human rights norms in supporting decisions regarding customary law has not been universally observed among Tanzanian judges.

Customary rules on inheritance of landed property, in particular, have attracted a protracted attention in Tanzanian courts such that while some judges in the judicial hierarchy have invoked the principle of gender equality and non-discrimination as enshrined in the Constitution and international human rights instruments to depart from the rules of customary law (as demonstrated by the above selected cases), others have stood by the rules to deny women the right to inherit property [30]. For instance, while the decision in *Holaria's* case was a milestone in alleviating women from injustice of customary law, some judges in subsequent cases did not heed the call of building on its jurisprudence and continued giving decisions that embrace discriminatory inheritance law. This was evident, for example, in the case of *Maajabu Msumari v. Yusuf Msumari* [31]. In this case the High Court, per Msumi J. (as he then was), reiterated that: "...the correct position in Sambaa customs is that the daughter has the right to use, throughout her life time, a clan land bequeathed to her by her deceased father. While she is in occupation of the said land, she cannot dispose of it to anyone... Appellant (was held) to occupy the suit *shamba* until she dies when it will revert to male heir of the family of the respondent's father."

Another decision which highlights the difficulty in dealing with discriminatory customary laws is evident in *Elizabeth Stephen & Another v. Attorney General* [32]. In this case, the

High Court held that the customary law that prohibited a woman from inheriting and selling clan land was discriminatory and unconstitutional but refused to strike down the law. Apparently the reason for the High Court's decision was reluctance to interfere with customary law. The court was of the opinion that it was impossible to effect customary change by judicial pronouncements. This decision was given despite the trend in the previous cases in which the High Court engaged constitutional and human rights principles of gender equality in its resolve to protect women against discrimination in land rights. Due to this inconsistency in dealing with customary law, it may be argued that the use of human rights principles of equality and non-discrimination to deal with discriminatory laws of inheritance of landed property depends on individual judge's willingness and ingenuity.

What is important is the emerging trend that courts are now prepared, in appropriate cases, to adopt the language of human rights, including the principle of non-discrimination on basis of sex, to protect women's land rights. The influence of human rights language, however, is greater in the higher courts compared to the lower courts in the hierarchy. This is confirmed in a review of court cases on property rights of widows which observed a significant difference between approach taken by the lower courts and that taken by the High Court and the Court of Appeal [33]. The decisions of the lower courts, however, may be defeated easily on appeal if they disregard established precedent on the matter.

## 7. Overview of Challenges

The law may afford women a fair measure of protection of their land rights on paper. Practically, however, the justice system in Tanzania has not necessarily been kind to women. It is documented in literature that women encounter various hurdles in invoking legal machinery to seek redress [34]. The formal laws guaranteeing women equal rights to land operate on condition that a woman is aware of them and is willing to enforce her claims through justice system. Unfortunately, most women have limited or lack knowledge of their legal land rights and procedures for claiming the rights through formal justice system. Studies have revealed that majority of people particularly those in rural areas have poor knowledge of their legal rights and procedures to claim the rights [35].

Stakeholders such as women's rights activists and mostly urban-based non-governmental organisations (NGOs) dealing with land rights are taking a range of initiatives promoting women's awareness and exercise of their legal land rights. They place emphasis on different approaches, which include legal training of women on basic land and human rights; writing wills; and procedures to enforce their land rights in courts. Their services are, however, curtailed by lack of resources [36].

Women also find it difficult to realise their land rights due to the problem of costs of navigating justice system. For example, a woman would probably need representation by an

advocate in order to put up with technical court procedures. Although the law does not compel a party to be represented by an advocate, it is important that the party is availed with best legal service in the court. Such representation, however, is expensive and women who most often do not have the necessary economic means of accessing legal support are severely affected. A few NGOs are involved in provision of legal aid to poor women and widows. Apart from having limited resources to carry out this noble work, these NGOs are urban-based with poor rural coverage.

There is also problem of geographical barrier. Majority of the people with poor access to justice are in the rural areas where limited resources and geographical challenges, in terms of distance, hinder access to justice for many [37]. District Land and Housing Tribunals (DLHTs) and other superior land disputes courts are mainly located in urban areas far away from village communities. It may cost a fortune for some village women to access these courts. They have to travel for a long distance and incur travel, shelter and food costs. Even most Primary Courts are distributed within wide geographical locations such that access to justice for the majority is impeded.

Connected to this is the question of which court has jurisdiction over a particular matter. Only High Court of Tanzania has jurisdiction over matters challenging the constitutionality of a particular law. This means a village woman who intends to challenge the constitutionality of a particular customary law on ground of discrimination on basis of sex will have to file a petition in the High Court which is normally far away from her village community. This alone is enough of deterrent for a poor rural woman to pursue her land rights claims.

In some cases, cultural factors may overshadow redress mechanisms envisaged by legislation. For example, in a traditional rural area where customs and patriarchy are held in high regard, it would be "shameful" for a woman (whose social support network is tied up in the community) to claim before courts her rights to own and exert control over land *vis-a-vis* her male family members. In such areas where family and community is controlled by patriarchal customs, court decisions that uphold women's rights, which are already considered Western, may be thought of as elevating women over and above the family or society.

Studies have shown that court decisions that uphold women's inheritance rights to land have had but minimal impact upon the majority of womenfolk, particularly among the rural populace where customary norms are part and parcel of life [38]. They know and accept the norms as binding, notwithstanding the legislative and judicial measures to undermine them. The problem is compounded by poor access to court decisions. Case laws are not well-circulated for members of public to access court decisions explaining women's rights to land. There are few public libraries keeping court judgments and the high court registries where unreported cases are found are situated far away from the reach of village men and women. Moreover, law reports are published in



English and are very expensive for a poor woman to buy. Even though the Judiciary in Tanzania has established a mechanism to provide online access to court judgments, this may still be expensive and depends on access to internet. Nevertheless, courts remain important agent of change because they have power to apply the principle of non-discrimination in interpreting the law in such a way that equality in land rights is advanced.

## 8. Conclusion

This article has observed that statutory law in Tanzania recognises women's land rights to a large extent. Despite the legal safeguards, many women, especially rural-based women, still experience insecure land rights due to prevailing traditional attitudes and discriminatory customary law and practices. The principle of non-discrimination which is enshrined in the Constitution of the United Republic of Tanzania and international human rights instruments to which Tanzania is a signatory, provides a tool for challenging discriminatory practices and enhancing equality in land rights. Courts have been important agents in enforcing the principle of non-discrimination in a bid to protect women against discriminatory customary laws and practices that militate against their land ownership and inheritance rights.

Enforcement of women's right to non-discrimination with regard to land rights, however, is fraught with significant challenges, including lack of legal literacy and skills among many women, inadequate access to legal services, and widespread traditional attitudes against women's land ownership and inheritance rights especially in rural areas. Sustained application of the non-discrimination principle can pave way towards eradicating barriers and advancing women's land rights. Such efforts should be supplemented by intensified campaigns for imparting knowledge of legal land rights and human rights among men and women. Legal reform should be effected to harmonise inheritance and land laws in order to strengthen the realisation of women's land rights. Reform of succession laws should reflect equal inheritance rights to women granted by international human rights treaties to which Tanzania is a party. In addition, government legal aid facilities should be established to assist widows, orphans and poor women in their efforts to enforce their land rights claims in courts.

## Abbreviations

AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COHRE	Centre on Housing Rights and Eviction
DLHT	District Land and Housing Tribunal
G.N	Government Notice
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental Organization
R.E	Revised Edition
SADC	Southern African Development Community
TGNP	Tanzania Gender Networking Programme
UDHR	Universal Declaration of Human Rights
UN	United Nations

## Author Contributions

Laurent Agola is the sole author. The author read and approved the final manuscript.

## Conflicts of Interest

The author declares no conflicts of interest.

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