



Original Article

## Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania

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Article DOI: <https://doi.org/10.37284/eajle.6.1.1541>

DatePublished: ABSTRACT

29 October 2023

Keywords:

*Child,  
Intestate Rules,  
Inheritance,  
Illegitimate Child,  
Customary Law,  
Child Act and  
Constitution.*

This paper explores legal implications of Child Act, 2009 concurrently with the intestate rules of customary law in Tanzania (to be on referred as intestate rules). From the discussion it is evident that little study has been done on this area of law since the colonial masters left 60 years ago. The main issue that this paper identifies is the inequality in provisions of the intestate succession laws, which is contrary to the provisions of equality, brought about by the Law of Child Act dispensation. The article also seeks to unearth contradictory application of the intestate rules of customary law in Tanzania. Reference is made to the leading judicial decisions which directly affects and alters the intestate rules. This is followed by a brief discussion of unequal intestate rules and judicial decisions. The inroads to be made in order to improve children right to parental property in this field of intestate rules are suggested including reform in this area of law. This study is limited to the applicability of codified intestate rules from patrilineal societies as provided under the Local Customary Law Declaration Order (NO. 4), GN 346/1963(to be referred as GN 436/63 to be referred as GN 436).

### APA CITATION

Mgomba, F. A. (2023). Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania. *East African Journal of Law and Ethics*, 6(1), 30-41. <https://doi.org/10.37284/eajle.6.1.1541>

### CHICAGO CITATION

Mgomba, Fatuma Adam. 2023. "Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania." *East African Journal of Law and Ethics* 6 (1), 30-41. <https://doi.org/10.37284/eajle.6.1.1541>.

### HARVARD CITATION

Mgomba, F. A. (2023) "Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania.", *East African Journal of Law and Ethics*, 6(1), pp. 30-41. doi: 10.37284/eajle.6.1.1541.

### IEEE CITATION

F. A. Mgomba. "Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania.", *EAJLE*, vol. 6, no. 1, pp. 30-41, Oct. 2023.

### MLA CITATION

Mgomba, Fatuma Adam. "Legal Implications of the Law of Child Act on the Intestate Rules of Customary Law in Tanzania." *East African Journal of Law and Ethics*, Vol. 6, no. 1, Oct. 2023, pp. 30-41, doi:10.37284/eajle.6.1.1541.

## INTRODUCTION

The decision to write this article arose mainly from my experience as a lawyer and from 15 years teaching Customary Laws at *Institute of Judicial Administration*. The majority of teaching materials I consulted when preparing lecturers all along these years demonstrate that interstate rules of customary law have always been considered discriminatory in nature. I therefore developed interest to pay more attention on publications and research papers as well as decided cases on intestate rules of customary law especially cases about codified intestate rules of customary laws. My interest was on understanding the why intestate rules of Customary Laws are still applied despite the observed discriminatory nature of the laws. My concern was how the Tanzania principle of equality enshrined in its Constitution, ratified, and domesticated International Instruments on child rights of parental property are protected while applying interstate rules. This curiosity was further endorsed insights acquired while doing a Masters in Women's Law Programme. The programme, broadened my mind and thoughts and enabled me to go beyond law books and delve deeper into the interplay between law and the realities of people's lives.

### Background of Problem

Prior to year 2009, Tanzania did not have a law specific for children. Children affairs were regulated by various different laws like the Marriage Act, Customary Law, etc to the effect that child rights and welfare were not of paramount consideration. In 2009, the Law of the Child Act was enacted to accommodate among others, requirements of the International and Regional Legal Frameworks and Conventions on the Rights of Children. The Act aimed to provide for reform and consolidation of laws relating to children,

stipulate rights of the child as well as promote, protect, and maintain child welfare.

After enacting the Law of the Child Act, children affairs have been tremendously improved. Therefore, enactment of the Law of the Child Act has to a large extent filled the *lacunae* that existed in Tanzania for many years. The Law of the Child Act lays the foundation for the children's rights by stipulating the rights of children, including the right to inherit parental property. In addition, to achieve equality, section 5 of the Act prohibits all forms of discrimination of children of any kind. However, despite all the efforts taken by Tanzanian government to protect children, distribution of children's parents' estate is still subjected to intestate Customary Laws among other three different (Islamic, Hindu, and Statutory) laws. This is problematic especially on the implementation child right to parental property.

### Statement of Problem

Intestate rules of customary law stand among laws applicable in the administration of estate in Tanzania. However, the intestate rules of customary law have been seen as inadequate and not in line with the provisions for equality and for children right to parental property as provided under the Child Act 2009. Inequality is evident when intestate rules under the Local Customary Law Declaration Order of 1963 GN 436 is applied in the implementation of children's right to parental property<sup>1</sup>. As majority of intestate rules originated from a patriarchal system, an inequality to most children in Tanzania is obvious. For instance, intestate rules provide, among others, that children are legal heirs of their deceased father estate (rule 26 of GN 436). However, it discriminatively categorizes children: some have full right, others have limited rights to inherit, and even some are completely excluded from inheritance. Certainly,

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<sup>1</sup> Rule 1 up to 51 the Local Customary Law Declaration Order of 1963, GN 436/63.

this categorization reinforces and perpetuates inequality among children.

This is furthered by the fact that where there is an application of intestate rules in the division of deceased property, the intestate rules provisions do not present children equality leads to contravention to Child Act<sup>2</sup>. The intestate rules provide that the eldest son is entitled to a larger share compared to the other sons and daughters<sup>3</sup>. Thus, the said intestate rules are inconsistent with the principle of equality as provided under the Child Act of 2009. The child Act on the other hand, have made various provisions as to the rights of children without discrimination. With this law, children's right to parental property is inclusive can inherit on any grounds.

In addition, a debate continues the so-called 'illegitimate' children's right to inherit after the death of his/her putative father. A long tendency has been that the courts recognize the children born within wedlock and ignore the deceased children born of a woman/women not married to the deceased who do not have any claim to inheritance. The intestate rules do not recognize illegitimate children in cases of inheritance where the children were not legitimated before the death of their putative father and where there is no will to that effect<sup>4</sup>. However, after enactment of Child Act, courts, as provided under the said Act, through various decisions have been working towards implementation of equality and non-discrimination principles against provision of intestate rules of succession in Tanzania.

### Significance of the Study

A comparative study of these two laws (the Child Act 2009 and Intestate rules of Local Customary

Law as provided under the Customary Law Declaration Order of 1963 GN 436) seemed to be vital in understanding better the next step for our country's struggle to protect children's right of inheritance. This would be a welcome innovation in the Tanzanian legal system, as it will help address the criticism by Tanzanian child rights activists. The activists compel the courts to use international child's rights general rules as domesticated under the Child Act in 2009.

### Definition of Key Terms

#### *Child*

The Child Act, under section 4, defines a child to be a person below 18 years. However, in Tanzania, there are various laws, which define a child depending on the context within which that person is referred to. For the purpose of this paper, the term child includes deceased children regardless of one's age, including even an unborn child.

#### *Intestate Rules*

Literally Intestate Rules are customary rules which govern and regulate the whole process of an administration of estate of the deceased person who died without having made a will to dispose of his/her property<sup>5</sup>.

#### *Inheritance/Succession*

Inheritance is defined as a process whereby the heirs acquire legally the property left behind by a deceased person. Technically, it means a science that shows people who are entitled to inheritance and how much each of them will get from the property of the deceased according to law<sup>6</sup>.

<sup>2</sup> Section 5(2) of the Child Act of 2009 provides a person shall not discriminate against a child on grounds of gender, race, age, religion, language political opinion, disability health status customs ethnic origin, rural or urban background, birth, socio-economic status, being a refugee or other status.

<sup>3</sup> Rule 22 of second schedule of GN 436/1963

<sup>4</sup> Ishengoma case

<sup>5</sup> N. N. Nditi, *Succession and Trust in Tanzania: Theory, law and practice*, LawAfrica Publishing (K) limited., Nairobi, Kenya 2017.

<sup>6</sup> Mzee Mustafa Mzee Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of

**Customary Law.**

Customary law simply refers to any rule or body of rules of human action or behaviour established by usage with binding effect to a given community<sup>7</sup>.

### **APPLICABILITY OF INTESTATE CUSTOMARY RULES OF SUCCESSION IN TANZANIA**

As part of customary law operating in Tanzania, intestate rules of customary law's application are not automatic. Certain legal requirements must be established by the court for intestate rules to be applicable. The said requirements are here under succinctly explained:

One, an intestate rule will be applicable if it is not contrary to the Constitution or any written law. This requirement was elaborated by the High Court in the case of *Maagwi Kimito*, where it was held that, customary laws of this country now have the same status in our courts as any other law, subject only to the constitution and any statutory law that may provide to the contrary<sup>8</sup>. This entails that the court, before applying intestate rules of customary law has to satisfy itself that the said rule does not contradict neither the constitution nor written laws. The same position was reiterated by the court in the case of *Kazungu Lushinga*<sup>9</sup> where it was held that, a Customary Law is applicable if it is not repugnant to Constitution as per Article 64(5) of United Republic of Tanzania (URT) Constitution. Thus, customary law will not be applied if there is any constitutional or/and statutory law provision(s) which limits the application of it.

Two, intestate rules apply to the Primary Court as per section 18(1)a (i) of Magistrate Court Act of 1984, R.E 2019(to be referred as MCA) which

provides that Primary Court shall have and exercise jurisdiction in all proceeding of a civil nature where the law applicable is Customary Law and Islamic Law. The wording of section 18(1)a (i) of MCA is to the effect that the Primary Court Magistrates` are vested with unlimited original jurisdiction to apply customary laws (interstate rules of inheritance inclusive) generally in civil cases subject to s.11(4) of Judicature and Application of Laws Act (Cap 358) of 1961 (RE 2002)

Three, the intestate rule may be applicable if parties involved into dispute are members of the community or membership there to. This means that, if it is appropriate, the parties involved in a dispute be treated as a member of the community in which customary rights or obligations make them fit and just for the said matter to be dealt with in accordance with customary law instead of other law that would otherwise be applicable. In other words, intestate rules under customary law can be applied in the administration of a deceased estate if a deceased is a member of customary law community<sup>10</sup>.

Four, where intestate rules relevant to the matter before the court are established and accepted<sup>11</sup>. That is to say, rules of intestate succession may apply to matter of status of succession to a person who is or was a member of a community in which rules of customary law are established and accepted by a given community. The Laws require more that, court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or

Deceased Father: A Tanzania Case Study, Journal of Law, Policy and Globalization [www.iiste.org](http://www.iiste.org) ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.45, 2016).

<sup>7</sup> Section (1) of Interpretation of Laws and General Clause Act of 1972(as reviewed 2002).

<sup>8</sup> *Maagwi Kimito v. Gibeno Werema* (1985) TLR No 132

<sup>9</sup> *Kazungu Lushinga v. Juakali Degulla* (1986) TLR No. 98

<sup>10</sup> Section 11 (1) b and 11 (4) of JALA. (RE 2019). JALA read to be read together with Section 88. (1) a and s. 89(1) a(i) of The Probate and Administration of Estates Act [CAP 352 R.E. 2019].

<sup>11</sup> Section 11(1)b and 11 (4) of JALA. (RE 2019).

impliedly misapplied or suspended by any written law<sup>12</sup>.

Five, the Primary Court Magistrate is required to apply the intestate rules prevailing within the area of the local jurisdiction of the court. If there is more than one such law, the court will apply the customary law applicable in the area where the act, transaction or matter occurred or arose<sup>13</sup>. This requirement is calculated to unravel the situation when there is more than one intestate rule applicable in a matter.

Therefore, despite the above set conditions for applications of customary law, it is expressly stated that the application of the intestate rules of customary law has same status as other laws<sup>14</sup>. More so, intestate rules, subject to other conditions, are to operate under the standards set in the statutory laws, Constitution, and International Instruments the state has signed and ratified.

### Intestate Rules of Succession

Inheritance is a universal concept among human beings. Each society has its own laws and guidelines to govern and regulate the devolution of property from a deceased person to his descendants. Intestate rules are among rules which regulate and govern distribution of deceased estate in Tanzania. Tanzania as a nation, consists of diverse ethnic groups, each with a different set of rules and customs relating to succession. Thus, each tribe, race or community is subject to its own peculiar system of intestate rules. The said rules as provided under the GN 436 governing the division of a deceased estate who dies without a will. Evidently,

these rules provide for the unequal inheritance of property between children.

### *Legal Heirs under Intestate Rules*

The main heirs of the deceased estate are children. It is clear that where the deceased leaves a son(s) and a daughter(s), they will inherit all his property exclusively<sup>15</sup>. The same position was elucidated in the case of *Masudi Ally vs Chiku Masudi (1992) TLR No. 50* where the court held that, under Customary Law, only children of the deceased have the right to inherit from their deceased's parent property. Therefore, deceased's relatives (i.e., grandchildren, brothers, sisters and their children, father, paternal uncle, and aunts, husband, or wife)<sup>16</sup> will inherit only if it is established that the deceased had no children of marriage at all and subject to the circumstance of the case. The right to inherit under rule 26 of GN 436 is only for legitimate children. The effect of the said rule explained by the High Court in the case of *Masud Ally*<sup>17</sup>.

When it comes to an illegitimate child, it is a well-settled position of the intestate rules the so-called illegitimate child is not entitled to any share from his/her deceased putative father<sup>18</sup>. Three famous cases emphasize the point above by upholding the position of the customary law<sup>19</sup>. Inheritance or rather the right to parental property is subjected to certain legal requirements/conditions to be fulfilled. An illegitimate child may inherit under intestate rule if he/she is legitimized by marriage or payment<sup>20</sup>. Each legitimization process has different legal repercussion to a child's right to parental property. If a child legitimized by marriage, any time, a putative father may marry illegitimate child's mother provided that, the marriage ceremony does

<sup>12</sup> Proviso of s.11(3) of JALA (RE 2019).

<sup>13</sup> Section 11(3) of JALA. (RE 2019).

<sup>14</sup> *Maagwi Kimito v. Gibeno Werema (1985) TLR No 132*

<sup>15</sup> Rule 26 of GN 436/63

<sup>16</sup> Rule 34,44,45,46,47,48 ,49 and 50 and 52 of GN 436/63)

<sup>17</sup> *Masudi Ally vs Chiku Masudi (1992) TLR No. 50*

<sup>18</sup> Rule 43 of GN436/63

<sup>19</sup> A case of *ChachaMalima v. MwitaKitogo (1986) TLR 117*, *Hamisi Nyanga v. Omar Sand (1973) LRT 37* and *Violet Ishengoma vs Administrator General (1990) TLR No72*

<sup>20</sup> Rule 181 of the Local Customary Law Declaration Order of 1963, GN 279/63.

not contravene any provision of the Law of Marriage Act of 1971 RE 2019. As for legitimization by payment, the customary rules require to be done before a child is weaned<sup>21</sup>. The case of *Beatrice Njowoka vs. Evaristus Nambunga (1988) TRL 67(HC)* is of importance as clearly state that, legitimization application must be made before the child is weaned. The same position was reached in the case of *Zaina Ismail vs. Saidi Mkondo (1985) TLR 239* where the court held that, the respondent cannot claim the child, as he never legitimized it in time by application through the law of person, the Local Customary Law Declaration Order of 1963, GN 279 of 1963.

### ***Classification of Legal Heirs***

As said before above, legal heirs are legitimate children of the deceased person. Heirs are classified into three groups/classes<sup>22</sup>. The first-class heir is the elder son<sup>23</sup>. If a deceased had more than one wife, the first son from the first house is the heir in the first-class.<sup>24</sup> A Daughter can inherit in this class if no son at all in their family<sup>25</sup>. Second-class heirs include all other sons of deceased person and the third class is of daughters of the deceased<sup>26</sup>.

### ***Distribution of Property to Legal Heirs.***

The process of distribution of deceased property to legal heirs is guided by age, sex and priority<sup>27</sup>. Under intestate rules, the heir of first-class normally inherits first and gets the lion share of estate compare to other children. Heir(s) of second class is entitled to inherit a bigger share than that of heirs of third class. In the very old case of *Donald s/o Musa v. Tutito s/o Yonathan [1967] HCD No. 118* Said, J. (as he then was) held that, second-degree heirs include all other sons and they inherit a bigger share

than daughters who are normally heirs in third degree. Their share of inheritance is normally smaller than the heirs in the other two degrees. Therefore, when interpreting intestate rules, the court clearly shows that the whole process of classifying children as legal heirs and the distribution process of estate is based on age, sex, and priority. Age and sex are factors of consideration in the second and third class, where the older one gets more than the young ones, and males get a bigger share than females irrespective of age.

Moreover, intestate rules provide that woman (daughter) can inherit a clan land in terms of usufruct only until she marries or dies, the only exception being if there are no male relatives in the clan at all the Local Customary Law Declaration Order of 1963. Yet, the woman heir cannot sell such immovable property unless there are no male members in the family.

Illegitimate children as pointed out earlier, are excluded from inheriting their father's estate<sup>28</sup>. Rule 43 of GN 436 provides that illegitimate children cannot inherit from the father upon his dying intestate. A legitimated child by marriage cannot take the first class in succession, though he is elder son, if there is a son whose mother was married before he was legitimated<sup>29</sup>. In other words, an illegitimate child legitimized by payment will never inherit in first class rather in the second class if they are males and in the third class if they are female according to his/her age<sup>30</sup>.

<sup>21</sup> Rule 181A of the Local Customary Law Declaration Order of 1963, GN279/63

<sup>22</sup> Rule 21 of GN 436/63

<sup>23</sup> Rule 25 of GN 436/63

<sup>24</sup> Rule 19 of GN 436/63

<sup>25</sup> Rule 29 of GN 436/63

<sup>26</sup> Rule 25 and 23 of GN436/63.

<sup>27</sup> Rule 30 of GN 436/63.

<sup>28</sup> Rule 43 of GN 436/63.

<sup>29</sup> Rule 41 of GN 436/63

<sup>30</sup> Rule 42 of GN 436/63

## Effects of the Child Act on the Applications of Intestate Rule of Customary Law

The Child Act has an immense impact to various intestate rules of customary law as provided under Second Schedule of GN 436/1963. The following are some of these effects.

Rules 19, 23, 24, 25 and 29 of GN 436/63 contradicts with section 5 and 10 of the Child Act, which seek to ensure that children are not discriminated for any reason and not excluded from equal rights. In this Rules, the right to enjoy parental property is curtailed. Legally, it is unfair to put classes among children of the same parent, and consequently create differences to the extent of denying or minimizing chances to inherit from their deceased father estate.

Rule 30 of GN 436/63 is also discriminatory in nature as it requires distributions of the deceased estate to be done according to sex and age of the heir in the appropriate classes as against provision of Child Act<sup>31</sup>.

As for rule 20, this one contradicts section 5 and 10 of Child Act. This rule is backed up with the popular understanding among many different groups that daughters marry into other families and therefore gain a home and access to land and property through their membership in the husband's family. This assumption re-enforces patrilineal inheritance systems, which confines most Tanzanian daughters to secondary rights or rights of use, rather than direct proprietary rights to land and other property<sup>32</sup>.

Again, the elder sister or female relative will be responsible in administration of estate if no male relative at all and that she has to be assisted by elder council<sup>33</sup>. This is also a kind of cheap patriarchy discrimination.

Regarding the right to inheritance of an illegitimate child, Rules 38, 41, 42 and 43 of GN 436/63 are very popularly used. These rules limit an illegitimate child to inherit due to aforementioned conditions. It is evident that even after being legitimized, for an 'illegitimate' child being legitimated to inherit, he/she is still subjected to some conditions attached to stigma of being born out of marriage (rules 41 & 42 of GN 436/63). From the above explanation, it is clear that the legal implications of both ways of legitimating an 'illegitimate' child discriminate the child based on the fact that he/she was born out of wedlock. Hence, being born out of wedlock affects his/her right to parental property even after legitimization. This is not only contradicting sections 5 and 10 Child Act but also the Article 13 of the Constitution of United Republic of Tanzania.

Generally, the aforementioned rules are discriminatory in nature as they contradict Section 5 of Child Act and equality principles prescribed in the Constitution of United Republic Tanzania. Section 5 of Child Act prohibits child discrimination based on birth, gender, race, age, religion, language, political opinion, disability, health, customs, ethnic origin, rural or urban background, socio-economic status, being a refugee or of other status. Thus, under the Act, all children are entitled to equal treatment and equal rights to their deceased father estate as provided under section 10 of Child Act. It should be noted that, the Child Act save to domesticated various international law principle as stated by the general rules that International Law shall form part of the law of Tanzania in all circumstances even when it comes to the application of intestate rules in the areas exempted from the use of the Child Act. Accordingly, Children will not in any way be culpable to any form of discrimination<sup>34</sup>.

<sup>31</sup>S.5 of Child Act.

<sup>32</sup> Helen Dancer (2017) An Equal Right to Inherit? Women's Land Rights, Customary Law, and Constitutional Reform in Tanzania. *Social and Legal Studies* 26 (3) 291-310.

<sup>33</sup> Rule 1 to 5 of GN 436/1963

<sup>34</sup> Mohammed, H and. Mashamba, C.J. (2014). *Child Rights and the Law in East Africa*, Lawafrica Publishing Co. (T) Ltd, Dar es Salaam at p.4.)

## Leading Cases Altering the Rules of the In Intestate Rules

There have been conflicting court decisions on applications of intestate rules even before enactment of Law of the Child Act of 2009. Some decisions modified rules which bar or limit the right of children from their deceased parents' estate. There also decisions of the court, which apply intestate rules as they are in the second Schedule of GN 436/1963.

The first decision which accorded daughters (women) in Tanzania Mainland, an equal status to men (boys) in the matter of inheritance in respect of immovable property, such as clan lands, was made in the case of *Ndewawiosia Ndeamtzo Vs Immanuel Malasia (1968) H.C.D. 127*. Saidi J, as he then was, made a progressive decision in the following terms

*"It is quite clear that this traditional custom has outlived its usefulness. The era of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equity, daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality".*

This decision however, did not have much support. Ten years later, the learned Lugakingira, J. as then applied rule 20 as it is in the GN 436/63<sup>35</sup> to deny the daughter and widow of the deceased fully inheritance of a portion of clan land held by the deceased.

Later on, Mwalusanya, J. declared Rule 20 of G.N 436 unconstitutional for being inconsistent with Article 13(4) of our Constitution, which bars

<sup>35</sup>Clementina Tikengwa and another Vs TraseasKabogi. [1978] LRT 49

<sup>36</sup>Bernado Efraim Vs HolariaPastory and GervaziKaizilege, H/C (PC) Civil Appeal No. 70/1989, (MZ)

discrimination because of sex<sup>36</sup>. He went further and declared that, rules governing the inheritance of holding by female heirs made by the Bukoba Native Authority which in rules 4 and 8, entitled a female to inherit a self-acquired land of her father to have usufructuary rights with no power to sell that land, to be void and of no effect. The Court of Appeal held that, a female member of the clan could not sell clan land to a stranger, which is prohibited under Haya customary law<sup>37</sup>. The Court continued to pronounce conflicting decision on intestate rules that denied a daughter or a woman the right to enjoy clan land to the fullest until the Law of Child Act was enacted which among other things denounced discrimination of any kind.

The enactment of the law of the Child Act 2009 brought a new direction and an alternative perception on right of illegitimate child to inherit their father property. The High court gave a remarkable decision through its appellate jurisdiction as far as intestate rules restricting inheritance of children born out of wedlock are concerned. The court has granted right to inheritance to children born out of marriage in the case of *Elizabeth Mohamed v. Adolf John Mohamed, (Administration Appeal 14 of 2011, High Court of Tanzania at Mwanza (unreported)*. Hon. Mruma, J up turned the decision made on the case of *Violet Ishengoma Kahangwa and another v. The Administrator General and another [1990] TLR 253*. The presiding judge held that, the Bahaya customary rule that espouses that putative father's obligation to his illegitimate children is personal and ends with his death and does not survive him and cannot attach to his estate, is repugnant to the provisions of the Law of the Child Act, 2009<sup>38</sup>.

According to the court, Section 9 of the Law of the Child Act, 2009, imposes duties and responsibilities to parents to their children during their lifetime

<sup>37</sup>RubukaNteme v Bi Jalia Hassan (Court of Appeal of Tanzania at Mwanza) (unreported) Civil Case number 19/1986.

<sup>38</sup>S.5 and 10 of Child Act of 2009



while section 10 of the same Act prescribes the rights of a child to parental property after the parent's death. The decision was based on the following facts. After the death of JCM intestate, the respondent who was his son begotten under a Christian marriage was appointed as an administrator of his father's estate. The appellant was one of the two wives of JCM, the deceased, under customary marriage subsequent to the deceased's Christian marriage. After several proceedings at a primary court, it was held that three children of the appellant were entitled to inherit from their father's estate. The respondent successfully appealed to a district court. The appellant being not satisfied with the district court decision appealed to the High Court where it was ruled that children born out of wedlock have a right to the father's estate and it was ordered that the three children born out of marriage to be included in the heirs list. The court considered, among other laws provision, section 10 of the Law of Child Act that provides for rights to parental property.

Recently, the High Court of Tanzania mainland misapply customary intestate rules of inheritance in the case of *Elizabeth Mohamed v Aldof John Mohamed Probate and administration of estate Appeal No. 14 of 2011*. In this case, the deceased had four children; three children were born out of marriage and one child under Christian marriage. Children born out of wedlock were denied the right to enjoy their deceased father's property by rule 43 of GN 436/1996. On April 2012, Mruma J., held that rule 43 is discriminatory, contrary to the Law of the Child Act, 2009 and the Constitution of URT. Again, in the case of *Judith Patrick Kyamba v. Tunsume Mwimbe and 3 Others, Probate and Administration Cause 50 of 2016*, High Court of Tanzania at Dar es Salaam (unreported), Mlyambina, J. held that children born out of wedlock are biological children just like those born within the matrimonial home; they are entitled to

equal shares of their common father with fellow siblings. He has the view that, it is barbaric and discriminatory to contend that illegitimate children cannot inherit from their father's estate in light of the equality of all human beings and equality before the law<sup>39</sup>. Therefore, based on the national and international law, children born out of wedlock are no more referred to as "bastards"; they are equal children like those born in wedlock sharing equal rights including inheritance rights. The facts of the case was, the petitioner asked the High Court to be granted letters of administration of her father's statute after he died intestate. In her petition, she left out five children of the deceased who were born out of the wedlock. At the hearing of the objection to the petition, the petitioner argued that under the Customary law illegitimate children have no right to inherit the deceased's estate and cannot have any legal interest over the deceased's estate. Therefore, some decision of the High Court reformed existing intestate rules of customary laws on the administration of estate in order to bring it into line with the child Act, the Constitution and Human right international Instruments.

## DISCUSSION

Prior to enactment of Child Act, some courts either out of ignorance or deliberately disregarded the provisions of the Judicature and Application of Law Act (Cap 358) of 1961 established requiring application of customary rules or a blind effort to elevate customary rules of inheritance above the Constitution, written laws, and international law on child right. The courts often overlook Article 64(5) of the Constitution and applied intestate rules even when the constitution and a few decided cases are clear on the fact that Customary rules are discriminatory. For instance, Lugakingira, J. disregarded the decision of a case of *Ndewawiosia D/O Ndeamtzo vs Immanuel Malasia (1968) H.C.D. 127* by applying Rule 20 to deny the daughter of the

<sup>39</sup>Article 12 (1) and Article 13 (1) of the Constitution of the United Republic of Tanzania of 1977

deceased fully inheritance of a portion of clan land held by the deceased which by then was inconsistent with natural justice and equity<sup>40</sup>; and to date, contrary to Constitution and Child Act. The two latter documents do not discriminate between male and female children whether born within marriage or not.

Still to date the debate continues over whether intestate rules provide adequate children property rights. Some family prefer to seek adjudication of their inheritance claims with their clan leaders, or head of the family who use codified or uncoded intestate rules which are often male-dominated. The said rules may be preferred as they may be more flexible in considering extra-judicial, personal issues. However, this can and in fact, affect rights of children either way, depending on their particular local circumstances.

The enactment of the child Act of 2009 has given new impetus to Tanzanian courts to disdain intestate rules for being either unconstitutional or appears to conflict with the Constitution. Despite provisions of the Law of child Act that apparently give rights and protections to children, it is found that in practice, many children are unable to enjoy full right to property from their fathers. This inability to inherit property results from several significant deficiencies in the Tanzanian succession laws, as well as the continued use of obsolete customs to determine succession matters.

It is urged that the government of Tanzania has to recognize that, among other things, one area in which most children may be disadvantaged is in respect of parental property/ inheritance rights. It seems that the government has failed to adequately enforce this right, because the child Act ends only in providing for the right to parent property while the whole process of succession is guided by multiple laws including intestate rules of Customary

Law. Under the intestate rules in patrilineal societies in Tanzania, children born within wedlock are discriminated by being given a share according to age and sex. A girl child is entitled to the smallest share and cannot inherit clan land whereas an illegitimate child is totally denied a share of his/her parental property. This inequality and discrimination are perpetuated by the continued using widespread discriminatory rules of intestate succession. It is believed that, without government political will in this issue, either by amending intestate rule of customary laws or harmonizing succession laws in line with Constitution and Child Act, the right to parental property will continue to be a day- nightmare to most of children.

Currently Tanzanian children do merely depend on the mercy of the Judge or Magistrate to enjoy equal right to parental property. As above indicated, there are a few decisions pronounced by High Court on the right of a daughter to inherit clan land and High court provision for Child Act especially on the right of illegitimate child to enjoy their parents' property. Most court decisions and declaration that intestate rules contradict the Law Child Act and Constitution as discriminative while not taking effective measures do not give a true picture and reflection of the actual legal position. Consequently, most rules are still in use on ground and continue affecting majority of children.

Court decisions are of importance as they enforce non-discrimination and application of equality principles embraced under the constitution and the Child Act. These decisions maybe used as spotlight to other courts whenever the case concerns child right to parental property. Nevertheless, by the very nature of court decisions and their dissemination, coupled with the problem of communication and level of literacy among most of our people, such decisions cannot reach most of the people and promote awareness of the same within a short span

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40 Clementina Tikengwa and Another vs Traseas Kabogi.1978 LRT 49.

of time; nor can such decisions cover every aspect of the problem at one time. Since courts do not, by their very mode of operation, search for people's problems or disputes for resolution, they have always to be moved by the aggrieved party on a given matter. Thus, there is a necessity for a legislative measure to protect children in this matter.

There are many decisions challenging the right to illegitimate children and daughter's right to inherit clan land. There is no or a very few known decisions of the court challenging rules relating to classification of legal heirs and distribution of estate which is done according to sex and age of children etc. and stringently pronouncing the rules as discriminatory in nature and reinforce inequality contrary to the Constitution and Law of Child Act spirit. The court cannot escape the blame as it does not challenge intestate rules or legislations not brought before it for interpretation. For example in the case of Elizabeth Steven and another v AG<sup>41</sup>, the petitioner filed a petition under article 30(3) of the Constitution of the United Republic of Tanzania, 1977, for an order declaring unconstitutional paragraphs 1 to 51 of the second schedule of the Local Customary Law<sup>42</sup>, which gave males preference over females heirs, the court failed to reach a decision based on the articles of the Constitution and international instruments pleaded by the petitioner.

The Court should note that, even though it is held that the customary law has the same status as written law, still its application is not automatic. There are several conditions required to be established before applying intestate rules, among others is that it applies if they do not contradict the constitution or written laws. Therefore, to ensure children's equal right to enjoy parental property court, the court should denounce the application of intestate rules on the grounds that they contract with either provisions

of Child Act and /or undermine Constitutional provisions. For instance, the court can use the decisions of the case of *Kazungu Lushinga Vs Juakali Degulla (1986) TLR No. 98* and case of *Maagwi Kimito v Gibeno Werema (1985) TLR 132* to decline application of all intestate rules, which contradict Child Act and Constitution.

## CONCLUSION

With such contradictions between the Law of Child Act 2009 and intestate rules of customary law, children rights to parental property cannot be well enforced. The children will remain discriminated against and denied inheritance the same way as it was prior to the enactment of the Law of the Child Act 2009. Thus, without a strong legal system, which includes enacting a comprehensive succession law that promotes the rights and wellbeing of Tanzanian children, the children's right to inherit parental property will be a nightmare. Therefore, the Law of child Act should be used as a stepping stone to reform and consolidate laws relating to succession matters base on equality, non-discrimination, and the welfare of children rights as paramount consideration in Tanzania.

## REFERENCES AND SOURCES OF MATERIAL

### Laws

- The Constitution of United Republic of Tanzania (Cap 2) of 1977 as Amended from Time to Time
- Interpretation of Laws and General Clause Act (Cap 1) of 1972 as reviewed 2002.
- Judicature of Application of Law Act (Cap 358) of 1961 as reviewed 2019.
- The Law of the Child Act (Cap 13) as reviewed 2019

<sup>41</sup> Elizabeth Steven v AG (High Court of Tanzania at Dar es Salaam) (unreported) Miscellaneous Civil Case number 82/2005.

<sup>42</sup> The Local Customary Law Declaration Order GN 436 of 1963

The Magistrate Court Act (Cap 11) of 1984 as reviewed 2019

The Local Customary Law Declaration Order GN. NO. 279 of 1963.

The Local Customary Law Declaration Order GN No. 436 of 1963.

The Probate and Administration of Estates Act [CAP 352) as Reviewed 2019

### Cases

Ally vs Chiku Masudi (1992) TLR No. 50.

Beatrice Njowoka vs. Evaristus Nambunga (1988) TRL 67(HC).

Bernado Efraim Vs HolariaPastory and GervaziKaizilege, H/C (PC) Civil Appeal No. 70/1989, (MZ)

Clementina Tikengwa and Another vs Traseas Kabogi (1978) LRT 49.

Donald s/o Musa v. Tutito s/o Yonathan [1967] HCD No. 118.

*Elizabeth* Mohamed v. Adolf John Mohamed, (Administration Appeal 14 of 2011, High Court of Tanzania at Mwanza (unreported).

Judith Patrick Kyamba v. Tunsume Mwimbe and 3 Others, Probate and Administration Cause 50 of 2016, (unreported).

Kazungu Lushinga v. Juakali Degulla (1986) TLR No. 98

Maagwi Kimito v. Gibeno Werema (1985) TLR No 132

Ndewawiosia Ndeamtzo Vs Immanuel Malasia (1968) H.C.D. 127.

RubukaNteme v Bi Jalia Hassan (Court of Appeal of Tanzania at Mwanza) (unreported) Civil Case number 19/1986.

Violet Ishengoma Kahangwa and another v. The Administrator General and another [1990] TLR 253.

Zaina Ismail vs. Saidi Mkondo (1985) TLR 239.

### Books and Articles

Helen Dancer (2017) An Equal Right to Inherit? Women's Land Rights, Customary Law, and Constitutional Reform in Tanzania. *Social and Legal Studies* 26 (3) 291-310.

Mohammed, H and. Mashamba, C.J. (2014). *Child Rights and the Law in East Africa*, Lawafrica Publishing Co. (T) Ltd, Dar es Salaam at p.4.)

Mzee Mustafa Mzee Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzania Case Study, *Journal of Law, Policy and Law, Policy Globalization* [www.iiste.org](http://www.iiste.org) ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.45, 2016)