"Kikuyu Customary Marriage With Particular Reference To Elopement."

A dissertation in partial fulfilment of the Requirements for the LL.B. Degree, University of Nairobi.

By

D.N. WAMBEU.

Nairobi May 1979.

A C K N O W L E D G E M E N T S .

I am grateful to Mr. Isabirye D.M. a Lecturer at the Facaulty of Law who made constructive criticism of this work. His advice and guidance have been most helpful.

My appreciation are also due to F.G. Njoroge, J. Irungu and P.M. Ashcroft who helped me morally and financially in this work and finally x to Regina Nguhi and Christabel Wangui who typed the dissertation for me.

D.N.W.

C O N T E N T S:

TABLE OF CASES.

S T A T U T E S .

African Courts Ordinance 1951.

African Courts (Amendment) Ordinance 1962.

African Christian Marriage and Divorce Act Cap 151 Laws of Kenya.

Courts Ordinance 1907.

Constitution of Kenya NO. 5 of 1969.

East Africa Order In Council 1897.

East Africa Order In Council 1902.

East Africa Marriage Ordinance 1902.

Evidence Act Cap 80 Laws of Kenya.

Guardianship of Infants Act Cap 144 Laws of Kenya.

Indian Limitations Act 1877.

Judicature Act Cap 8 Laws of Kenya.

Kenya Independence Order In Council 1963.

Magistrates Courts Act Cap 10 Laws of Kenya.

Marriage Act Cap 150 Laws of Kenya.

Native Courts Regulations 1897.

Native Christian Marriage Ordinance 1904.

Native Tribunal Rules 1913.

Native Tribunals Ordinance 1930.

A B B R E V I A T I O N S .

E.A	-	East Africa.
E.A.L.J.	-	East Africa Law Journal.
E.A.L.R.	-	East Africa Law Reports.
K.L.R.	-	Kenya LAw Reports.
K.H.C.D.	-	Kenya High Court Digest.
L.R.	-	Law Reports.
M.L.R.	-	Modern Law Review.
U.H. C.	-	Uganda High Court.
U.L.R.	-	Uganda Law Reports.
V	-	Versus.
Z.L.R.	-	Zambia Law Reports.

I N T R O D U C T I O N

During the Colonial rule in Kenya, Customary law was looked upon as the law of the barbaric Natives. In some instances the Courts refused to recognise the validity of transactions carried out under Customary law.[1] The Colonial Government, with the 'civilising' mission in mind made attempts to phase out Customary law. Laws were enacted to enable Africans to govern their affairs in accordance with 'civilised' law.[2] The more of a white man the African became, the closer to civilisation he was considered to be. Thus the Colonial Government sought to impose English law which embodied their philosophy of life, on the Africans. They were aware, however, of the dangers that might result if Customary law was phased out too rapidly. So they allowed it to operate under certain conditions, and s as long as it did not interfere with the colonial objectives i.e. the exploitation of the Colony's natural resources and cheap labour.

Today, more than fifteen years after Independence, attempts to phase out Customary law still continue.[3] Customary land law for instance, is being replaced by English land law through the process of consolidation, adjudication and registration under the Registered Land Act Cap 300. This is not suprising, however, when one considers the conditions under which Independence was granted to Kenya. GARY WASSERMAN rightly describes it as the 'Independence' bargain'.[4] All that the Nationalists did in 1963 was to force the Colonialists to relinquish direct political control, under conditions more favourable to them than to Kenyans.[5] The Africans simply stepped into their shoes to continue the system. Many Colonial institutions remain today.

Despite such attempts at its suppression, Customary law continues to regulate the affairs of many Africans. This is especially so in the area of Family law. In practice, even those Africans who marry under statute law will already have contracted a valid Customary Marriage. The reason for

this is that a Society's law embodies its philosophy of life. Therefore Customary law is a reflection of the African philosophy of life. As one Kikuyu proverb goes, 'Kiega kiiumaga mucii'. i.e.the good things come from home. Any attempt to replace Customary law with foreign law is bound to meet with little success.

It is the foregoing account that has prompted the present Writer to attempt a clear and comprehensive analysis of a Kikuyu Customary marriage, with particular reference to Elopement. The Writer also seeks to examine the various aspects of such a marriage in the light of the many criticisms that have been labelled against Customary law marriages generally. THis is in an attempt to show that such criticisms display failure to grasp the deep significance which the various aspects have for the Africans.

To present a good background the application of Customary law since the Colonial days to the present will be examined. In particular the attitudes of the Colonial Executive, Legislator and Judiary towards Customary law.

In the second chapter an analysis of the ordinary Kikuyu Customary marriage will be given. This will include the essentials and formalities that constitute such a marriage, thus giving it validity. Particular emphasis will be laid on Elopement as a form of marriage under Kikuyu Customary law. Here the social and economic factors that lead to elopement will be examined. Attention will be drawn to the judicial attitude towards marriage by elopement.

As stated earlier; efforts to suppress Customary law especially in the field of Family law still continue roday. In addition there are people who feel that certain aspects of Customary marriages are undesirable,, especially Dowry and Polygamy. The Writer will suggest some solutions to these problems in the conclusion. The Writer believes in the continued application of Customary law free from all forms of suppression.

CHAPTER 1

APPLICATION TO CUSTOMARY LAW IN KENYA

A. APPLICATION DURING THE COLONIAL ERA

Kenya was born in 1886 when the British and the Germans demarcated their spheres of influence in Eastern Africa. This was after the Berlin conference of 1885 in which the colonising powers set out rules on how to aquire and establish authority over territories in Africa. Such rules were coupled with moral injunctions to stop slave trade and bring civilization. Lord LUGARD puts in a nut-shell, the reasons for Britain's acquisition of territories. in Africa.

> "The Industrial Revolution led to the replacement of agriculture by the manufacturing industry, with the consequent necessity for new markets for those products, importation of raw materials for industry and food to supplement the decreased home production and feed the increased population"[1].

To gain favourable public opinion at home for acquiring foreign territories, the colonisers gave a moral justification. They were coming to 'civilise' the heathen peoples of Africa, to bring the light of civilization to the dark continent. As one KEITH[2] put it, they were bringing to the dark places of the earth, the abode of barbarism and cruelty, the torch of culture and progress. Therefore in short, Britain set out to exploit the resources of these acquired lands with a purported moral justification of coming to civilise the Africans.

From 1886, Britain ruled her sphere of influence, Kenya, through the I.B.E.A. Company. But by 1895 the company having failed commercially, handed over power to Britain. In that year, Britain declared a Protectorate over the present day Kenya, marking the beginning of their official rule. To give effect to such rule some legal basis was necessary.

The basis for a legal system in Kenya was laid down by the 1897 East Africa Order In Council which introduced British legal theory. The order provided that English common and statute law was to be the residual law[3] and in addition applied some Indian Acts to Kenya[4].

In recognition of the fact that the Africans had their own laws, the Order through Arcticle 52 permitted the application of Native law and custom to them. It also gave the commissioner, the power to make rules for the administration of justice in Native Courts. In particular he had power to alter or modify where necessary, Native law and custom in the interests of humanity and justice. Acting under the Order, the commissioner made the Native Courts Regulations[5], which established Native Courts. These courts were to apply Native law and custom where all the parties were Africans. There was, however, one crucial qualification. Native laws and customs would apply only where they were in conformity with justice and morality[6]. Thus the 1897 Order though introducing foreign law made provision for the application of customary law, which no doubt included customary marriage laws. The 1897 Regulations also provided for the application of customary law.

In 1902 the East African Order in council of that year made provision for the establishment of a High Court with jurisdiction over all persons. This was given effect by the 1907 Courts Ordinance. Another change occured in 1930 when the colonial Legislator realised that the Africans had a legal philosophy which conflicted sharply with theirs. As a result of the report of the MAXWELL COMMITTEE[7] on Kikuyu Land tenure, the Native Tribunals Ordinance was passed[8]. The Ordinance vested the power to establish Native Tribunals in the Provincial Commissioner. The Tribunals had power to apply native law and custom prevailing in their area of jurisdiction to the Africans, provided it was not repugnant to justice and morality. Appeals lay to the Native Court of Appeal, and the District Commissioner[9]. Some appeals could go to the High Court by way of case stated. This refers to a situation where a court after delivering judgement, still has doubts about the correctness of its decision. Therefore it refers such a case to the High Court for a clear and final statement of the law. Cases dealing with marriage and inheritance under native law and custom could not be so stated. By S.22 of the Ordinance, the practice and procedure was to be regulated by Native law and Custom. Legal representatives were barred from appearing before the Native Tribunals. The Tribunals were manned by Elders presumed to be well versed in customary law.

In 1951 the African Courts Ordinance NO.65 was enacted. Its objects were:

(i) to give legal effect to the modernisation of the Native Tribunals in order to make them resemble the English type of courts.

(ii) to carry further the process of aglicising the Africans by applying the separation of powers doctrine to them. This would result in less control of these courts by the Executive[10].

The Ordinance also established the Court of Review which was the Africans High Court.

In 1962 the African Courts (Amendment) Ordinance was passed. Its main object was to replace the control of the Executive over African Courts with that of the colonial Judiciary.

From the fore-going account it is clear that customary law (referred to as Native law and custom) was to continue applying to the Africans. This was in keeping with the principle of indirect rule which called for the preservation of African traditional institutions. Lord LUGARD the Architect of indirect rule, expressed the opinion that interference with Native customary law was to be deprecated[11].

Nevertheless the colonial Government could not resist the temptation of modifying and altering customary law to suit their own ends. The introduction of such institutions as the courts, greatly affected customary law, which hitherto had been applied by Elders well versed in it. These courts were manned by foreigners who did not understand customary law, and worse still considered many aspects of it barbaric. It is submitted that customary law was only allowed to continue applying, as a necessary evil. To understand the colonial view of customary law, however, a brief discussion of the attitudes of the Executive, Legislator and Judiciary, towards it is necessary.

THE EXECUTIVE

During the colonial rule, the separation of powers between the Executive Legislator and Judiciary was almost non-existent. Rather it was common to find the functions of more than one such organs, vested in either the Governor or the Commissioner. The separation of power is aimed at making the three organs of government, act as checks against each other to avoid abuse of power. Therefore lack of it meant the commissioner or Governor had so much power. Subject to the control retained by the secretary of state, he was an absolute ruler. However, though the Executive had both administrative and legislative functions, it is worthwhile to say something

about its attitude towards customary law, as an Administrator.

The 1897 East Africa Order in council, vested Legislative and Executive powers in the commissioner of the then East Africa Protectorate, Kenya. It gave him power to make rules for the administration of justice in the Native Courts. He was the head of the administration, the organ of government directly involved in dealing with the Africans and hence in the application of customary law. The principle of indirect rule demanded that the administrators work through the already established African institutions. In fact the administration was so insistent on non-interference with the tr traditional institutions to the extent of criticising legislation which had such effect. PHILLIPS quotes the Governor of the Equatorial Province of the Sudan who condemned the use of state laws to enforce obedience to religious teaching.

> "I am thus brought to the conclusion that the policy of applying practically standardised ordinances for the marriage and divorce of Native Christians was wrong in principle and disastrous in practice[12]".

The Governor Mr. PARK went on to recommend that customary marriage and Divorce laws of the African ought to apply instead. In addition such marriage ordinances made it an offence to contract marriage thereunder, under customary law. The Administrators felt the penal provisions were not appropriate to the social conditions prevailing in East Africa[13]. They also felt better equipped to apply customary law since they believed they knew the outlook and social conditions of the African.

It is to be remembered however, that despite such strict adherence to indirect rule, the Administrators still regarded the Africans as immature and in need of parental guidance and protection from their own weaknesses. Lord Lugard vividly supports this view in his dramatic description of the African.

> "In character and temperament, the typical African of this race type is a happy, thriftless, excitable person lacking in self-control, discipline and foresight, naturally courageous and courteous and polite; full of personal veracity; fond of music and loving weapons as of oriental clover of jewelry. In brief the virtues and defects of this race type are those of attractive children, whose confidence once it has been won is given ungrundingly as to an older and wiser superior without question and envy[14]".

With such views about the Africans, it is easy to see that African institutions were only retained for administrative convenience. Such institutions were kept under strict check. For instance, final appeals from the Native Tribunals lay to the Provincial Commissioner who was again responsible for the appointment of the members of the Tribunals. The Provincial and District Commissioner not only supervised the administration of justice in Native Courts, but also acted as magistrates. They could revise cases from the Native Tribunals or sit with the Tribunals during the hearing. It is submitted that such African institutions were altered and modified in the name of 'civilisation'.

It is regrettable that no proper records of the decisions made by administrators in cases dealing with customary law, exist, most of them having been oral. Yet as they were part of the colonial system, the Administrators shared the same low opinion of customary law. Having so much power at their disposal over Native institutions for the administration of justice, they no doubt took the opportunity to eject some 'civilisation' into these institutions.

THE LEGISLATOR

The Legislator's attitude towards customary law is reflected in the laws passed. At the very outset, the 1897 East Africa Order in council applied certain Indian Acts which were a codification of English law, mainly to Europeans. Such a move was aimed at enabling the Europeans to lead a life identical to that which they had left in England, by having the laws they were used to, applying to them. The other side of the coin was that they should not be subjected to customary law, the law of the 'uncivilised'. In fact it was not until the passing of the Judicature Act in 1967 that non-Africans were made subject to customary law[15].

Isolating the Europeans from the operation of customary law was not enough. Laws were to be enacted aimed at anglicising customary law, by altering or modifying it, to suit English principles of justice and morality. It is to be remembered that the principle of Trusteeship was used to rationalize and justify the colonial policy. This principle called for the preservation and use of indegenous institutions and their development towards more 'civilised' values[16]. To achieve such development, the legislator provided for a Repugnancy clause. The clause stated that customary law was only applicable so long as it was not repugnant to justive and morality[17]. Of all restrictions, this clause was the most sweeping. Customary law could

hardly be repugnant to the community which still accepted it, thus the justice and morality of the colonial power was to provide the standard[18].

The Legislator regarded customary law, which is unwritten, as inferior to imported laws which were generally written. The repugnancy clause provided further that customary law would not apply where it was inconsistent with written law. Therefore whenever there was a conflict between it and the imported laws, the latter prevailed. In colonial reality customary law had to be subject to the law of the 'civilised', the written law.

In keeping true to the 'civilising mission' the Legislator further provided legal means by which the African could opt - out of customary law and get some enlightenment from the English type of law. In 1904 the Native Christian Marriage Ordinance NO. 9 was passed. Its main object was to provide a simplified procedure for African christians who wanted to contract statutory marriages. The 1902 East Africa marriage ordinance was considered too complicated for the Africans. Provision was also made to enable the Africans to convert their customary marriages into statutory ones under the ordinance.

The few examples outlined reflect the Legislator's low attitude towards customary law. To him it was a law to be applied sparingly. This is evident from the many restrictions he imposed on it. It is of some interest to note that though a legislative council was set up in 1906, it was not until 1944 that an African was nominated to it. In the meantime, he was represented by missionaries who considered to know the African better than he knew himself.

Having laid down the laws, it was left to the Judiciary to interpret and apply them.

THE JUDICIARY

The Judiciary had even more adverse views about customary law. At the outset it is to be noted that most of the colonial Judges and Magistrates had very little knowledge of the conditions and customs of the Africans. They did not quite understand customary law either. This was partly because of their British legal training and partly due to the fact that they were transferred all over the Empire. Therefore they never stayed long enough in one place to get to understand its laws. A further reason may be that they were not the best Judges from Britain. Lord DEVLIN describes the colonial Judges as follows:

> "Those who brought the gift (British justice) to these countries were the second-best, for naturally the best remained at home, their social contribution to the countries in which they served was nil; they were, if you like, the

judicial blimps[19]."

The judges and magistrates tended to apply the law they had grown up with, English law, and which they felt more at home with. This was so even where they were supposed to apply customary law. Armed with such ignorance they set out to apply customary law.

In regard to a customary marriage the colonial Judges viewed them as second-rate. In fact such marriages were regarded as nothing better than promiscuous sexual immorality. Validity was refused to them as they did not conform to the classical definition of a marriage given in HYDE V. HYDE[20]. In that case marriage was defined as a voluntary union between two persons for life, to the exclusion of all others. The judicial attitude toward customary law marriages is well illustrated in R. V. AMKEYO[21]. In that case the issue was whether a customary law marriage was a marriage for the purpose of the Indian Evidence Act 1872 which made the spouse, an incompetent witness for the prosecution HAMILTON C.J. held that such a marriage was not a valid marriage for the purposes of that Act. Among the reasons he gave for his decision were that, the woman was not a free contracting agent, this being done through her parents. He further said that there was no limit to how many wives a man could have and he retained the power to dispose of them. He had the following to say of a customary law.marriage[22].

> "In my opinion, the use of the word 'marriage' to describe the relationship entered into by an African native woman of his tribe according to tribal custom is a misnomer which has led in the past to a condiderable confusion of ideas. I know of no one word that correctly describes it 'wife-purchase' is not altogether satisfactory, but it comes smuch nearer to the idea than that of 'marriage' as generally understood among civilised peoples".

The decision has been followed in other cases. In ROBIN V. REX[23] the point on appeal was that the wife's evidence had been wrongly admitted. The court held that the English rule of non-admissibility of a wife as a witness against the husband, never applied to polygamous marriages.

The courts employed the repugnancy clause to disallow the application of customary law in matters clearly falling under it. In one such case the Applicant had married Pauline in 1935 according to Roman Catholic rites but she deserted him almost immediately. Subsquently she had eight childred with other men. The applicant sought the return of Pauline and

the eight children, as they belonged to him under customary law. The court dismissed the action holding in effect that such a customary law was contrary to natural justice. It is interesting to note that the justice referred to was justice" ..... as we people in England see it[25]".

The residual law clause was used to apply English law without regard to the local circumstances, as required by law. The judicial attitude as to the superiority of English law over customary law is evidenced by the fact that when an African carried out transaction under English or stature law they were reluctant to let him fall back and rely on customary law. Once the African had entered the purview of the law of the 'civilised' the courts would not let him backslide into that ot the 'uncivilised'. This was illustrated in one Ugandan case[26]. In that case an African christian married a woman under customary law. She committed adultery with another person. The husband instituted criminal proceedings for Adultery. The Ugandan High Court quashed the conviction holding that a marriage between christians celebrated under Native custom was a nullity.

English procedural laws were applied to suppress customary law. In one Kenyan case[27] the plaintiff, an African sought to recover a part of the dowry returnable upon the dissolution of marriage. The events giving rise to the action occurred about 1899 or 1900. The lower court applying customary law had given judgement for the plaintiff. On appeal the court held that the Indian Limitation Act 1877 applied to bar the action as stale. Sir J. W. BIRTH, C.J. referred to S.14 of the Native Tribunal Rules 1913 by which the court is bound by procedure applicable to suits and stated ...."Such procedure includes the relevant law of limitation and it is immaterial whether or not either or both litigants are natives[28]".

No doubt the Judiciary displayed its contempt of customary law in many ways. The few illustrations outlined, however, suffice to reflect their attitude towards it. One wonders why the courts, with due respect, failed to follow such wise reasoning as shown in R.V. OUMU s/o ACHADA[29]. In that Ugandan case, the court held in effect that the English law definition concerning marriage must be adapted to suit the social condition of people concerned; that the terms husband and wife included parties to a customary marriage.

Thus during the colonial rule, customary law was subjected to so many restrictions. The Legislator, the Executive and the Judiciary being part of the same colonial system, saw it as the law of the primitives, to be replaced by the law of the civilised, English law. Such supperssion of customary law continues today.

B. APPLICATION IN INDEPENDENT KENYA

The laws which were applying in Kenya during the colonial rule were retained by the Kenya Independence Order in Council of 1963. S.4 (1) of the Order retained all existing laws subject to the modifications made by the constitution and those which might be made in future. Such existing laws included customary marriage laws. Today the legal basis for the application of customary law is to be found in the Judicature Act[30], the Magistrates Court's Act[31], and the constitution[32]. Various other statutes also recognise the validity of transactions carried out under customary law.

The Judicature Act through S 3 (2) makes provision for the application of customary law.

> "The High Court and all surbodinate courts shall be guided by African customary law in civil cases in which one or more parties is subject to it or affected by it ...."

The section though it has its own pitfalls, has abolished the racial discrimination that existed in the colonial era. During that time, customary law only applied to the Africans. Thus in effect, an African who had his right under customary law infringed by a non-African might find himself without a remedy, for the non-African could not be subjected to such law, but under the section, customary law will apply to a non-African who comes into contact with it. The words " .... affected by it" in the section, can only refer to a non-African who might be affected by a customary law transaction for a particular purpose and not necessarily be subject to it[33]. The section, however, leaves much to be desired.

According to it courts are not bound by customary law, but are only to be guided by it. This gives the court a discretion as to whether or not to apply it, a discretion which the courts have not failed to exercise usually to the detriment of customary law[34]. The section further provides that customary law shall only apply where it is not repugnant to justice and morality. As argued earlier this clause was inserted by the colonial Legislator to restrict the application of customary. The section does not specify whose justice it refers to and one wonders if it is stil justice as people see it in England[35]. It is submitted that the section displays the low opinion that the Legislator had of customary law. Courts have given effect to such opinion by refusing in some instances, the character of law to customary law and demanding that it should be proved like any other fact[36].

As if S 3. (2) of the Judicature Act has not put enough limitations on customary law, the Magistrates court's Act introduces further restrictions. According to S.2 of the Act, a claim under customary law is defined to include such matters as marriage, dowry, divorce, maintenance and custody and guardianship of children. The section uses the word 'means' rather than 'includes', showing it is intended to be exhaustive. In fact it has been held to be exhaustive[37]. The main quarrel with the section is that it leaves out many matters which properly fall under customary law, for instance customary Tort and Contract.

COTRAN[38] discussing the section is of the opinion that it could not have been the draftsman's intention to exclude other matters not covered by the section for this would lead to absurd results. He submits that since there is no such definition in the Judicature Act which is later in time to the Magistrates Court's Act, then a claim under customary law must necessarily include all subjects recognised by it. NOWROJEE[39] writing on the same section, states that it is exhaustive supporting himself with court decisions. He however, suggests a remedy for any litignant wishing to enforce a claim outside the scope of the section. He may do so in the High Court which the Magistrates Court's Act has no application. The present writer, though supporting NOWROJEE'S suggested remedy concurs with ~~as~~ COTRAN, an emminent writer on customary law and presently a Kenya High Court Judge. The present writer is of the view that to hold the section as exhaustive would be to put unnecessary restrictions on customary law. This law has been suppressed and down-graded since the colonial days. It is time the Legislator treated it with some respect.

Though the two Acts have displayed much disrespect in their treatment of customary law, the constitution, the supreme law, treats it with dignity. This is especially so in the area of customary personal laws. S. 82 (4) (c) of the constitution provides that the application of customary law with respect to any matter, to a person to the exclusion of any law, shall not constitute discrimination. S. 82 4(b) goes further to provide that the application of ones personal laws, which include marriage laws, does not amount to disrimination. In effect this sub-section puts all marriage laws at par and makes their application, a constitutional right. Thus if a court sought to exercise the disretion given to it under S. 3 (2) of the Judicature Act, to refuse to apply ones customary marriage law, the person may challenge the courts action as unconstitutional. S. 3 of the constitution declares any law which is inconsistent with it, void to the extent of its inconsistency. KAMAU, a keen student and writer in customary law, rightly argues that the section has an amending effect[40] on all other laws.

It is submitted that it would be unconstitutional for a court to apply other law to a transaction which ought to be governed by customary law. Mr. Justice MILLER has rightly stated in one case that it is wrong to conceive the idea that customary law marriages are inferior to those protected by statute[41].

There are other Acts which recognise the application of customary law and the validity of transactions carried there in. Under the Evidence Act[42] courts are directed to take judicial notice of customary law, just like of any other laws. The marriage Act[43], through S. 36 recognises the validity of a customary law marriage.

As stated earlier, the attitude of the Legislator, the Judiciary and the Executive towards customary law remains substantially the same as it was during the colonial rule. The fore-going discussion supports this view especially in relation to the Legislator. Courts have continued to apply English or statute law where customary law is supposed to apply. In WAMBWA V. OKUMU[44] the court applied the Guardianship of Infants Act instead of customary law on a question of custody of children. Clearly customary law ought to have applied by virtue of the Magistrates Court's Act[45].

As regards the Executive, its attitude is demonstrated by the appointment of two commission[46] and their recommendations. In 1967 a commission was appointed by the President to examine the existing marriage laws and find the extent to which they could be unified. Its recommendations were to the effect that such unification could only be achieved if English marriage law could be applied in place of the three other types of marriages laws, customary, muslim and Hindu. This was no doubt an emphasis on the superiority of English marriage law. Another commission on succession was appointed in the same year, on similar lines. Its recommendations resulted in the enactment of the Law of succession Act aimed at replacing the current four succession laws.

Amidst such suppression, however, customary law, especially on marriage has held its own. Most Africans still regulate their lives in accordance with it. READ J.S.[47] observes that the juridical foundation for the enforcement of customary law in the colonial time, lay in the support it enjoyed form the people. The same can be said of its application today.

KIKUYU CUSTOMARY MARRIAGE

Having examined the application of Customary law in Colonial and independent Kenya, it is appropriate here to look at a Kikuyu Customary Marriage. The chapter will open with an outline of the general characteristics of such a marriage. These will be followed by a brief but detailed analysis of the essentials and formalities that Constitute it. Particular attention will be drawn to the various criticisms which have been levelled against certain aspects of such a marriage and an examination of their validity.

Marriage in an African Society, which is a permanent Union between a man and one or several Women is the central institution upon which all others are dependent. This idea is well brought out by Professor MBITI who, writing of the African Marriage states:

> "For the African peoples, Marriage is the focus of existence. It is the point where all members of the Community meet; the departed, the living and those yet to be born. In the Marriage drama, there are no Spectators, except Actors and Actresses."[1]

According to him to die without getting married and with no children is to be completely cut off from Society.

What MBITI saya of the African Marriage is so descriptive of the part marriage plays in the Kikuyu Community. Every Kikuyu man or woman, sees marriage as a duty to himself, his family and the clan. Marriage is looked upon as a part of ones life. It is unheard of traditionally for one to decide not to marry. KENYATTA[2] writing about the Kikuyu states that it is the desire of each person to build up his own family and so extend his fathers family. The value and respect which the Kikuyu have for marriage is further illustrated by the various preparations one has to undergo, so as to be ready for it. From a very early age, the girls spend time with their mothers and other elderly women. This way they learn the duties of a wife and get instructions on how to behave when they get married. Similarly, the boys are coached by their fathers and other elders of the ways of running a homestead. These instructions are particularly emphasised during the circumsicion ceremony, when the boys and girls are educated on all aspects of marriage.

Though Marriage still plays a very important role among the Kikuyu the instructions that went with it are slowly loosing their place. This has come about due to education. The parents assume the boys and girls have learnt about Marriage at School. In any case the boys and girls are likely to disregard such instructions preferring to go by what they read in love stories. The result has been an increase in broken up marriages since the parties are not properly prepared for them.

Amongst most African Communities, polygamy is practised and the Kikuyu are no exception. Polygamy is an integral part of their social life and a man may marry as many wives as he can support. The institution is connected with the love for many children. Therefore the more the wives that one may have the greater the chances of getting many children and the higher the prestige. It is also considered that for a man to control and manage effectively the affairs of a large household, this is an excellent testimony of his capacity to look after the interests of the tribe.[3] It may be mentioned here that Marriage among the Kikuyu is looked upon as producing a duty to procreate.[4] Sexual intercourse therein is regarded as an act of procreation rather than one of pleasure only. The desire for many children arises out of the need to continue ones family name. In pursuance of this, the children are named according to the souls they represent. For instance the first son is named after his paternal Grandfather, So that the Grandfather may be remembered long after he is dead. Professor MBITI[5] gives a clear explanation of the role that procreation and naming of children, plays in an African Society. He describes procreation as the process by which each individual contributes the seeds of life towards man's Struggle against the loss of original immortality.

Polygamy is seen as a sign of wealth since only a rich man may afford to pay dowry for many wives. It follows that the rich man may marry as many wives as he can support. It is said that one Kikuyu Chief had Sixty Wives.[6] The question of dowry will be discussed later in the Chapter.

There are certain essential and formalities which must be complied with in order to Constitute a valid Kikuyu Marriage. The essentials constitute what may be described as the legal requirements for the validity of the marriage. The formalities refers to the procedures through which the essentials are fulfilled. The formalities are nearly of equal importance since where they have not been met, this may be prima facie evidence that the essentials have not been complied with. In the final analysis, however, the validity of the marriage will depend on whether the essentials have been fulfilled.

As stated earlier, Marriage is the central institution round which others revolve. For instance, it will determine the legitimacy of the children thereof and their succession rights. It therefore becomes necessary to be able to judge in what Circumstances a marriage may be said to have occurred. The standard procedure for negotiating the formation of a marriage by way of betrothal, may be described in five stages. Before these procedures or formalities are examined however, it is necessary to determine whether the person has capacity to contract a marriage. The essentials of a valid Kikuyu Customary Marriage may be discussed under three heads, to wit, Capacity, Consent and Dowry.

CAPACITY

For a person to have capacity to contract a valid Kikuyu Customary Marriage, he must have reached a certain age. In case of a girl, she must have reached menstruation[7]. For both girls and boys, however, capacity is determined by whether or not they have been circumcised[8]. There is no fixed age for this Ceremony but the participants will normally be 18 years and above. Generally the girls go through the Ceremony at an earlier age than the boys. Circumcision is looked upon as a deciding factor in giving a boy or girl the status of manhood or womanhood. Through this Ceremony the young are accepted into the adult world. During the Ceremony, the participants are instructed by their Elders and parents on how to behave when they become married men and Women. After Circumcision the person is accepted as a responsible member of the tribe able to carry out all the duties of an adult. This explains why the Ceremony is

chosen as deciding factor that the person has reached a marriageable age. That the ceremony is a prerequisite to marriage is illustrated by an account given by KENYATTA[9] of some Kikuyu men who married uncircumcised firls from Mombasa. When these men returned home, they found their parents refusing to recognise such marriages,. The ground for refusal was that the purported wives had not fulfilled the ritual qualification for matrimony - Circumcision.

Of late, however, circumcision has started declining in importance especially in relation to girls. This has come due to the teachings of Missionaries who consider circumcision of the girls as a barbaric practise.[10] They have no doubt succeeded in convincing their followers of the undesirability of the practise. However, the ceremony remains a very strong factor in determining a man's capacity to marry. It would be unthinkable for an uncircumcised man to enter into a marriage. The ceremony has also lost much of its significance. It has been reduced to a mere physical operation. Much of the education that went it has been ignored.

The parties to a Kikuyu Customary Marriage must have capacity, not only to marry but also to marry each other. Here capacity is used to refer to a situatio where the parties may be unable to marry each other because they fall within prohibited degrees. Such prohibition may be based on consanguinity or Affinity.[11] An objection based on Consanguinity means a man may not marry any woman to whom he is related in the direct line of descent. Therefore he may not marry or cohabit with his grandmother, mother, daughter or his parents sisters or first cousins. Prohibition based on Affinity demands that the Man should not marry or cohabit with his Wife's mother, grandmother or sister. Marriage is also not allowed between children of blood-brothers.[12] It may be noted that prohibited degrees among the Kikuyu cover a very wide area. This is especially so because Marriage brings together members of the two different clans where each spouse comes from. Such members are then prohibited from marrying each other.

Apart from the restrictions based on capacity, either on the grounds of age or prohibited degrees, there is a further limitation. A married ~~Woman~~ woman has no capacity to contract a valid Marriage unless and until she has obtained a divorce. This limitation does not apply to a husband, as it would contradict the polygamous nature of the marriage. Statute law has provided a further qualification on the capacity of parties to a Kikuyu Customary Marriage. The Marriage Act[13] demands that none of the parties intending to celebrate Marriage under it should have married under Customary law. The Act makes it an offence for a person already married under Customary law, to contract a Statutory Marriage.[14] This offence of bigamy, however, is a dead law as it is rarely enforced. Bigamy contradicts the polygamous nature of the African Marriage. It is no wonder then that it is rarely enforced.

Once it has been proved that the parties to the intended Marriage have capacity to marry(age) and to marry each other (not within prohibited degrees) the next step is to determine whether there is consent.

CONSENT

Prior consent of the parties to the intended marriage is necessary.[15] So too is the consent or permission of their respective parents. Special procedures are provided to ensure that the consent of the parties to the Marriage, especially that of the girl, is obtained genuinely. These will be discussed later under formalities. The consent of families is indicated by their participation in the various formalities of the marriage, especially in paying and accepting dowry. This requirement of the families consent illustrates the Communal nature of a Kikuyu Marriage. Marriage is seen as bringing together not only the parties to it, but also their respective families. Therefore the need is felt to give the families a chance to indicate their consent. It may be pointed out here that such consent is crucial to the marriage. If withheld that may well be the end of the intended marriage. However, the parties to it, may resort to elopement in an attempt to force the families' consent.

Having established that the parties to the marriage have capacity and there is consent, the next question is whether or not dowry has been paid or promised.

RURACIO

In many African Societies, it is Customary as a preliminary to Marriage for some property to be given on behalf of the prospective bridegroom, to the relatives of the bride. The Kikuyu are no exception. Such payment has variously been referred to as Bride-price, Bride-wealth, marriage Consideration etc. None of these terms adequately potrays the significance of the payment, since inherent in them is the idea of sale.[16] The present Writer therefore preferes to use the Kikuyu word for such payment - Ruracio.

Ruracio is the payment in the form of livestock property or money, which is given by or on behalf of the bridegroom to the family of the bride. This payment is the very Cornerstone of a Kikuyu Customary Marriage. When a man reaches an age at which he can marry, the first major question that occupies his mind is whether or not he can afford the Ruracio. Alternatively he considers whether his father may be able to pay it for him. There is no fixed amount of Ruracio as this is determined by negotiations between the two families. It is normally paid in instalments as it is considered ill-luck to bring it all at one go. Any livestock given in Ruracio must be replaced if it dies. The responsibiliyt for paying it lies on the bridegroom. However, the father or guardian is legally bound to supply the payment for his son's first wife, where able to do so.[17] Other relatives may also contribute towards Ruracio.

The payment of Ruracio is necessary in order to give validity to a Kikuyu Customary Marriage. At least some amount of Ruracio must be paid or promised. The payment establishes the affliation or legalcontrol of the Union.[18] Where some Ruracio has not been paid or promised to be paid, the children of the union belong to the woman's family. When divorce takes place, the man has an option either to remain with the children and forego Ruracio or Vice Versa.[19]

Return of the payment constitutes a divorce under Kikuyu Customary law.

Besides its legal significance, the payment serves many other purposes. It is a token of gratitude to the bride's family for their care in bringing her up. Ruracio serves as compensation to the bride's family for the alienation of her child-bearing capacity.[20] As stated earlier, where it has not been paid or promised, children of the union belong to the woman's family. In addition the payment confers stability on the marriage.[21] In a marriage where Ruracio has only been promised but not paid, the wife may leave the husband at the slightest excuse. If it has been paid, however, she will be in less haste to leave, knowing it might be difficult for her family to get the Ruracio for refunding to the husband. The husband too feels more confident to control the wife, once he has paid Ruracio.

The three essentials or legal requirements, Capacity, Consent and Ruracio are no doubt necessary in the formation of a Kikuyu Customary Marriage. Of nearly the same significance are the formalities through which such essentials are fulfilled.

FORMALITIES

The formalities through which a Kikuyu Customary Marriage by way of betrothal is formed, may be discussed in five stages.[22]

a) The first may be described as the proposal stage when the man's request is conveyed to the girl by one or more of his age-mates. It may be observed here, that the man and the girl will most likely have met before, say in dances. In fact after boys and girls have been circumcised, they are at liberty to visit each other. When the man and his age-mates go to the girls' home to a make the proposal, her mother if present finds some excuse to go away. This gives them the chance to discuss the proposal freely. If the girl consents, she tells them that the final decision rests with her parents. The man then reports the matter to his parents.

Meanwhile before the next stage, the parents on either side investigate the Character of the parties to the proposed marriage, and whether or not they have capacity, where either or both parties are found to be lacking Capacity the matter ends there. Past disagreements between the families themselves may lead to parents of either side refusing to give consent. In addition where either party to the proposed marriage is found to be of bad repute, this may be the end of the matter.

b) In the second stage the proposal is now conveyed to the girl publicly. The man's family prepare some beer, Njohi ya Njurio- the beer for asking the girl's hand. The beer is taken to the girl's home and the purpose for it stated. She is asked by her family whether she agrees to the proposal. She indicates her consent by fetching a horn and filling it with the beer. She then sips a bit of the beer and gives it to her parents, after which the parties may proceed with the ceremony. Refusal to fetch the horn and to sip the beer indicates lack of consent to the marriage.

c) Where the girl has consented, the first instalment of Ruracio is delivered. The amount as indicated earlier is set through negotiations between the families. It is to be noted that the payment of Ruracio may continue for a long time, even after the death of the husband responsible for paying it. In such a case the payment would be made by the MURAMATI, the first son who becomes a Trustee of the family property. After a substantial amount of the Ruracio, has been paid or promised, a date is fixed for the next stage.

d) This may conviniently be decribed as the Ngurario stage. Ngurario means the pouring of the blood of Unity. During this ceremony a ram provided by the husband to be, is slaughtered. The girl's consent is once again sought. She indicates it by fetching the knife for slaughtering the Ram, and eating its roasted Kidneys. After this ceremony, the betrothal is complete.

Betrothal under Kikuyu Customary Law does not give the parties to it, any rights they did not have prior to it.[24] For instance the fiancee is liable to pay compensation to the fiancee's family if he makes her preganant and does not marry her. Furthermore, if the fiancee becomes pregnant by a third party, compensation is due to her family not to the fiance. No special procedures are necessary to bring the betrothal to an end. It may be determined by death, change of mind or discovery that the parties are within prohibited degree. The fiance is entitled to a return of the Ruracio upon termination of the betrothal

e) The fifth stage consists of a mock capture of the fiancee. This is done by girls of her age-group or the fiance's female relatives. The day for mock capture is kept secret and she may be seized on her way to the river or in the garden. All this time, the fiancee struggles crying loudly and pretending she does not want to get married. The ceremony is aimed at letting all the neighbours know that so and so's daughter has become somebody's wife. There follows eight days of mourning during which she is not allowed to appear in public. Her age-mates keep her company singing 'sad' songs. The songs signify the loss of one of their members, since she has now joined a more respectable status in the tribe. After the eight days she visits her home led by a young girl of the husband's family, as if blind. During the visit, she receives such gifts as cooking utensils and hearth stones from her parents. She returns to her new home on the same day and the marriage is consummated.

In the case of MWAGIRU V MUMBI [26], the Kenya High Court discussed these formalities. In that case the Plaintiff sought a declaration that there was a valid and subsisting marriage between him and the Defendant. (The parties to the suit were Kikuyu) The Plaintiff adduced evidence to show that all the essentials and formalities of such a marriage had been complied with. In his evidence the Plaintiff indicated that the Defendant refused to sip some beer during the fourth stage. ~~also~~ (Ngurario) Also She did not fetch the knife for slaughtering the Ram or eat roasted Kidneys. On her part the Defendant contended that her consent was never sought or given; that she was not present at the vital stages necessary for a Kikuyu Customary Marriage. The Defendant had also subsequently gone through a form of Marriage before the District Commissioner at Nakuru with another man. The issue before the Court was whether there was a valid Kikuyu Customary Marriage, between the Plaintiff and the Defendant. Mr. Justice MILLER came the conclusion that the second and fourth stages in which the girl signifies her consent are very crucial for a valid marriage and held:

(i) the signifying of consent by the bride is necessary at two stages of the ceremonies which are vital to a regular Kikuyu Customary Marriage.

(ii) On the evidence of the Defendant, she was not present and consenting in at least one of these stages and the Plaintiff had failed to prove his case.

As stated earlier the formalities of such a marriage were well analysed.. The court relied heavily on the expert opinion of Professor G.S. MUNORU, the present Dean of the Law facaulty. Mr. Munoru has done a lot of research in the field.

From the foregoing account, it is clear that a Kikuyu Customary Marriage goes through so many formalities. This indicates the importance attached to the marriage institution. The formalities are aimed at ensuring that the parties to the marriage get a chance to demonstrate their intention clearly.

For instance, the girls' consent is sought in two stages, so as to give her an opportunity to exercise her will freely. The formalities also gives the families from both sides a chance to meet and get to know one anothe. In addittion they give the marriage the necessary publicity.

CRITICISM LABELLED AGAINST CUSTOMARY MARRIAGE

Certain aspects of Customary Law marriages have come under heavy Criticism mainly from the Colonial Judiciary and the Missionaries. Principally they have said of Customary Law marriages.

(a) that the wife is not a free contracting agent.

(b) that such marriages are merely wife - purchase.

(c) that their polygamous nature is unacceptable among civilised peoples.

(d) that they are of an impermanent nature.

Having discussed the essentials and formalities required in the formation of a Kikuyu Customary Marriage, it is appropriate here, to analyse such criticisms in relation to such a Marriage.

a) The notorious case of R V AMKEYO[27] gives a clear indication of the Judicial attitude towards Customary Marriages in the Colonial days. Among the reasons that HAMILTON C.J. gave for labelling such marriages as merely "Wife-Purchase" was that the woman is not a free contracting agent. He said that the Marriage would normally be carried on with her father's or brother's consent, her own consent being considered unnecessary. Looking at the essentials and formalities of a Kikuyu Customary Marriage it is easy to see that the above arguments do not hold water. As discussed earlier the girl has so many chances to display her consent or lack of it. She may even refuse to get married after the conclusion of the betrothal.[28]

b) Furthermore HAMILTON in describing a Customary Marriage as 'Wife-purchase' attributed a Commercial nature to the payment of dowry. An examination of the reasons for Buracio earlier discussed displays that it was never of a commercial nature. It therefore becomes difficul to understand the grounds, if any, upon which the description 'Wife-purchase' is based. Furthermore, the institution of dowry, as PHILLIPS[29] observes is not peculiar to Africans but existed also in the Western Societies. A Ugandan Commission on Marriage Divorce and the status of Women has rightly summarised the question of dowry as follows:

> " In all societies and all over the World, when people marry, something passes from one side to the other..... Marriage settlements and gifts in contemplation of marriage are known and important feature of many English Marriages .... Indeed in one case Proscott V. Fellow (1958) A.C. 260 a woman settled as much as fifteen thousand pounds on her husband in consideration of the marriage. It has never been suggested that this woman bought her husband.[30]
> (Emphasis Mine)

It is interesting to note that a year later the learned Chief Justice seemed to recognise a Customary Marriage as a Marriage.

c) The polygamous nature of Customary Law marriages has been subject to much criticism. Polygamy is in sharp contrast with the teachings of the missionaries, who see marriage as a permanent union between two persons. The missionaries were instrumental in the passing of the present day African Christian Marriage and Divorce Act, to enablle their converts to contract monogamous marriages. An interesting account is given among the Kikuyu which gives a dramatic illustration of the Missionaries attitude towards polygamy.[31] A man who had two wives under Customary law applied for a job at the parish. His application was turned down. A few months later one of his wives died and he re-applied for the job, this time successfully.

The missionaries met with much resistance for their adverse views

about polygamy, a social institution long cherised among the Kikuyu. ROUTLEDGE writing about the Kikuyu quotes a statement made by one Kikuyu man about the missionaries and their attitude towards polygamy. He said:

> " The Missionaries tell us that a man should have only one wife. If they teach such nonsence they may as well go away".[32]

The judicial attitude towards polygamy is well illustrated by AMKEYO's case. Even today the judicial attitude does not favour polygamy. In AYOOB V AYOOB,[33] the court seems to have considered that once a person contracts a monogamous marriage he must not be allowed to back slide into a polygamous one. The Court held that a Statutory Marriage could not be converted into a potentially polygamous muslim marriage.

The attitudes of the Courts and the Missionaries towards polygamy indicates a complete lack of understanding as to its significan among the Africans. Among the Kikuyu as argued elsewhere polygamy is very useful when one considers the vital role that children play in Marriage. If a man dies without a male child his family group comes to an end. However, polygamy would ensure that a man may have many children to continue his name. Thus where for instance, the first wife could not bear children, or only gave birth to daughters the husband would be able to take another wife or wives to remedy the situation. But the Colonial Courts and the Missionaries took upon themselves the duty of condemning any African institution which showed any divergence from their own institutions. Such is a sad state of affairs.

It is submitted that polygamy is on the decline. The Kenya Commission on Marriage and Divorce was of the opinion that it will soon die out, and it is in the National interest for it to do so.[34] The Commission further recommended that the law should do all it can to discourage it. The present writer is of the view that polygamy as practised today serves no useful purpose. More will be said about it in the conclusion.

d) Customary Marriages have aslo been branded as impermanent Unions. In AMKEYO's case the Court was of the opinion, that in such marriages the husband possesses the power to dispose of his wives, which he may exercise at his own discretion. In BISHAN SINGH V R,[35] the Court did not hesitate to label Customary marriages as impermanent. It said:

> " When people profess a religion which teaches mongamy and the sanctity of marriage, they must be taken ~~xx~~ to have abandoned the right to contract non-permanent unions such as are recognised and permitted under pagan Customs"
> (Emphasis mine)

~~Xxxix~~ With due respect, it is submitted that such a view impermanenty if applied to a Kikuyu Customary Marriage, would be erroneous. For in such a marriage there are no set grounds for divorce. Instead the guiding principle whenever some disagreements arise is reconciliation. Normally when the husband wants a divorce he sends the wife back to her parents home accompnied with two elders from his family. The elders are sent to go and explain to her family why her husband wants to divorce her, In the same way a wife who wants to divorce her husband runs away to her parents home She is then sent back with two elders, to her husband. The Elders from either side meet and try to reconcile the parties. If they fail the matter is referred to the village Elders, It is only where reconcilition beomes impossible that the marriage may be dissolved.

It is worthwhile to note that the divorce may be granted either by the families or by a Court.

If one were to compare a Kikuyu Customary Marriage to an English one, he would be likely to refer to the latter as impermanent rather than the former. The reason is that an English marriage which is an affair between two persons is easier to dissolve. All that the Petitioner is required to do is establish a ground for divorce. A Kikuyu Customary Marriage, however, is an affair between families who feel duty-bound to try and keep it subsisting for as long as possible. The fact that there are no set grounds for divorce makes it more difficult to dissolve such a marriage.

Having examined the essential and formalities necessary in the formartiion of a Kikuyu Customary Marriage, it is now apporpriate to discuss other ways through which a marriage may be formed. These includes widow inheritance, Levirate Unions, Woman to Woman Marriage and Elopement. We now turn to discuss them briefly and elopement in detail in the next chapter.

MARRIAGE BY ELOPEMENT

Apart from the ordinary Kikuyu Customary Marriage in Chapter II there are various other ways through which a marriage may be formed. These may be referred to as special types of marriages.[1] They comprise of Elopement, Levirate Union, Widow inheritance and Woman-to-Woman Marriages. The Chapter addresses itself to Marriage by elopment, but the other types will be discussed briefly. It is worthwhile to note that under Kikuyu Customary law, a Widow has many alternatives upon the death of her husband. Shemay choose to remain a Widow and maintain herself on her deceased husband's property. She has a life interest in the property.[2] Alternatively she may decide to enter into any of the Special type of Marriages.

(a) LEVIRATE UNION

When a husband dies, the widow may remain at his home and enter a levirate Union. This is a relationship whereby a brother of close relative of the deceased takes the Widow as a wife. He does this in order to raise up children with her for the deceased. Such children legally belong to the deceased husband. They inherit from him, not from the levir.

(b) WIDOW INHERITANCE

Here a Widow is as it were inherited by the younger brother of the deceased. She becomes his wife for all purpose, abandoning her late husband's home. Children born to the Union belong to the Inheritor and not to the deceased. Usually this option is only available where she had no Children with the deceased.

(c) WOMAN-TO-WOMAN

In this situation a Widow, if incapable of bearing children, marries a wife to raise children for her late husband. For the purposes of raising up the children, she invites either the deceased's brother or a close relative. The widow has to comply with the ordinary Kikuyu Customary Marriage discussed in the last Chapter.

These special types of marriages have been subject to criticism, especially Levirate Unions and Widow inheritance. They have been treated as affording evidence that Customary law treats women as Chattels. For instance the Commission on Marriage and Divorce, gave Widow inheritance as an example of a feature of Customary law which it saw as derogating from the dignity and status to which Women are entitled.[3] The critics argue that since the Woman may be inherited, she is just like any other property.

In relation to the Kikuyu, such criticisms may be found to be erroneous when one considers the part that these Special types of Marriages are supposed to play. They provide ways through which a Widow may be maintained. In addition they make it possible for the deceased to have children raised for him by a Levir, to continue his name. It may be noted that she is not forced into any such Marriages - she has a discretion. In fact she may choose to return to her father's home, to live there, or marry another man. In such a case a part of the Ruracio will be returned to the deceased husband's family. And those who argue that a Woman may be inherited just like any other property, ought to be reminded that it is not possible for the deceased husband to dispose of his wife by a Will.

MARRIAGE BY ELOPEMENT

Among the various ways by which one may Marry under Kikuyu Customary law is through elopement. The Kikuyu name for marriage by elopement is Uhiki Wa Gukirania. Before going into a discussion of it, it is worthwhile to note that this kind of marriage was very rare in the old days. In fact it was not encouraged. Perhaps the main reason for a negative attitude towards such marriage is that it was never the fashionable thing to do. As will be shown later people normally resort to a marriage by elopement due to some hindrances which stand in their way. Sometimes the problem may be lack of Ruracio - the parties to the intended marriage may feel they cannot wait until they get it, before commencing a married life. At other times the hindrance may be the lack of consent from their respective families. As such a marriage by elopement is not really the kind of marriage the parties would desire to contract. Instead they are forced into it by circumstances. It may further be added that traditionally marriage was always a family affair.[4] Thus the families would normally pull their resources together to see that their members contract the more fashionable Kikuyu Customary Marriage. Consequently Marriages by elopement then as opposed to now were very rare.

To elope is defined to mean escaping privately or secretly with a lover.[5] Elopement here is used to refer to a situation where a woman leaves her parent's home without their consent and goes to live with a man at his home, for all practical purposes as husband and wife, without having contracted a valid ordinary Kikuyu Customary marriage discussed in Chapter II. No doubt there may be many situations where a man and woman cohabit outside marriage, and even elope, but for the relationship to become a marriage by elopement, the parties to it subsequently have to comply with the requirements of an ordinary Kikuyu Customary Marriage.

Therefore the essentials of a marriage by elopement may be summarised as follows:

(a) There must be elopement i.e. the woman or girl must leave her parents home without their consent, to live with a man as husband and wife.

(b) There must be an intention to formalise the relationship as soon as practicable. Here it may be mentioned that such intention need not precede the elopement. It may develop when the persons start living together. Lack of such intention means the relationship may never be formalised, so as to become a marriage.

(c) The parties to the elopement must subsequently comply with the legal requirements of an ordinary Kikuyu Customary Marriage. In other words the intention to formalise the relationship must be given effect to.

From the above three essentials it may be concluded that the only real difference between an ordinary Kikuyu Customary Marriage and one by elopement is that in the latter, the parties to it give an undertaking to fulfil the legal requirements after cohabitation begins. In the former, however it is vice versa.

As stated earlier, elopement begins when a man and woman start living together as husband and wife without having complied with the legal requirements of a Customary Marriage. After elopement, the parties to it, or their representatives report the matter to their respective families.[6] Where there is a delay in reporting the parents of the girl send some women to go and find out with whom she has eloped. The parties to the elopement give these women a goat as a Commitment that there will be formalisation.[7] This goat is called, Mburi ya Nduma (Literally, the goat for the darkness) Afterwards the formalities and essentials of a Kikuyu Customary Marriage are complied with.

Not all elopements will subsequently end up in Marriage. At times though the parties may have an intention to marry at the commencement of their elopement, this may soon cease. In addition the parties may decline from reporting the elopement or refuse to give Mburi Ya Nduma to show that the relationship will be formalised. In such situations ,the woman's or girl's family have three alternatives. The first one is to make a claim for Ruracio from the man who has eloped with their daughter. In such a case, a meeting of the elders from both families will be held. The man will be asked to state clearly whether or not he intends to marry her, if he does then he must give an undertaking to pay the Ruracio. In addition he must go further and pay the Ruracio, within the time and at the instalments set by both families. It may be mentioned here that the payment indicates the seriousness of the man i.e. that he is committed to marrying the girl.

Where the man states that he has no intention to marry the girl, her parents may sue him for fornication.[8] Under Kikuyu Customary law any person who had sex with an unmarried girl is liable to pay compensation to her father. This right is rarely enforced nowadays. However, when a man and a girl elope and then show no intention to get married, the girl's parents may sue the man for compensation for fornicating with her. Fornication is not actionable where it is the girl's parents who are refusing to give consent to the Marriage.

Another action which the parents may take against the man, is one for pregnancy compensation. This only applies where elopement leads (as it nearly always does) to pregnancy. The compensation payable is normally is goats, and 10 Rams all valued at about KShs. 800/-.[9]

Thus a man who elopes with a girl without any intention to marry her may find himself paying heavily for the fun he had with her.

No doubt there are as many reasons why a man and a woman may decide to elope, as the number of elopements. In particular elopement may occur in the following situations:

a) Where a man and a woman decide to start living together as married people, without first seeking the consent of their families. The idea behind such a move is that if they sought the consent first, this may delay the commencement of their cohabitation. This is especially so since the parents of the woman may demand payment of part of the Ruracio as a condition precedent to giving consent. Therefore if the man cannot make the part payment immediately, the woman will not be allowed to go and live with him as his wife. Thus cohabitation will be delayed unless the two resort to elopement. Moreover even the ceremonies involved in seeking the Woman's family's consent require some expenses. Such negotiations must be accompanied by feasts, such as drinking beer and eating roasted meat. The intending bride has to meet all such expenses.

b) Where a man seduces his girlfriend who is a virgin,[10] or whose parents are strict Christians. Such seduction may lead to pregnancy. Here the girl will no doubt suffer dishonour for loosing her virginity before marriage. And where the parents of the girl are strict Christians they will consider it a terrible thing for their daughter to get pregnant outside marriage, whether or not she is a virgin. In both cases the man may decide to elope with the girl to save her, or her family from the dishonour that may follow upon the discovery of the pregnancy.

It may be pointed out here that the formalities through which a Kikuyu Customary Marriage has to pass, may take quite a long time. Hence in this situation the best way out for the man and his girlfriend to resort to elopement.

c) A third situation is where lovers who wish to marry are denied consent by their parents.[11] Such refusal may be based on some past quarrels between the respective families, or the bad Character of either the man or the girl. If the lovers feel they ought to get Married and their families are unreasonably withholding consent, they may resort to elopement. When these Lovers start living together and cohabiting, their families will realise the futility of withholding consent. In other words elopement here will be aimed at forcing the families' hand.

It is worthwhile to note here that if the consent has been withheld due to the fact that the Lovers lack capacity to marry, elopement will be of no consequence. As a result the lovers will be unable to contract a Marriage by elopement since they have no capacity to contract a valid marriage under Kikuyu Customary Law.

Some repetition at this point is necessary. In all the three situations discussed above, the relationships will not become marriages by elopement, unless and until the requirements of an Ordinary Kikuyu Customary Marriage, are complied with.

FACTORS BEHIND ELOPEMENT

The present writer has identified two primary factors behind Marriage by elopement. These are:

1. Ruracio
2. The Economic set up.

RURACIO (Dowry)

RURACIO (Dowry)

We have already examined the part played by Ruracio in a Kikuyu Customary Marriage.[12] Today however, the nature of Ruracio has changed, almost fundamentally. It has become commercialised to some extent with the passing of time. Exorbitant demands are often made which result in dissatisfaction on the part of the prospective husbands. PHILLIPS[13] writing about the place of dowry among African Communities, bears witness to the increased Commercialisation of it. He observes that during the years since the war, there has been a tendency towards Commercialisation of the transaction which was not in indegenous practise, of a Mercenary nature.

Among the Kikuyu, inflation started hitting at Ruracio around 1899.[14] During that year the Kikuyu were hit by a drought. Consequently much of the livestock died. Many people engaged in paid employemnt in Nairobi and other settled areas, in an attempt to get money for additional livestock. As a result the prices of livestock went up, as those who still had them demanded high prices. The raising of the prices of livestock, (which were the main form of payment of Ruracio) meant a rise in the Ruracio itself.

Further around 1918, the payment of Ruracio went up again. Around that time the Kikuyu ex-carrier Corps, coming from the First World War brought with quite an amount of cash. They started offering high prices for Ruracio in order to impress the parents of their fiancees. In addition people started throwing expensive marriage parties. This was especially in Church Weddings.[15] Instead of the traditionally agreed Ram and beer (say at the Ngurario) some wealthy families would slaughter additional bulls as well as provide such ds dishes like rice, bread and tea. It may be mentioned here that even where persons were married in Church, they would first have contracted a Kikuyu Customary Marriage.

Since those days, Ruracio has experienced inflationary rates comparable to those that have hit petrol. In one case concerning a Kikuyu Customary Marriage, the Court observed that the demand of KSh 9300/= for Ruracio was excessive.[16] The present writer witnessed in 1977, one case in his home area, where a payment of KShs. 25,000/= was demanded. The husband has already paid KShs. 12,000/= and promised the remainder in instalments. What a price to pay!

Though as earlier stated the quantum of Ruracio was a matter to be set by the two families, the average amount was about thirty sheep and goats.[17] During the old days again the quantum was based mainly on the prospective bridegroom's diligence. For instance she would be expected to work for long hours a day without resting. In fact one saying among the Wasukuma tribe of Tanzania is so descriptive of the factors taken into account in setting the quantity of Ruracio among the Kikuyu. The Wasukuma say that the face does not bear the child and the neck does not handle the hoe.

Today, however, many factors are taken into account in setting the quantum of Ruracio. These include the level of education of the girl - the more learned, the higher the payment. Account is also taken of the man's financial standing. Where he is a man of substance, the payment of Ruracio is high. In addition Marriage feasts have become so expensive. For instance the greater the number of cars one has at his wedding, the more successful it will appear to be. Such inflationary rates of Ruracio and other expenses involved are very scaring indeed to most would be Brides, especially where they are men of small means.

Consequently, it may be safely concluded that a man who wishes to marry but cannot afford the exorbitant payments, immediately will resort to elopement. This will enable him and the girl to live as married persons. The man has still to comply with the legal requirements of a Kikuyu Customary Marriage such as the payment of Ruracio in order that the relationship may become a marriage by elopement. But now that he has a "Wife" he may take his time in meeting the requirements.

It may be observed here that where the girl has eloped with a man willing to marry her, her parents have little control over her e.g. They cannot sue the man for fornication or pregnancy of the girl, since he has agreed to marry her. The only action against him is a claim for Ruracio, And it is in the man's interest to pay the Ruracio otherwise the issue of the union will belong to the girl's family.

The high price of Ruracio that one has to pay to get a wife is becoming the major cause of Marriage by elopement. PHILLIPS reporting on Native Tribunals 35 years ago bears witness to the connection between the payment of Ruracio and elopement. He states:

> "In the meantime, irregular unions are becoming increasingly Common; young men and girls, unwilling to go on waiting for years until the bride-price is saved up, start living together as man and wife usually, no doubt, with the intention of regularizing the union later, but none the less in defiance of Native law and of the wishes of their ideas and of the wishes of their elders." [18]

2. THE ECONOMIC SET UP

Colonialism brought with it, its own economic system at the core of which is money. As indicated above, the problem of high prices of Ruracio started with the introduction of money. The economic set-up has in effect destroyed the family, the Key institution of African Communities. It has struck a severe blow to the Communalistic ways of the Africans and made them more and more individualistic.[19]

The Kikuyu were especially hard hit by Colonialism and all the influence that came with it. Much of their land which consisted the White Highlands was taken and given to the settlers. They were put in reserves and forced to pay taxes. To get the money to pay the taxes, they had to go out to work in settlers farms and urban centres.

The impact of colonialism was so direct on the Kikuyu. Those who went to work far away in urban areas lost much of the ties they had with their families. The effect of all these was to weaken the family and clan control. People abandoned their communal life and became individualistic.

Today the movement to the urban areas has increased alarming rates. The Kikuyu being near the main Urban Center, Nairobi have continued to move in, in large numbers. In the towns they meet different people with different ways of life. In the Urban areas many things which would be frowned upon in the rural areas, take place. For instance a man and a girl may live in a relationshi similar to that of married people without having contracted a Marriage or even intending to. Such freedom is facilitated by the fact that men and women who work in the towns, have their own visit each other and do what they please.

Perhaps the main difference between Urban and rural life is the part public opinion plays in the people's lives. In the rural areas, a person is part of a bigger community. The way he leads his life is a concern of those around him. Where he does something unacceptable to the community, public opinion will denounce it. Thus social pressure is brought to bear upon the person and make him stick to the conduct that the community deems acceptable.
In the urban areas, however, public opinion has little or no place. People lead individual lives. The guiding principle appears to be "live and let live" Consequently a person may do something in the Urban areas (which would invite an unfavourable public opinion in the rural areas) and not incur public wrath.

As a result of all the social and economic changes, marriage is no longer the communal affair it used to be. The respective families of the parties to the marriage do not play an effective role. In almost all cases the husband to be has to pay the Ruracio without assistance. Education and hence job opportunities for both men and women, has also helped to give Marriage an individualistic character. Such employed people are able to provide

for themselves and therefore less dependent on their parents. Consequently the parents have less control over them. The individualistic outlook to life that education produces has led the educated men and women to regard marriage as an affair between two persons. Such a view is the exact opposite of Kikuyu traditional outlook to marriage.[20] As such the role of families in the marriage drama is now only a secondary one. It follows then that where the families refuse to give consent, or demand too much Ruracio the parties to the proposed marriage may resort to elopement.

The foregoing discussion indicates the principal causes of marriage by elopement. Unfortunately the courts in Kenya, with all due respect do not appear to be aware of marriage by elopement under Kikuyu Customary Law. Instead in every case where the question is whether or not a valid marriage exists, they have applied the test of an ordinary Kikuyu Customary Marriage discussed in Chapter II. The result has been in some cases to declare a marriage by elopement as invalid.

JUDICIAL OUTLOOK TO MARRIAGE BY ELOPEMENT

CASE v RUGURU[21] gives a clear example of an incidence where the Court has failed to recognise a Marriage by elopement and thus created many difficulties The plaintiff a European, claimed an order declaring that the claimed Defendant no right to occupy his house. The Defendant's case was that she was the Plaintiff's wife according to Kikuyu or Embu Customary Law and was residing as such. The Plaintiff admitted having paid KShs. 3000/= as part of the dowry. He insisted however that no valid Marriage existed between him and the Defendant. Applying the test of a Kikuyu Customary Marriage, the court held that there was no valid marriage. It came to such a conclusion because the Ngurario - the pouring of the blood of unity had not been performed.

That was a sad state of affairs. The parties had lived together as husband and wife for over five years. The Plaintiff had clearly indicated an intention to formalise the union and in fact paid part of the dowry. All these constitute a marriage by elopement. Though it may be said for the court that the issue of elopement as a form of Marriage was never pleaded, surely it ought to have addressed its mind to it. In so doing the hardships caused to the Defendant may have been avoided.

The position is not always that sad. In some instances the court has read a Valid Kikuyu Customary Marriage where it was a marriage by elopement. One such case is ZIPPORAH WAIRIMU V PAUL MUCHEMI.[22] The parties were of the Kikuyu tribe. The Plaintiff, claimed the custody of four children, three of whom she had had with the Defendant with whom she had lived for six years. She contended that no marriage existed between them due to non-performance of certain requirements of a Kikuyu Customary Marriage. The Defendant contended that they were married as he had paid part of the dowry after they started cohabiting. He therefore claimed Custody of the children. It was held that there is a valid Customary Law Marriage where part of the dowry is paid and the parties live like married people under Customary Law, although some of the REQUIREMENTS OF a marriage remain unperformed. (emphasis Mine) This was another clear case of marriage by elopement. As KAMAU observes, although the court did not state so in so many words, it was relying on elopement.[23]

Another such case is MARY WANJIKU V PETER HINGA[24] where the issue was whether there was a valid Kikuyu Cusotomary Marriage. The cohabitation between the Plaintiff and the Defendant commenced sometime in 1963 a year after the Plaintiff whom the Defendant had made pregnant, left school. They lived together as husband and wife until 1973 and were blessed with five children. In 1973 the Defendant started neglecting the family leaving the children without food or school fees. He also became hostile to the Plaintiff. At one time just before she left him she had a miscarriage due to violence

used on her. The Deffendant contended that he had never married the Plaintiff; that the payments alleged to be part of the dowry were loans to the Plaintiff's father. The court rejected his allegation as untrue. It was held that the Plaintiff was the Defendants wife under Kikuyu Customary law. Here again was another case of marriage by elopement. The parties to it started cohabiting prior to compliance with the legal requirements.

In some instances the court faced with a marriage by elopement has had recourse to the common law presumption of a valid marriage. This was the case in YAWE V PUBLIC TRUSTEE.[25] The public Trustee petitioned the Kenya High Court to determine inter alia whether the appelant was the widow of the deceased. The deceased was a Ugandan pilot working with the East African Airways who died in 1972. He belonged to the Baganda Community. Form around 1963 to the time of his death he had lived with the appellant, a Kikuyu, as husband and wife ahd had four children. The appellant contended that she was married to the deceased under Kikuyu Customary Law. The court of appeal reversing the high Court's decision which had held there was no valid marriage held:

(i) the presumption of a valid marriage was known to Customary law.

(ii) that the presumption had not been rebutted.

(iii) the appellant was the widow of the deceased.

With respect it is submitted that such recourse to common law was not necessary. It was a marriage by elopement known to Kikuyu Customary law.

The foregoing discussion has dealt with marriage by elopement, the situatio in which it occurs and the factors behind it. The judicial treatment of such a marriage has also been examined. It has further been observed that such marriages are on the increase though there is so little written about elopement. It is submitted that Marriage by elopement may raise important legal and social issues. A lot of harm may be done to parties who have contracted such a marriage when the courts declares the marriage as non-existent. It is further submitted that when a man and a woman live together as husband and wife

believing themselves to be married, the law has no business to declare that they are merely Boyfriend and Girlfriend. The case of THE REPUBLIC V BANDA strongly supports the above view:

> "Where a man and a woman are living together in a stable relationship but are not formally married either under a statute or under Customary law, it seems to us quite unrealistic to suggest that the depth of feeling they have for one another must be less than if they were married."[26]

C O N C L U S I O N .

Chapter I of this paper concerns itself with the application of Customary law since the Colonial days to the present. It has been showm that all along Customary law was down-graded in its application. During the Colonial era, it was seen as embodying primitive values. Thus it had to be altered to conform to more civilised values or modified. In Independent Kenya, almost the same low opinion towards it persists. In fact the object seems to be a complete phasing out of Customary, in favour of the English type of law. The principal justification for this is said to be the promotion of Nationalism. However, the real reasons appear to be, the predominance of non-Africans in the legal profession and the legal training which is based on non-African values.

Kikuyu Customary marriage was dealt with in chapter II. Attention has been drawn to various criticisms labelled against Customary law Marriages generally, especially regarding Dowry and Polygamy . The Kikuyu Customary marriage was examined in the light of such criticisms. It is clear from such examination that the criticisms display lack of understanding of the deep signifiance behind the various aspects of a Customary law Marraige. Even today there is a continued outcry against polgamy and a call for the abolition of Dowry.

Chapter III has addressed itself to Elopement. A brief but thorough discussion of marriage by Elopement, the situations in which it arises and the factors behind it has been made. An examination of Court decisions has revealed that the Courts do not seem to be aware of the existence of marriage by elopement under Kikuyu Customary law. Such lack of awareness has, in some cases, caused hardiships to the parties to such a marriage.

It is appropriate at this point to make a few submissions.

(a). Time has come when Customary law should be accorded the

respect it deserves. In this connection the provisions of the Judicature Act S.3(2) which require that to be applicable Customary law should not be inconsistent with any written law or repugnant to justice and morality, must be deleated. In addition the sub-section should be altered to make it mandatory for Courts to apply Customary law whenever applicable rather than be just guided by it, Courts too should t treat Customary law like any other law in Kenya and abstain from demanding that it must be proved as a fact. Let it be remembered that Customary law is an expression of th African philosophy of life. It embodies what they see as the good life. It is the law they know and understand.

(b). The payment of Ruracio should continue to be an essential of a valid Kikuyu Customary marriage. To abolish it would be to strike a deadly blow at the very root of such a marriage. It may be observed that problems connected with Ruracio are more anticipatory than real. The prospective Bridegroom sees marriage as a most challenging event to his manhood. Consequently he may agree with whatever high demands for Ruracio which the prospective Bride's parents make. Therefore one remedy would be for the Bridegroom to take a strong stand during the marriage Nn negotiations for fixing the amount of Ruracio. It is submitted that with the increasing number of unmarried Mothers, most parents would rather have their daughters married to avoid the extra burdens they may impose on their families if they became unmarried mothers. Consequently the parents will not stick to high prices of Ruracio whre such are likely to break the intended Marriage.

A further remedy would be introduce a ceiling on the amount of Ruracio payable. The ceiling may be difficult to enforce, but at least it will ensure that intended marriages are not broken by excessive demands of Ruracio. In any case one has an option to marry under statute law. Such law does not require Ruracio for the validity of a marriage under it.

(c). Polygamy as practised today has outlived its usefulness. The trend these days appears to be; where a married man becomes rich, he in most cases marries a young and educated girl as his second wife. He feels that she will be more able to cope with the demands of modern life and his present status, than the old-fashioned first wife. The first wife is consequently neglected with her children in the rural areas, the man and his new wife settling in a house in the urban areas. Such a sad state of affairs was never so in the old days. Polygamy as practised then under Kikuyu Customary law, demanded that the first wife should always retain a senior status in relation to the subsequent wives.

As a result of the above trend in polygamy, the present writer hopes that polygamy may soon die out. Its death will be facilitated by social and economic pressures.

(d). It is time the Courts R recognised marriage by elopement under Kikuyu Customary law. This will help avoid the difficulties created where such recognition is lacking.

Finally it is the Writers most sincere hope, that the foregoing recommendations may one day find favour with the Legislator and the Courts.

T H E E N D .

FOOTNOTES TO THE INTRODUCTION.

1. R -v- AMKEYO 7 E.A.L.R. 14 HAMILTON c.j. expressed the opinion that a 'union' between Natives under native law and custom could not be treated as a marriage. He described a Customary marriage as 'Wife purchase'.

2. In 1904 the Native Christian Marriage and Divorce Ordidance was passed. It was aimed at introducing simplified formalities to govern the marriages of African Christians.

3. The Law of Succession Act 1972 and the arbotive Marriage Bill provide good illustrations.

4. WASSERMAN, G. The Independence Bargain (1973) Journal of Commonwealth Political Studies.

5. KAMAU, G.K. Trends in Marriage and Succession Law in Kenya (1886-1977)

FOOTNOTES TO CHAPTER I

1. Lord LUGARD The Dual Mandate In TRopical Africa. (Frank & Cass Ltd. 1965). p. 614.

2. Ibid at p. 618.

3. Article 11 (a).

4. The Indian Acts applied include,
   (i) Indian Succession Act.
   (ii) Indian Divorce Act.
   (iii) Indian Penal and Procedure Codes.

5. No. 15 of 1897.

6. Ibid Articles 2 (a) & (b).

7. Report Of The (Maxwell) Committee On Kikuyu Land Tenure. (1929 NAIROBI) pp. 40-41.
   The Committee reported the fears expressed by the Kikuyu that land matters were being taken to Judges in Nairobi who did not understand their customary law. They preferred that the Distric Commissioner should give final decisions on such matters.

8. No. 39 of 1930.

9. Ibid ss. 33 & 34.

10. (1951) Legislative Council Debates,(Government Printer). Vol. 4 Column 177-180.

11. Supra at p. 312.

12. PHILLIPS A. Report On Native Tribunals.(Government Printer NAIROBI 1945). para. 906.

13. MORRIS & READ Indirect Rule And The Search For Justice. (O.(C.P.O. 1972). 231.

14. Ibid.

15. Cap. 8 S, 3 (2) now applies customary law to non-Africans.

16. HARVEY W.B. Introduction To The Legal Systems In East Africa. (E.A.L.B. 1975). p. 522.

17. 1902 East Africa Order In Council. Article 20.

18. Supra footnote No. 13 at p. 175.

19. DEVLIN 'Judges And Law Makers.' (1976) M.L.R. p. 8.

20. (1886) L.R. 1 P&D 130.

21. (1917) 7 E.A.L.R. 14.

22. Ibid at p. 16.

23. 12 K.L.R.

23. 12 K.L.R. 134. (1929- 1930).

24. OMWOYO MAIRURA v. BOSIRE ANGINDE 6 C.R.R. 4 (1958).

25. R. v. LUKE MARANGULA.(1949-54) L.R. of Northern Rhodesia 140.

26. BISHEN SINGH v. R. U.H.C. Criminal Appeal No. 13 of 1923.

27. WAIHARO WA KINGATE v. KAMUETE WA NGINYI.11 K.L.R. 67.

28. Ibid. at p. 68.

29. (1912) 2 U.L.R. 152.

30. Cap. 8 Laws Of Kenya.

31. Cap. 10. Laws Of Kenya ss. 2 & 10.

32. No. 5 of 1969.

33. COTRAN E. 'Integration Of Courts And The Application Of Customary Law In Kenya! (1968) E.A.L.J. p. 19.

34. WAMBWA v. OKUMU [1970] E.A. 578.
The Court applied the Guardianship of Infants Act Cap. 143 to a transaction which according to the Magistrates' Courts Act, and the Judicature Act and the Constitution, should have been governed by customary law.

35. Supra . footnote No. 25. E.A.

36. KIMANI v. GIKANGA [1965] E.A. 735.

37. KAMANZA CHIMAYA v. MANZA TSUMA, Civil Appeal No. 6 of 1970 Kenya High Court.

38. Supra. footnote No. 33.

39. NOWROJEE P.E. 'Can A District Magistrate Administer The Whole Of Customary Law?' (1973) 9 E.A.L.J. p. 59.

40. KURIA G.K. Religion, The Constitution And Family Law And Succession In Kenya.(Unpublished). P.128.

41. WILLIAM MULLI v. FRANCIS KITHUKA.(1971) K.H.C.D. 118.

42. Cap. 80 Laws Of Kenya. S. 60 (1) (a).

43. Cap. 150 Laws Of KEna Kenya. S.37 provides that the Act does not affect the validity of a maarrige contracted in accordance with cutomary law.

44. Supra. footnote No. 34.

45. S. 2 (e)-the definition of a claim under customary law includes the custody of children.

46. The Kenya Commission On The Laws Of Marriade,Divorce and Succession. (government Printer 1968).

47. Supra. footnote No. 13 at p. 168.

FOOTNOTES TO CHAPTER II.

1. MBITI J.S. African Religions And Philosophy. (Heinemann London, 1969) p. 163.

2. KENYATTA J. Facing Mount Kenya. (Heinemann shools ed. NAIROBI 1971). p. 163.

3. Ibid at p. 174.

4. Ibid.

5. Supra footnote No. 1.

6. ROUTLEDGE W.S. With A Prehistoric People. (LONDON, Arnold 1910). p. 133.

7. Supra footnote No. 2 at p. 169.

8. Supra footnote No. 6 at p. 133.

9. KENYATTA J. opp. cited p. 132.

10. WANYOIKE E.N. An African Pastor. (E.A.P.B. 1973) p. 72. In discussing the work of the Gospel Missionary Society among the Kikuyu, the writer states that these Missionaries detested female circumcision above all other Kikuyu customs. They therefore took it upon themselves to discourage it by preaching against it and demanding that none of their Converts should be involved with it.

11. COGNOLO C. The Agikuyu (Nyeri Mission Printing School 1933). p. 113. The writer states that in most cases no Kikuyu will dream of marrying even a distantly related kinswoman, for fear that evil may befall the marriage.

12. COTRAN E. The Law Of Marriage And Divorce. (Sweet & Maxwell LONDON 1968). p. 11.

13. Marriage Act Cap. 150 Laws Of Kenya. S. 37.

14. Ibid S. 45.

15. Supra footnote No. 12.

16. NSEREKO D.D. The Nature And Function Of Marriage Gifts In An African Marriage, E.A.L.J. Vol. 6, (1973) p. 89.

17. Supra footnote No. 12 at p. 14.

18. Ibid at p. 13.

19. KARURU v. NJERI [1968] E.A. 361.

20. PHILLIPS A. Report On Native Tribunals. (Government Printer NAIROBI 1945). para. 884.

21. COGNOLO C. Opp. cited at p. 109.

22. These stages are also well discussed by COTRAN and KENYATTA. They are also analysed in MWAGIRU V. MUMBI [1967] E.A. 639.

23. GATHIGIRA S.K. Miikarire Ya Agikuyu. (C.M.S. Bookshop 1942 NAIROBI). P. 13. The book is written in Kikuyu.

24. Supra footnote No. 12 at p. 10.

25. Ibid. at p. 15.

26. [1967] E.A. 639.

27. 11 K.L.R. 14.

28. ROUTLEDGE W.S. Opp. cited at p. 124.

29. Supra footnote No. 20.

30. Report Of the Commission On Marriage And Divorce And The Status Of Women, 1965 para. 201.

31. Supra footnote No. 10 at ; p. 78.

32. Supra footnote No. 6 at p. 134.

33. [1968] E.A. 72.

34. Report Of The Commission On The Law Of Marriage And Divorce. (Government Printer NAIROBI 1968). para. 78.

35. Uganda High Court, Criminal Appeal No. 13 of 1923.

FOOTNOTES TO CHAPTER III

1. COTRAN E. Restatement Of African Law, Kenya. (Sweet & Maxwell, LONDON). p. 16.

2. COTRAN E. Restatement Of African Law, Kenya-Succession. (Sweet & Maxwell, LONDON). p. 12.

3. 'Report Of The Commission On The Law Of Marriage And Divorce'. (Government Printer, NAIROBI 1968). para. 54.

4. KENYATTA J. Facing Mount Kenya. (Heinemann Schools' ed. NAIROBI 1968). p. 113.

5. Chamber's Twentieth Century Dictionary.

6. KAMAU G.K. 'Cohabitation Outside Marriage In Some English Speaking Countries (Unpublished). p. 29. The paper is to be presented at the third World conference on 'Family Living In A Changing Society' Uppsala, in June 1979. The Writer attempts a brief but comprehensive discussion on Elopement as a form of marriage.

7. GATHIGIRA S.K. Miikarire Ya Agikuyu. (C.M.S. Bookshop 1942 NAIROBI). P. 16. The book is written in Kikuyu.

8. Supra footnote No. 1 at p. 17.

9. Ibid.

10. Supra footnote No. 7 at p. 16.

11. Supra footnote No. 6 at p. 29.

13. PHILLIPS A. Survey Of African Marriage And Family Life. (O.U.P. 1953). p. 218.

14. WANYOIKE E.N. An African Pastor. (E.A.P.H. 1974). 69. The writer disccusses the various conflicts that arose between the Missionaries and the Kikuyu regarding customs.

15. Ibid.

16. CASE v. RUGURU. [1970] E.A. 55.

17. Supra footnote No. 4.

18. PHILLIPS A. Report On Native Tribunals. (Government Printer 1945). para. 892.

19. Supra footnote No. 6 at p. 7.

20. Supra

20. Supra footnote No. 4.

20. [1970] E.A. 55.

22. High Court of Kenya at Nairobi, Civil Appeal No. 1280 of 1970. (Unreported).

23. Supra footnote No. 6 at p. 33.

24. High Court of Kenya at Nairobi, Civil Appeal No. 94 of 1977. (Unreported).

25 Court of Appeal for East Africa, Civil Appeal No. 13 of 1976 (Unreported).

26. (1973) Z.L.R. 111 p. 113.

BIBLIOGRAPHY.

BOOKS.

Chamber's Twentieth Century Dictionary.

COGNOLO, C. The Agikuyu.(Nyeri Mission Printing School 1933.)

COTRAN, E. Restatement Of African Law, Kenya. (Sweet & mMaxwell, LONDON).

Restatement Of African Law, Kenya-Succession. (Sweet & Maxwell, LONDON).

GATHIGIRA, S.K. Miikarire Ya Agikuyu. (C.M.S. Bookshop 1942 NAIROBI).

HARVEY, W.B. Introduction To The Legal Systems In East Africa. (E.A.L.B. 1975).

KENYATTA, J. Facing Mount Kenya.(Heinemann Schools ed. NAIROBI 1971).

LUGARD, L. The Dual Mandate In Tropical Africa. (Frank & Cass Ltd. 1965).

MBITI, J.S. African Religions And Philosophy. (Heinemann LONDON, 1969).

MORRIS & READ INdirect Rule Ans The Search For Justice. (C.P.O. 1972).

PHILLIPS A. A Report On Native Tribunals. (Government Printer NAIROBI 1945).

Survey Of African Marriage And Family LLife. (O.U.P. 1953).

ROUTLEDGE W.S. With A Prehistoric People.(LONDON Arnold 1910).

WANYOIKE E.N. An African Pastor. (E.A.P.B. 1973).

A R T I C L E S .

COTRAN, E. - Integration Of Courts And The Application Of Customary Law In Kenya. (1968) E.A.L.J. 19.

DEVLIN, - Judges And Lawmakers. M.L.R. 8.

KURIA, G.K. - Religion, The Constitution and Family and Succession in Kenya. (Unpublished).

Cohabitation Outside Marriage in some English Speaking Countries (Unpublished).

NOWROJEE, P.E. - Can a District Magistrate Administer the Whole of Customary Law. (1973) 9 E.A.L.J. 59.

NSEREKO, D.D. - The Nature and Function of Marriage Gifts in an African Marriage. (1973) 6 E.A.L.J. 89.

Report of the (Maxwell) Committee on Kikuyu Land Tenure. 1929 Nairobi.

REport of the Commission on Marriage, Divorce and the Status of Women 1965 (Uganda).

The Kenya Commission on the Law of Marriage and Divorce. (Government printer 1968).

WASSERMAN, G. T The Independence Bargain.(1973) Journal of Commonwealth Political Studies