

The Law on Property Grabbing 3: Property and Inheritance Rights of HIV/AIDS Widows and Orphans – The Law of Mozambique and the Standards of International Law

Peter W. Schroth, IRCG LLC and Lawyers Without Borders, USA
schroth@attglobal.net

Lucy Martinez, Freshfields Bruckhaus Deringer US LLP, USA

Mozambique is a party to the key global and African treaties relevant to the property and inheritance rights of women and children and generally recognizes those rights in its 2004 Constitution, 2004 Family Law and 1997 Land Law. However, certain provisions of the Succession Chapter of the 1966 Civil Code need to be updated to ensure equality and non-discrimination. Certain elements of customary law and practices are also inconsistent with the equal protection of property and inheritance rights for women and children. This paper offers several other recommendations for improvement.

INTRODUCTION

This paper is one of a series examining the law of individual African countries in light of requirements of international treaties ratified by and binding on them. All of the papers build on, and assume knowledge of, Schroth (2007), a survey of international law protecting the inheritance and property rights of widows and orphans, with particular attention to African instruments, such as the African Charter on Human and Peoples' Rights ("Banjul Charter") and the African Charter on the Rights and Welfare of the Child ("ACRWC"). Readers are requested not to misinterpret this paper as singling out Mozambique for criticism: other papers in this series are or will be directed to the law of other countries and adopt a similar tone, aiming to identify areas of improvement in the protection and strengthening of rights of widows and orphans.

The primary topic of this paper is the inheritance rights of orphans in Mozambique whose parents owned property, including provision by the parents for their children's future, and enforcement mechanisms for such orphans, where, as is common, the parents' property does not in fact pass to their orphans. A related topic is the right of widows (and possibly of widowers, *see, e.g.,* Mwenda *et al.*, 2005, pp. 964-966) to their lost spouses' property and to provide for their children's future, because in many cases a man's property does not pass to his widow.

This paper summarizes relevant provisions of: (1) international and regional treaties as ratified by Mozambique; (2) Mozambique's Constitution; (3) Mozambican law on marriage and children, being the 2004 Family Law; (4) national law on land, being the 1997 Land Law; (5) national law on succession and inheritance, being the Succession Chapter in the 1966 Portuguese Civil Code; and (6) customary law and practices. This paper concludes with certain recommendations for strengthening the property and inheritance rights of women and children in Mozambique, with the acknowledgement that many programs and organizations are already working towards this goal.

As a result of length limitations, this paper takes a great deal of knowledge for granted, such as the prevalence of HIV/AIDS in Mozambique, the prevalence of orphans of AIDS in Mozambique (*see* especially UNAIDS-WHO, 2006a, 2006b), and basic facts about Mozambique and its legal and cultural history. Islamic law is not discussed in detail in this paper, but will be discussed in a later paper.

INTERNATIONAL LAW

Mozambique has ratified or acceded to several global and regional treaties relating to property and inheritance rights for women and children, including the International Covenant on Civil and Political Rights (“ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) and its Optional Protocol, the Banjul Charter, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“ACRWA Protocol”), the ACRWC and the Convention on the Rights of the Child (“CRC”). Notably, it has not ratified the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) or the ICCPR Optional Protocol.

These treaties – of whose contents the reader is assumed to be aware from reading Schroth (2007) – require Mozambique to submit periodic reports to international bodies, detailing its efforts to implement its international treaty obligations (*see, e.g.*, ICCPR, Art. 40; CEDAW, Art. 18; CRC, Art. 44; Banjul Charter, Art. 62). Mozambique has generally met its reporting obligations under the CEDAW and the CRC, albeit often with lengthy delays, but not under the ICCPR (*see* www.unhchr.ch) or its reporting obligations to the African Commission on Human and People’s Rights (*see* www.achpr.org). Mozambique’s compliance with its international legal obligations is addressed further below in Section 7, after an analysis of its domestic laws on the property and inheritance rights of women and children.

CONSTITUTIONAL LAW

Mozambique’s Constitution was enacted 16 November 2004, replacing the 1990 Constitution, which in turn replaced the 1975 Constitution. Many aspects of Mozambican constitutional law may be relevant to the property and inheritance rights of women and children. This section summarizes the key provisions.

Article 36 of the Constitution provides that men and women are equal under the law in all aspects of political, economic, social and cultural life. The Constitution not only protects this fundamental right, but also promotes, supports and values the development of women and encourages an increased female presence in all aspects of political, social, economic and cultural life in the country (art. 122).

Children have the constitutional right to be protected by their families, the society and the State, to ensure their full development. All children, especially orphans, neglected and physically or mentally impaired children, have the right to be protected against any sort of discrimination, mistreatment and abuse from their families and any member of the society. Article 120 requires the family and the State to ensure that children have access to education, under the constitutionally enshrined values of national unity, love of country, equality between men and women, respect and solidarity. Fathers and mothers have the duty to assist their children, whether conceived in or out of wedlock. Child labor is prohibited (art. 121).

Article 95 of the Constitution states that “all citizens shall have the right to assistance in the case of disability or old age. The State shall promote and encourage the creation of conditions for realising this right.” This provision would seem to protect those who are incapacitated by diseases such as HIV/AIDS.

The Constitution provides that the State “shall recognize and guarantee” the rights of private ownership of property (art. 82) and of inheritance (art. 83). Article 99 establishes three sectors for property ownership: (i) the public sector, being the State and public entities; (ii) the private sector, being natural persons or private legal entities; and (iii) the cooperative and social sector, being communities, workers’ groups and non-profit legal entities. Article 111 of the Constitution further states, “In granting titles for the use and enjoyment of land, the State shall recognise and protect rights acquired through inheritance . . . unless there is a legal reservation or the land has been lawfully granted to another person or entity.” Land in Mozambique is regarded as State property and thus cannot be sold or purchased; the State determines land use and the benefit of land (arts. 109, 110).

The Constitution acknowledges the plurality of legal systems that co-exist in Mozambique, to the extent that they do not conflict with the fundamental values and principles of the Constitution (art. 4). In the event of any conflict, all other law is subordinate to the Constitution (art. 2). This is particularly relevant in the context of customary law, which, as discussed in Section 6 below, may conflict with the constitutional guaranty of equality.

NATIONAL LAW ON MARRIAGE AND CHILDREN – THE 2004 FAMILY LAW

Mozambique recently revised its statutory regime in relation to marriage and children. The Family Law, *Lei de Família*, No. 10/2004, replaces the chapter on Family Law of the 1966 Portuguese Civil Code (the “Civil Code”). The 2004 Family Law regulates all topics related to family relationships, including marriage, parenthood, affiliation, adoption and alimony rights.

Women’s Rights

The 2004 Family Law represents a significant evolution of Mozambican law with respect to the rights of women and helps implement the constitutional guaranty of equality between men and women. Indeed, the preamble notes that the Law was necessary to adapt Mozambique’s family law “to the Constitution and other instruments of international law and consequently to eliminate the provisions supporting unequal treatment in family relations.” Under the Family Law, both husband and wife have the right to own property, to be treated with respect and dignity by the other spouse, to conduct family affairs, to raise and to act on behalf of their children, and to manage their estate. The (traditionally male) concept of “head of household/family” has been replaced by the concept of “representative of the family,” meaning that the family can be represented by either a man or a woman, unless the family decides otherwise (art. 99). The husband and wife administer the marital property equally and can freely dispose of the property, although disposal of common property requires consent in certain circumstances (arts. 102-103).

Individuals must be 18 years of age before they can be married, although in some cases a 16 year old may marry with the consent of his or her parents or guardians (Family Law, art. 30). The “promise of marriage” is null and void if one of the intended spouses is under 18 years old (art. 19(2)). The 2004 Family Law defines three forms of marriage: civil, religious and traditional (art. 16). To be recognized under Mozambican law, religious and traditional marriages must also meet the requirements of civil law marriages (arts. 18, 24, 75). One potential area of tension relates to polygamous marriages, which are not recognized by the Family Law (arts. 16(2), 30(1)(c)) but permitted by Islamic and customary law. Approximately one third of all Mozambican women are believed to be in polygamous marriages; women in such marriages may not be protected under the Family Law.

Children’s Rights

The 1966 Civil Code defines minors as “persons of either sex under the age of 21” (1966 Civil Code, art. 122). Children have the right to be registered immediately after their birth and also have the rights to their own name and to use the surname of their parents’ family (Family Law, art. 205). The Family Law makes no distinction between legitimate and illegitimate children: “children have the same rights and are liable for the same duties, irrespective of the origin of their birth” (Family Law, art. 204). Registration services are performed by the Civil Registration services. The newly-enacted Civil Registry Code expanded the period of free birth registration from 30 to 120 days after the child’s birth, to encourage registration (*see* CRC 2007 Report, ¶ 72).

The Family Law contains extensive protections for children. For example, parents must support their children financially until the children complete their education and can maintain their own means of living. Parents may not waive parental rights, except where the child is adopted or given to a foster family (Family Law, arts. 285, 288). If either parent dies, the other parent (whether male or female) remains entitled to exercise parental rights (arts. 309, 312). Relatives such as grandparents, siblings, uncles, aunts and cousins have a duty to care for younger relatives who are orphans or abandoned by their

parents (arts. 280, 281). Generally, parents may dispose of or otherwise manage the assets of a child's estate only if they have specific judicial authorization to do so. Actions taken without judicial authorization may be voided by the courts. To the extent that the child is mature enough to evaluate and opine on financial matters, the court must consult the child and take the child's opinion into account before issuing the authorization (arts. 296, 300-302). The child's wealth must be delivered to the child upon his or her coming of age or emancipation (arts. 304, 305, 308).

In relation to orphans or other vulnerable children, an unfortunately prevalent issue in Mozambique, Mozambican law provides for three options, depending on the age and circumstances of the child. First, the court may appoint a guardian (*tutor*) to care for and manage the child's estate and interests, at the request of the public attorney's office (*Ministério Público*). The guardian is supervised by the *Conselho de Família* or Family Council, a board formed of two relatives of the child and a representative of the *Ministério Público* (arts. 337-341, 346-348, 353, 362-64). Second, the child may be placed with a foster family (*família de acolhimento*), which is the most common option for orphaned children in Mozambique (Nhate, 2005, p. 3), although foster children are sometimes represented as biological children in surveys, particularly if the child was orphaned at a young age (Grassly and Timaeus, 2003, p. 3). The foster child may have inheritance rights in case of intestacy of a foster parent, if the intestate does not have descendants, ascendants, siblings, descendants of siblings or a living spouse. Any inheritance rights of the foster child expire when he or she turns 18 years old (Family Law, arts. 381, 384-386). Third, the child may be adopted in certain circumstances (sec. 395). The adoptee loses any family bonds with his or her natural family and becomes legally tied to the family of the adopting parents (Family Law, sec. 400). Court decisions in relation to guardianships, foster families or adoption, along with court decisions on the regulation of parental power, must take into account the child's point of view (arts. 396, 399).

Bills on Child Protection and on Legal Assistance for Minors that would protect children's rights, *inter alia*, to equal protection, to have a family and to health and education were introduced in 2007 (CRC 2007 Report, ¶ 76).

NATIONAL LAW ON LAND – THE 1997 LAND LAW

As noted above, under the Constitution, land in Mozambique is regarded as State property, which therefore cannot be sold or purchased, and the State determines land use and the benefit of land (Constitution, arts 109, 110). The rights of communities and individuals to use the land are recognized and protected by the 1997 Land Law and other laws, such as Law 02/91, determine procedures for the transfer of title of State property to tenants.

Under the Land Law, the “right of land use and benefit” (*direito de uso e aproveitamento da terra*, or “DUAT”) may be acquired in three ways: (i) by custom, either by local communities or by individual men and women; (ii) by good faith occupation of the land for more than ten years, provided that the claimants are Mozambican nationals; and (iii) by authorisation of an application submitted by natural or legal entities, either national or foreign (Land Law, arts. 9, 12). Both men and women have the right of land use and benefit (art. 10). However, the process for registering interests in land is slow and expensive, which in many cases discourages people from using it (Alfai, p. 11). In a 2007 survey, 77% of people interviewed were living in homes that were not registered and no legal procedure had been followed for the conveyance of the property, because they were “unaware of the importance of this registration and did not know the procedures required to carry out the registration” (Alfai, p. 11).

NATIONAL LAW ON INHERITANCE – SUCCESSION CHAPTER OF 1966 CIVIL CODE

Mozambican inheritance and succession law is governed by Chapter V (*Direito das Sucessões*) (the “Succession Chapter”) of the 1966 Portuguese Civil Code (arts. 2024-2174) and the December 2007 Tax Code on Succession and Gifts. These succession-specific laws are supplemented by provisions in other statutes, such as the 1997 Land Law and the 2004 Family Law. For example, under Article 106 of the

Family Law, each spouse is free to dispose of his or her property by will (art. 106). However, these provisions are not always in harmony, mainly because the Succession Chapter was originally drafted in the 1960s and is based on a patrilineal system of inheritance. The Government is currently considering a revised draft Succession Chapter, which may come into effect in 2009.

Succession and inheritance are also known in Mozambique as descent and distribution. Mozambique law provides for both testate and intestate succession; the latter is particularly important in Mozambique, because wills are not commonly prepared, as a result of high rates of illiteracy and customary law practices and cultural taboos regarding will-writing (UN-HABITAT YEAR Report, p. 71; Alfai, p. 6).

There are three ways to establish succession under Mozambican law: by statute, by will, or by separate agreement between the interested parties (Succession Chapter, art. 2026). Statutory succession is further divided into discretionary succession (*sucessão legítima*), which can be superseded by will or contract, and mandatory succession (*sucessão legitimária*), which overrides any will or contract. Successors may be “heirs,” who inherit an apportioned amount of the estate by law or pursuant to a will (e.g., “one-third of my estate”), or “legatees,” who inherit specific, identified assets (“legacies”) of the testator’s estate pursuant to a will (e.g., “my house in Maputo”) (art. 2030). Any person (including an unborn fetus) may inherit by statute, will or contract, subject to certain exceptions, such as convictions for felony or perjury (arts. 2026, 2033-2038).

The “head of household” is responsible for managing the estate until its distribution. The head of household is appointed in the following order of preference: (i) the spouse of the deceased, if he or she is an heir or has distribution rights by reason of marriage; (ii) the executor, unless the testator provides otherwise; (iii) the heirs by statute; or (iv) the heirs by will. Amongst other factors used to determine the head of household, preference is given to male heirs over females and to legitimate relatives over illegitimate ones (Succession Chapter, arts. 2079, 2080). In cases of succession by statute, an illegitimate child is entitled to only half the quota of a legitimate child (arts. 2139, 2158).

These preferences in succession to males over females and to legitimate over illegitimate children are inconsistent with the Mozambique Constitution and the 2004 Family Law. Indeed, in June 2007, the CEDAW Committee noted its concern that “discriminatory provisions still exist in several areas of Mozambique law including in . . . laws governing inheritance rights.” (CEDAW Committee, ¶ 12.) Similarly, a 2007 report, organized by the UN Commission on Legal Empowerment of the Poor, noted: “In Mozambique, and particularly after the approval of the Family Law in 2004, the regime of succession was found to be out of sync with the current reality. Thus, the Law of [S]uccession is currently being review[ed], with efforts being made to safeguard the rights of spouses in the event of asset-sharing, while at the same time foreseeing the need to make the procedures for the acceptance of the inheritance more flexible. Reinforcing the protection of the rights of spouses could be supported by the fact that many widows and their children are dispossessed of their inheritances, even when married, in some cases motivated by customary practices. The lack of written wills (testaments), formal marriages and a property system adopted by the couple is considered to be one of the aspects influencing the distribution of the couple’s assets.” (Alfai, p. 12.)

CUSTOMARY LAW AND PRACTICES

In practice, there are two primary legal systems in Mozambique: a system based on the Portuguese civil law system, being the statutory regime, and a system based on local customary laws and practice. These two systems of law occasionally conflict with each other or with Islamic law, which, while not formally a part of the legal system, also influences legal decisions in some parts of the country.

Customary law varies regionally within Mozambique. In the north, it generally promotes a matrilineal inheritance system, apparently based on the “*prazo* system,” whereby the Portuguese Crown granted

control over tracts of land to a woman for “three life tenures,” provided she married a Portuguese man. The land so acquired would then be inherited matrilineally, passing from mother to daughter. However, this matrilineal system has been modified such that control rights over land are still vested in men, usually the woman’s maternal uncles and nephews (Waterhouse, p. 47). In southern Mozambique, customary law generally promotes patrilineal inheritance. Certain customary practices, such as early or forced marriage, initiation rites and dowry requirements, are inconsistent with the rights of women and children otherwise provided in Mozambican statutes and the Constitution. As one commentator has observed, under widely practiced customary law in Mozambique, “men have direct inheritance rights to farm land, cattle and property – particularly housing – whereas women do not. Under customary law, women’s access to all these resources depends on kinship or marriage: in other words, women acquire access to land and a house through their parents, brothers or husbands” (Waterhouse, p. 47).

These customary laws and practices are sometimes confirmed by Mozambique’s Community Courts, which operate as informal fora to resolve minor civil and criminal disputes, including disputes relating to family, housing and land issues (Santos, p. 55). The Community Courts decide disputes on the basis of “impartiality, good sense and equity” (Article 2, No 2 of Law No. 4/92, as quoted in Santos, p. 56), which usually includes customary and religious law.

Customary laws and practices are also applied by traditional leaders or chieftains (*régulos*), who are recognized as community authorities. The *régulo* position is passed down from generation to generation (Santos, fn. 4). The *régulos* cooperate closely with local State bodies and with the Community Courts in relation to all issues, including property and inheritance rights, and are entitled to be consulted on fundamental matters affecting the life, well-being and development of the local communities. According to a 2007 survey, 95% of people, when faced with a problem, will turn first to the heads of neighbourhood, district heads and traditional leaders to mediate or resolve the conflict (Alfai, p. 14). If the conflicts are not resolved at that level, the case is taken to court, but most conflicts are resolved by the local structures, without the need for court involvement (*ibid.*, p. 14).

Insofar as these customary laws and practices conflict with the constitutional guaranty of equality, the Constitution must prevail, but this statement assumes that the matter is decided by an official State decision-maker, which, as noted above, is unlikely. Insofar as these customary laws and practices conflict with statutory protections for women and children, set out in the 2004 Family Act and the 1997 Land Law, it is unclear how this conflict should be resolved. The Mozambique Government’s Technical Unit for Law Reform is currently drafting legislation to bring Community Courts within the formal legal framework and to provide for appeals from the Community Courts to the district and provincial courts, which will require the regular courts to reconcile inconsistencies between customary law and statutory law. However, in any event, case law does not constitute binding authority in Mozambique and accordingly the legislature may have to intervene to resolve the conflict.

CONCLUSIONS, IMPLICATIONS AND RECOMMENDATIONS

This paper has summarized certain tensions between Mozambique’s international obligations and its domestic and customary laws relating to the property and inheritance rights of women and children. The Constitution prevails over any other statute, but any inconsistency between statutes, such as an inconsistency between the Family Law and the Succession Chapter, or between statutes and customary law, will be resolved (if at all) by Mozambican courts, unless the legislature intervenes.

As to the rights of women, Mozambique itself recognizes that, although it has ratified most of the key treaties, “traditional practices are still prevalent, which give women and girls a much lower status than men” (CRC 2007 Report, ¶ 323). It has also recognized that, although “there have been some advances in legislation, there persist some gaps. . . . In the family, women are more discriminated by direct relatives who do not give them the same treatment afforded to men. Quite frequently, women’s formal education

is neglected in favor of that of their male counterparts. . . . The raised level of illiteracy in [and] among women and the little knowledge of their rights make it possible that cases of blatant discrimination against women are never brought before a court of law.” (CEDAW 2005 Report, pp. 17-18.)

Mozambique also recognizes that its efforts “to ensure that Mozambican children can enjoy their fundamental rights have continuously been challenged by the effects of colonisation, armed conflict, underdevelopment and absolute poverty” (CRC 2007 Report, ¶ 17). It acknowledges that most of its commitments in international treaties regarding children’s rights have “yet to be incorporated in domestic legislation. Thus, various civil and criminal matters in the context of existing legal provisions in the country, generally precede the realisation of children’s rights required by the CRC . . . and by similar international legislation” (*id.*, ¶ 34). The government stated in 2007 that it was revising Mozambican legislation to ensure conformity to the various international treaties (CRC 2007 Report, ¶ 35).

In light of these conclusions, below are the preliminary recommendations of the international lawyers who have participated in this project. These recommendations are not yet final. They focus on legal issues, such as treaty ratification, statutory amendments and access to justice, rather than issues relating to cultural change or other aspects of social policy, such as literacy and education.

Treaty Ratification and Reports

Mozambique should consider ratifying the ICESCR and the Optional Protocols to CEDAW, the ICCPR and the ICESCR and making timely reports to the relevant bodies under international and regional human rights treaties.

Statutory Amendment

Mozambique should consider updating the Succession Act to ensure its compatibility with the Constitution and the 2004 Family Law, including ensuring that: legitimate children receive property equally with illegitimate children; male and female relatives receive property and are otherwise treated equally; and the surviving spouse is entitled to inheritance of at least one half of the estate. Mozambique should also consider updating the Family Law to protect the rights of women in polygamous marriages.

Effective Remedies and Access to Justice

Mozambique should consider creating special training programs for judges (including judges in the Community Courts) and for *régulos* regarding the importance of protecting property and inheritance rights of women and children. Mozambique should consider providing specific training on property and inheritance rights of women and children for the Judicial Patronage and Assistance Institute, a State institution created in 1994 in the Ministry of Justice, which provides pro bono assistance to the poor. Mozambique should consider producing and distributing a short handbook for courts and litigants on property and inheritance rights and on how to reconcile customary traditions with statutory protections.

Increased Registration of Land Interests

Mozambique should consider encouraging more, ideally most, interests in land to be registered, pursuant to a systematic program of computerization, surveying and demarcation, and creating a reporting mechanism for registration and transfers of interests in land.

Encouraging Will Writing or Other Succession Planning Programs

Mozambique should consider encouraging will-writing in the following ways: (i) urge local government and religious officials and *régulos* to encourage the making and upholding of wills; (ii) expand will-writing program to all adults, not just those who are part of a succession planning program (for example, HIV/AIDS victims); (iii) promote the secure storage of wills in churches and mosques; and (iv) increase male participation in will writing, because men are often the first to die and have more property to distribute. These wills should relate both to the disposition of property and to care for orphaned children (guardianship, foster families or adoption). Alternatives to wills, such as memory books, may also be

considered, with the caveat that some communities view such books with suspicion and concern regarding voodoo (*see* Schroth, 2008, pp. 612-613).

Supporting Existing Programs or Organizations in Mozambique

Mozambique should consider expanding the following programs or working closely with the following organizations already focused on protecting the rights of women and children in Mozambique, either generally or in relation to the specific issue of property and inheritance rights (*see* CRC 2007 Report, ¶¶ 47-48, 50, 136-136, 151-152):

Women

- The National Plan for the Advancement of Women and the Gender Policy and Implementation Strategy, both aiming to protect gender equality.
- The Rural Support Finance Program, aiming to improve the quality of life in rural households, including training programs on business management, gender and HIV/AIDS.
- The Women’s Forum (*Fórum Mulher*), based in Maputo, has proposed a Draft Bill of Law of Succession aiming to improve the protection of women’s inheritance rights (White and Oração, 2006).
- Other NGOs working in the promotion and defense of women’s rights include MULEIDE (Mulher, Lei e Desenvolvimento – Woman, Law and Development), AMMCJ (Mozambican Association of Women’s Lawyers), EWILDAF/Mozambique, the WILSA Project on the legal situation of women in Southern Africa, AMME (Associação Moçambicana de Women na Redacção), AMRU (Associação da Mulher Rural), ACTIVA (Association of Women Entrepreneurs and Executives), and the OMM (Organization of Mozambican Women).

Children

- The 2006 National Action Plan for Children, aiming to promote the welfare of children generally.
- The Plan for Orphan and Vulnerable Children, aiming to ensure that all orphan and vulnerable children enjoy access to basic services, necessary for their survival and development.
- The Child Parliament, which promotes children’s participation in the context of children’s rights.
- The National Birth Registration Plan, aiming to make birth registration more accessible, which reportedly led to an increase in birth registration by 293% between 2004 and 2006.

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