

# Access to Justice for Women's Economic Rights: Good Judicial Practices

Insights from a Judicial Colloquium in Eastern & Southern Africa



## A Critical Role for the Judiciary

- Judges play a critical role in advancing women's economic rights by helping implement laws and providing a forum to address violations.
- Courts enable access to justice.

## Advancing Women's Human Rights

**“As judges we need to interpret laws liberally and purposefully to protect women's rights.”**

-- Justice Abida Ali-Aroni, Kenya High Court of Garissa

**“[T]he time has now arisen ... to assume the role of the judicial midwife and assist in the birth of a new world struggling to be born. Discrimination against gender has no place in our modern day society.”**

-- Justice Oagile Bethuel Key Dingake, Botswana Court of Appeal

- **CEDAW** (The Convention on the Elimination of All Forms of Discrimination Against Women) highlights the role of **“competent national tribunals”** to ensure **“the effective protection of women against any act of discrimination.”** [1]
- The **Maputo Protocol** (Protocol to the African Charter on Human and Peoples' Rights of Women in Africa) recognizes: “Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure ... **effective access by women to judicial and legal services.**” [2]
- Constitutional law, integrating human rights, has transformative potential for women's equality, ensuring women have access to resources on an equal basis. [3]
- Human rights law calls for **substantive equality, taking account of disparate impacts**, rather than a formal equality of identical treatment. [4] Special measures may be required to address indirect discrimination and ensure women's equality in access to land and property. [5]
- Judgements should consider how discrimination is compounded by intersecting factors. [6]
- **Rights should be given “broad and generous interpretation,”** and “limitations on rights should be interpreted narrowly.” [7]
- Not just laws, but also practices and customs need to comply with human rights standards. [8] If possible, **customary law should be read in compliance with basic rights.** [9]
- Gender stereotypes cannot guide decisions, [10] and judges should challenge the stereotype of women as “perpetual intruders.” [11] As the CEDAW Committee sets out, **“Women should be able to rely on a justice system free of myths and stereotypes, and on a judiciary whose impartiality is not compromised by those biased assumptions.”** [12]
- Litigants often fail to raise the human rights dimensions of a case, requiring judges to help identify this. [13]



## Applying International and Regional Standards

- International and regional standards can complement domestic standards and constitutional protections, supporting women's equality and economic rights.
- **The Bangalore Principles of Judicial Conduct** calls on judges to stay “informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.” [14]

## Promoting Information Access

**“Access to justice is not limited to physical or financial access – it must include informational access.”**

-- Justice Boaz Olao, Kenya Environmental and Land Court

- Judges can hold open court days, sensitizing communities to the law and rights.
- The judiciary has a role to play in not just delivering judgements, but also ensuring that they are widely disseminated.
- Judgements should be shared through law reports, as well as incorporated in trainings.
- Judges can collaborate with chiefs and local leaders to disseminate key legal principles. Judges can hold sessions with communities, informing them of rights protections.
- Judges can highlight to the legislature the implications of their decisions and the need to amend or create new laws.

## Advancing Women's Economic Rights

**“[W]omen's access to, control over and use of land and productive resources contribute to promoting gender equality and constitute a solid basis for improving women's social, political and economic status.”** -- African Commission on Human and Peoples' Rights

Resolution 262 on Women's Right to Land and Productive Resources

- Property and land rights for women is a social and historical justice issue. Access to land and property is a precondition for recognizing many other rights.
- Violence against women includes economic harm under human rights law. [15] Widows are particularly vulnerable to economic violence and “property grabbing” by relatives, leading to destitution and homelessness.
- Rights to land and property have both substantive and procedural dimensions. **Women are entitled to own, acquire, inherit, enjoy, manage, administer, and dispose of property.** [16] Women should also participate in decision-making on law and policy related to land and property. [17] Women further have **the right to sustainable development.** [18]
- Judges can expedite cases of women's property rights, avoiding court delays.
- Judges need to be sensitive to the **non-monetary contributions of women to family wealth**, including childcare and the improvement of land. [19]
- Judges should be cognizant of systemic bias resulting in a lack of documentation, including unregistered marriages and women's names not appearing on property deeds. [20]
- Judges should take account of current reality, ensuring women and children of plural marriages are not left vulnerable and without legal protection. Women's rights need to be protected regardless of their relationships.

# Endnotes

- [1] Convention on the Elimination of All Forms of Discrimination Against Women art. 2, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
- [2] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 8, *adopted* July 11, 2003 [hereinafter Maputo Protocol].
- [3] *E.g.*, Makhosazane Eunice Sacolo (nee Dlamini) and Another vs. Jukhi Justice Saco lo and 2 Others (1403/ 16) [2019] SZHC (166) 30th August 2019. *Sacolo* is a milestone judgment. until this decision in 2019 women in Eswatini did not have equal rights to marital property.
- [4] Afr. Comm'n, on Hum. and Peoples' Rts., General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, ¶ 42 (2020), <https://www.achpr.org/legalinstruments/detail?id=75> [hereinafter ACHPR General Comment No. 6]; Comm. on Econ., Soc., and Cultural Rts., General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), ¶ 7, U.N. Doc. E/C.12/2005/4 (August 11, 2005) [hereinafter CESCR General Comment No. 16]; Comm. on Econ., Soc., and Cultural Rts., General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 8, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR General Comment No. 20]; Hum. Rts. Comm., General Comment No. 18: Non-discrimination, ¶ 8, U.N. Doc. HRI/GEN/1/Rev.1 (November 10, 1989) [hereinafter HRC General Comment No. 18].
- [5] Maputo Protocol, art. 2; CESCR General Comment No. 16, ¶ 10; CESCR General Comment No. 20, ¶ 9; HRC General Comment No. 18, ¶ 10.
- [6] Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 33 on Women's Access to Justice, ¶ 3, 8, U.N. Doc. CEDAW/C/GC/33 (July 23, 2015) [hereinafter CEDAW Comm. General Recommendation No. 33].
- [7] *Ramantele v Mmusi & Others: Summary of Judgment*, SOUTHERN AFRICA LITIGATION CENTRE, at 3, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Summary-of-CofA-Judgment.pdf>.
- [8] Maputo Protocol, art. 2(2) and 5; CEDAW, art. 2(f) and 5(a).
- [9] *E.g.*, *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013(8) BCLR 918 (CC) (30 May 2013).
- [10] Maputo Protocol, art. 2(2); CEDAW, art. 5(a).
- [11] Justice Hellen Omondi, Kenya Court of Appeal.
- [12] CEDAW Comm. General Recommendation No. 33, ¶ 28.
- [13] Anneke Meerkotter, Executive Director, Southern African Litigation Centre (SALC).
- [14] *The Bangalore Principles of Judicial Conduct*, 7 (2002), [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).
- [15] Maputo Protocol, art. 1(j); CEDAW Comm. General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19 (Sixty-eighth session, 2017), ¶ 1, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017).
- [16] Maputo Protocol, art. 19(c) and 21; Afr. Comm'n. on Hum. and Peoples Rts., 262 Resolution on Women's Right to Land and Productive Resources (Fifty-fourth session) ACHPR/Res.262 (LIV) 2013; ACHPR General Comment No. 6; CEDAW, art. 15 and 16.
- [17] Maputo Protocol, art. 19(b); CEDAW, art. 14(2)(a); CEDAW Comm. General Recommendation No. 34: Rights of Rural Women, ¶ 6, CEDAW/C/GC/34 (March 7, 2016).
- [18] Maputo Protocol, art. 19.
- [19] ACHPR General Comment No. 6); CEDAW Comm. General Recommendation No. 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), ¶ 46, 47, U.N. Doc. CEDAW/c/GC/29 (February 2013). *E.g.*, *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020).
- [20] Justice Sylvia Chirawu-Mugomba, Judge, Hight Court of Zimbabwe; Sibongile Ndashe, Initiative for Strategic Litigation in Africa (SALC).