

# **The Division of Matrimonial Property in Kenya: A Feminist Approach**

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## Declaration

I, FREYDA KONNO OWINO do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Francis Kariuki

## Acknowledgements

I thank the Almighty God for bringing me this far. He has granted me grace, providence and protection.

I acknowledge the overwhelming and remarkable input of my supervisor, Francis Kariuki. His criticism, counsel and guidance were invaluable. You are greatly appreciated.

I give thanks to my mentor, best friend and father, Mr. George Owino for his support, prayers and constant encouragement.

## Dedication

This work is dedicated to Loice Aluoch.

## Abbreviations

1. CEDAW – Convention on the Elimination of all forms of Discrimination against Women
2. KLR – Kenya Law Reports
3. MWPA – Married Women Property Act
4. No. – Number
5. SA – South Africa
6. UDHR – Universal Declaration of Human Rights
7. Vol. – Volume

## List of Statutes

### **Kenyan Legislations**

1. Constitution of Kenya, 2010.
2. Judicature Act, Cap 3, Laws of Kenya.
3. Land Act, No. 6 of 2012.
4. Land Registration Act, No. 3 of 2012.
5. Marriage Act, 2014.
6. Married Women Property Act, 1882.
7. Matrimonial Causes Act, Cap 152, Laws of Kenya (repealed).
8. Matrimonial Property Act, 2013.

### **South African Legislations**

1. Deeds Registries Act, No. 47 of 1937.
2. Divorce Act, 1979.
3. Matrimonial Property Act, No. 88 of 1984.

### **International Instruments**

1. African Charter on Human and Peoples Rights
2. East African Community Treaty
3. Universal Declaration of Human Rights

## List of Cases

1. *Echaria v Echaria*, Civil Appeal 75 of 2001
2. *Essa v Essa*, [1995] CAK
3. *Estate Sayle v Commissioner of Inland Revenue Authority* [1945] SA
4. *Gissing v Gissing*, [1970] 2 All ER
5. *I v I*, [1971] EA
6. *Jordan v Jordan* [2001] 3 SA
7. *Karanja v Karanja* [1975] KLR
8. *Kivuitu v Kivuitu*, [1991] KLR
9. *Nderitu v Nderitu*, Civil Appeal No. 203 of 1977
10. *Otieno v Ougo and Another* (1988) 1 KAR
11. *Pettitt v Pettitt*, [1970] AC

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## ABSTRACT

The concept of equality between men and women has spurred debates both nationally and internationally over the years. This has seen the enactment of international human rights instruments with anti-discriminatory provisions and more so, a convention entirely dedicated to protecting women against any form of discrimination, that is, Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

This study looks into protection of women's rights to matrimonial property upon the dissolution of a marriage. The starting point of the study is the family, and particularly what marriage means for women as regards property rights. As the study concerns matrimonial property laws in Kenya, the research mainly reviews prior and existing laws in Kenya.

Using a feministic approach, the study examines whether women's rights to matrimonial property are adequately protected by the relevant statutory provisions in Kenya.

## Chapter One

### INTRODUCTION TO THE STUDY

#### 1.1. Background to the matrimonial property regime in Kenya

The lack of a statute spelling out applicable principles in the division of matrimonial property during the colonial and postcolonial period in Kenya meant that the courts had to fashion some form of guidelines on how matrimonial property was divided between parties upon divorce.<sup>1</sup>

Therefore, courts relied on the Married Women's Property Act (MWPA)<sup>2</sup> in matters relating to matrimonial property. The MWPA was a statute of general application in England on 12 August 1897.<sup>3</sup> Consequently, it was applicable in Kenya in so far as the circumstances of Kenya and its inhabitants permitted.<sup>4</sup> Pursuant to the Judicature Act, the MWPA applied in priority to customary law.<sup>5</sup>

The MWPA granted power to the court to consider the respective shares of the parties to matrimonial property upon divorce.<sup>6</sup> Courts considered whether a claimant had made financial contribution towards acquisition of matrimonial property.<sup>7</sup> Such contribution could either be direct or indirect.

Contribution was considered direct where a party put in money directly towards the acquisition of matrimonial property. In this case, courts would simply determine the proportion of that contribution.<sup>8</sup> Indirect contribution arose where one of the parties spent money in other matters that the acquirer of the property would otherwise have had to cater for.<sup>9</sup> This included the wife's expenditure in maintaining the home, educating the children or paying for other expenses such as food and clothing for the family.<sup>10</sup>

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<sup>1</sup> Ruth A. Odhiambo and Maurice Oduor, 'Gender Equality' in Lumumba P.L.O, Mbondeyi Morris and Odero Steve, *The Constitution of Kenya: Contemporary Readings*, Law Africa, Nairobi, 2013, 113.

<sup>2</sup> Married Women Property Act (1882).

<sup>3</sup> *I v I* [1971] EA 278.

<sup>4</sup> Section 3, *Judicature Act*, (Cap 8, Laws of Kenya).

<sup>5</sup> Cap 8, Laws of Kenya.

<sup>6</sup> Section 17, *Married Women Property Act*, (1882).

<sup>7</sup> In *Gissing v Gissing* [1970] 2 All ER 780 and *Pettitt v Pettitt* [1970] AC 777.

<sup>8</sup> Ruth A. Odhiambo and Maurice Oduor, 'Gender Equality', 114.

<sup>9</sup> Ruth A. Odhiambo and Maurice Oduor, 'Gender Equality', 114.

<sup>10</sup> *Karanja v Karanja* [1975] KLR 307.

The court recognized that in the case of women, proving financial contribution whether direct or indirect might be problematic and therefore, the courts had to look at other forms of contribution that might be made by a woman to the family.<sup>11</sup>

The issue on indirect contribution was further explored in a number of cases, such as *Nderitu v Nderitu*<sup>12</sup> and *Kivuitu v Kivuitu*.<sup>13</sup> These cases affirmed that a wife's contribution more often took the form of backup services on the domestic front rather than direct financial contribution.<sup>14</sup> In effect, courts would have been entitled to take into account any form of contribution whether direct or indirect, monetary or non-monetary.<sup>15</sup>

Over the past few years, Kenya has revised some of its laws and repealed statutes that governed matrimonial property. These include the Matrimonial Causes Act,<sup>16</sup> the Married Women Property Act<sup>17</sup> and the repealed Constitution. To this effect, the 2010 Constitution states that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>18</sup> Equality includes the full and equal enjoyment of all rights and fundamental freedoms.<sup>19</sup>

Further, women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.<sup>20</sup> Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.<sup>21</sup> It is not clear whether these 'equal rights' refer to 50/50 division of rights on matrimonial property or whether it refers to equality based on contribution of each spouse.

The Matrimonial Property Act defines contribution to include non-monetary contribution such as farm work, childcare and companionship.<sup>22</sup> The Act also states that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their

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<sup>11</sup> *Karanja v Karanja* [1975] KLR 307.

<sup>12</sup> *Nderitu v Nderitu*, Civil Appeal No 203 of 1977.

<sup>13</sup> [1991] KLR 248.

<sup>14</sup> *Nderitu v Nderitu*, Civil Appeal No 203 of 1977.

<sup>15</sup> *Nderitu v Nderitu*, Civil Appeal No 203 of 1977.

<sup>16</sup> Cap 150, Laws of Kenya.

<sup>17</sup> 1882.

<sup>18</sup> Article 27(1), *Constitution of Kenya*, (2010).

<sup>19</sup> Article 27(2), *Constitution of Kenya*, (2010).

<sup>20</sup> Article 27(3), *Constitution of Kenya*, (2010).

<sup>21</sup> Article 45(3), *Constitution of Kenya*, (2010).

<sup>22</sup> Section 2, *Matrimonial Property Act*, (2013).

marriage is otherwise dissolved.<sup>23</sup> Other notable statutes that will be discussed later in the study include the Land Act,<sup>24</sup> the Marriage Act<sup>25</sup> and the Land Registration Act.<sup>26</sup>

The ambiguity in these statutes as regards division of matrimonial property reflects a failure on the part of the Kenyan government in protecting women's rights to matrimonial property adequately. For this reason, the study delves into the issue by looking at; the historical development of women's rights to matrimonial property; the legal framework that have been put in place over the years and; an analysis of the existing statutes on matrimonial property rights in comparison to international standards.

## 1.2. History of women's right to own property

### 1.2.1. English women's property rights

At common law, the wife was viewed as a 'feme covert'.<sup>27</sup> This emphasized a wife's subordination to the man, as it put her under the influence and protection of the husband.<sup>28</sup> Upon marriage, the husband and wife became one person under the law, as the property of the wife was surrendered to her husband, and her legal identity ceased to exist.<sup>29</sup> Any personal property acquired by the wife during the marriage, unless specified that it was for her own separate use, went automatically to her husband.<sup>30</sup>

Women were often limited in what they could inherit.<sup>31</sup> Males were more likely to receive real property (land), while females with brothers were sometimes limited to inheriting personal property, which included clothing, jewelry, household furniture, food, and all moveable goods.<sup>32</sup> In an instance where no will was found, the English law of primogeniture automatically gave the oldest son the right to all real property, and the daughter only inherited

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<sup>23</sup> Section 7, *Matrimonial Property Act*, (2013).

<sup>24</sup> No. 6 of 2012.

<sup>25</sup> 2014, Laws of Kenya.

<sup>26</sup> No. 3 of 2012.

<sup>27</sup> Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, (London: Blackwell, 1989), 196.

<sup>28</sup> Claudia Zaher, "When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture" *Law Library Journal* Vol 94, 460.

<sup>29</sup> Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, <http://www.umd.umich.edu/casl/hum/eng/classes/434/geweb/PROPERTY.htm> accessed on 26th February 2016.

<sup>30</sup> Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*.

<sup>31</sup> Hiam Brinjikji, "Property Rights of Women in Nineteenth-Century England".

<sup>32</sup> Hiam Brinjikji, "Property Rights of Women in Nineteenth-Century England".

real property in the absence of a male heir. The law of intestate primogeniture remained on the books in Britain until 1925.<sup>33</sup>

### 1.2.2. Married Women's Property Act 1882

Coverture meant that by marriage, the husband and the wife became one person in law.<sup>34</sup> The legal existence of the woman was suspended during the marriage and consolidated into that of the husband, under whose protection and cover she performed everything.<sup>35</sup> William Blackstone explains that as a result of this, a man could not grant anything to his wife or enter into covenant with her, for the grant would suppose her separate existence; and to covenant with her, would be only to covenant with himself.<sup>36</sup>

Anything the wife earned or inherited during the marriage legally belonged to the husband.<sup>37</sup> She could not make contracts or incur debts without his approval.<sup>38</sup> Nor could she sue or be sued in a court of law.<sup>39</sup> Only the extremely wealthy were routinely exempted from these laws: under the rules of equity, a portion of a married woman's property could be set aside in the form of a trust for her use or the use of her children.<sup>40</sup>

The Married Women's Property Act 1882 addressed the grievances presented by English women, as it altered the common law doctrine of coverture to include the wife's right to own, buy and sell her separate property.<sup>41</sup> Married women's legal rights included the right to sue and be sued.<sup>42</sup> Any damages a wife might pay would be her own responsibility, instead of that of her husband.<sup>43</sup> Married women were then also liable for their own debts, and any outside trade they owned was subject to bankruptcy laws. Further, married women were able to hold stock in their own names.<sup>44</sup>

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<sup>33</sup> Hiam Brinjikji, "Property Rights of Women in Nineteenth-Century England".

<sup>34</sup> William Blackstone, "Commentaries on the Laws of England", 1756.

<sup>35</sup> Commentaries on the Laws of England, (1756).

<sup>36</sup> Commentaries on the Laws of England, (1756).

<sup>37</sup> Rachel Ablow, *One Flesh, One Person and the 1870 Married Women's Property Act*, available at [http://www.branchcollective.org/?ps\\_articles=rachel-ablow-one-flesh-one-person-and-the-1870-married-womens-property-act](http://www.branchcollective.org/?ps_articles=rachel-ablow-one-flesh-one-person-and-the-1870-married-womens-property-act) accessed on 12<sup>th</sup> March 2016.

<sup>38</sup> Rachel Ablow, *One Flesh, One Person and the 1870 Married Women's Property Act*.

<sup>39</sup> Rachel Ablow, *One Flesh, One Person and the 1870 Married Women's Property Act*.

<sup>40</sup> Rachel Ablow, *One Flesh, One Person and the 1870 Married Women's Property Act*.

<sup>41</sup> Married Women Property Act, 1882.

<sup>42</sup> Trevor May, *An Economic and Social History of Britain* (New York: Longman, 1987), 90.

<sup>43</sup> Trevor May, *An Economic and Social History of Britain* (New York: Longman, 1987), 90.

<sup>44</sup> Trevor May, *An Economic and Social History of Britain* (New York: Longman, 1987), 90.

### 1.2.3. Women's property rights in Kenya

Before independence, customary law of the respective tribes in Kenya primarily applied in personal law matters such as marriage and inheritance. In addition, courts relied on the MWPA on the division of matrimonial property. Women were discriminated against in this era, as will be shown later in the study.

The earliest attempt towards reforming family laws in Kenya came sometime after independence, when the then President (Jomo Kenyatta) appointed two Commissions to conduct the process of reformation.<sup>45</sup> These were the Commission on the Law of Marriage and Divorce, which was charged with the task of reviewing the law on marriage and divorce, and the Commission on the Law of Succession which was tasked with reviewing the law of succession.<sup>46</sup>

Both Commissions were tasked with the drafting of a single law on each of these matters that would have a nation-wide application, rather than the multiple legal regimes that existed at the time, which were largely based on racial classifications and in many respects defied the principles of equality between men and women.<sup>47</sup>

The overarching mandates of these two Commissions were therefore to consolidate the fragmented succession and marriage laws as well as ensure recognition of the equal rights of women and men to property in marriage and upon dissolution of marriage.<sup>48</sup>

All attempts made to pass the Bill proposed on marriage laws by the Commission were defeated by Parliament for the reason that it purportedly assaulted the local customs or granted too many rights to women.<sup>49</sup> It was not until the promulgation of the Constitution in 2010 that women were given hope as to the guarantee of their rights in matrimonial property.

Article 45(3) of the Constitution of Kenya provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage. This provision sought to cure the subjugation of women upon the dissolution of marriage and disenfranchisement even within marriage by ensuring that both parties in

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<sup>45</sup> Nancy Baraza, *Family Law Reforms in Kenya: An Overview*, presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30 April 2009.

<sup>46</sup> Nancy Baraza, *Family law reforms in Kenya: an overview*, 2009.

<sup>47</sup> Nancy Baraza, *Family law reforms in Kenya: an overview*, 2009.

<sup>48</sup> Nancy Baraza, *Family law reforms in Kenya: an overview*, 2009.

<sup>49</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', *University of Nairobi Law Journal* (2003) 156.

marriage have equal rights. This provision gives effect to the feminist view in the sense that it seeks to liberate women and reverse the patriarchal society which insubordinates women.

Further, Article 68(c)(iii)<sup>50</sup> provides that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage. It is in this spirit that the Matrimonial Property Act was passed in 2013.

The Matrimonial Property Act 2013 was enacted as a culmination of a long battle for the rights of women upon separation or grant of divorce between spouses and was a big boost for women. The provisions of the Matrimonial Property Act 2013 indicate a feminist influence on the law as it recognizes the non-monetary contribution of women towards the matrimonial property and as such, it states that matrimonial property is to be divided according to the contribution of the spouses.

#### 1.2.4. Judicial approaches to the division of Matrimonial Property

In *Pettitt v Pettitt*,<sup>51</sup> the House of Lords affirmed that section 17 MWPA did not give judge discretion to pass title of property from the legal owner to the other spouse. In *Gissing v Gissing*,<sup>52</sup> it was held that the court cannot devise arrangements which the parties never made. The court cannot also ascribe intentions which the parties in fact never had. *Pettitt* and *Gissing*, although superseded by statute in the U.K., have been used as law in Kenya. However, contradictory interpretations of these cases in local courts clouded the jurisprudence on matrimonial property.

In *Karanja v Karanja*,<sup>53</sup> the court held that when property is purchased jointly by both spouses and registered in the name of the husband with the wife's approval, a resulting trust can be inferred in her favour. This decision was reaffirmed in *Kivuitu v Kivuitu*.<sup>54</sup> The court laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares. In his *obiter dicta*, Omolo J. went further to presume that every wife has some interest in property acquired and registered in her husband's sole name due to her indirect contribution occasioned by fulfilling the duties of a wife and mother.

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<sup>50</sup> Constitution of Kenya, (2010).

<sup>51</sup> *Pettitt v Pettitt* (1969) 2 All ER 385.

<sup>52</sup> *Gissing v Gissing* (1971) AC 886.

<sup>53</sup> *Karanja v Karanja*, (1976) KLR 307.

<sup>54</sup> *Kivuitu v Kivuitu* [1985] LLR 1411 CAK.

In *Essa v Essa*,<sup>55</sup> the court cited Pettit and purported to approve various passages of that decision that denied the court power under section 17 MWPA to pass title to property from one spouse to another. Contradictorily, the court then granted the appellant a 50% share in property registered in the sole name of the respondent.

This approach reached its peak in *Nderitu v Nderitu*.<sup>56</sup> The court endorsed *obiter dicta* of Omolo, JA in *Kivuitu* and held that in the absence of a clearly declared decision [of the spouses] the court does not consider how much one party or other contributes but decides on an equality of division. The appeal court therefore increased the appellant's share in the disputed property, registered in the sole name of the deceased, from 30% to 50%, without considering the provisions of the relevant property statutes or differentiating between singly and jointly-held properties.

### 1.3. Statement of the Problem

The Constitution states that parties to a marriage have equal rights before, during and at the dissolution of the marriage.<sup>57</sup> On the other hand, the Matrimonial Property Act states that property shall be divided according to the contribution of each party in the acquisition of that property.<sup>58</sup> Contribution is defined to include non-monetary aspects such as childcare, companionship and farm work. It is not clear whether the Constitution alludes to 50/50 division of matrimonial property or whether 'equality' means the contribution of each party in the acquisition of such property. This ambiguity provides a leeway for the exposure of women to harsh cultural and judicial decisions that leave them miserable at the dissolution of marriage. Additionally, neither the Constitution nor the Matrimonial Property Act addresses the various types of marriages recognized in Kenya when it comes to division of matrimonial property. They simply refer to "marriage".

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<sup>55</sup> *Essa v Essa* [1995] LLR 384 CAK.

<sup>56</sup> 1998 LLR 2731 CAK.

<sup>57</sup> Article 45(3), *Constitution of Kenya*, (2010).

<sup>58</sup> Section 7, *Matrimonial Property Act*, (2013).

#### 1.4. Literature Review

The issue on division of matrimonial property in Kenya has been highlighted Muriuki Muriungi<sup>59</sup> and Augustus Mutemi<sup>60</sup>. Both papers, entitled “A Feminist Critique of the New Family Laws in Kenya” and “Family Law Reform in Kenya: A Feminist Critique” respectively, discuss the evolution of laws on matrimonial property. The authors give a history of women’s rights over the years, looking at statutes and decided cases, and the changes that have been realized through feminism. These include the enactment of the Marriage Act and most notably the inclusion of non-monetary contribution in the definition of contribution in the Matrimonial Property Act.

Nancy Baraza<sup>61</sup> and Patricia Kameri Mbote’s<sup>62</sup> in their papers, “The Philosophy and Historical Development of Family Laws in Kenya” and “The Land has its Owners: Gender issues in Land Tenure under Customary Law in Kenya” respectively, discuss the history and development of family laws in Kenya. They also explain the extent to which customary law has been regarded as an impediment in achieving women’s right to property after dissolution of marriage.

In a bid to assert the injustices women have faced over time, this study borrows from Perpetua W. Karanja’s article; “Women’s Land Ownership Rights in Kenya”.<sup>63</sup> She studies discriminatory land laws in Kenya and points out the patrilineal nature of the customary law regime in Kenya and how this disadvantaged women, stating that culture played a major role in subordinating women. Further insight on the discriminatory nature of the law on women in Kenya is drawn from Jennifer Smith et al, ‘Women’s Land and Property Rights in Kenya – Moving Forward into a new era of Equality’. This article was written immediately after the Post-Election Violence of 2007/08 and highlights the plights of women, especially after the mass displacement of population that took place.

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<sup>59</sup> A Feminist Critique of the new Family laws in Kenya, [https://www.academia.edu/8462856/A\\_Feminist\\_Critique\\_of\\_the\\_New\\_Family\\_Law\\_Regime\\_in\\_Kenya](https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya), accessed on 20<sup>th</sup> February 2016.

<sup>60</sup> Family Law Reform in Kenya; a Feminist Critique, [https://www.academia.edu/8462856/A\\_Feminist\\_Critique\\_of\\_the\\_New\\_Family\\_Law\\_Regime\\_in\\_Kenya](https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya), accessed on 20<sup>th</sup> February 2016.

<sup>61</sup> Nancy Baraza, ‘The Philosophy and Historical Development of Family Law in Kenya’.

<sup>62</sup> Patricia Kameri-Mbote, ‘The land has its owners! Gender issues in land tenure under customary law in Kenya’ IELRC working paper International Environmental Law Research Centre (2005 – 9) at 1. Available at <http://www.ielrc.org/content/w0509.pdf> accessed on 2nd February 2016

<sup>63</sup> Available at <http://scholar.valpo.edu/twls/vol10/iss1/6> accessed on 13th March 2016.

To advance the theory of feminism in division of matrimonial property, the study draws inspiration from E.A Archampong<sup>64</sup> who talks about the idea of equality from a feminist perspective in relation to matrimonial property laws in Ghana. His article is entitled “Matrimonial Property Division at Marriage Breakdown: The way forward”. He discusses the need for a gender equality perspective in the division of matrimonial property, drawing conceptions of gender equality from feminist legal theory as the basis for generating his definition of equality in the paper. Further, he analyses statutes and the interpretation of cases regarding matrimonial property in Ghana, and proposes ways of improving the law and its application to achieve greater gender equality for spouses.

In addition, it is generally contended that laws on division of matrimonial property have been inconsistently applied by judges, who have no legislative parameters within which to assess critical issues such as the contributions, needs and resources of separating couples. Charles Kanjama and Katarina Juma’s digest,<sup>65</sup> analyses the matrimonial property rights from cases which have been decided by both Kenyan and English law courts over the years. It states that women’s rights to matrimonial property have been overlooked over the years and the enactment of new laws on the topic are a step forward on the government’s side in ensuring the equality that is envisaged in the Constitution.

Jennifer Smith *et al* <sup>66</sup> advance the proposition that sex-discriminatory laws doom women to perpetual poverty and minimal, if any, access and control over property and land. They also state that absolute sole ownership by men denies women’s rights to land and matrimonial property. Therefore, they propose that the legislature should pass law that requires spouses to register land and property jointly.

Winifred Kamau<sup>67</sup> talks of the need to reconcile customary laws and women’s rights. She gives a background of customary laws in the pre-colonial and post-colonial periods, the impact of colonization on customary law and the nature of customary law in Kenya. She further states that since customary law is one of the sources of law under the 2010 constitution, it should not discriminate against women’s rights.

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<sup>64</sup> E.A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Journal.

<sup>65</sup> Family Law Digest on Matrimonial Property, Law Africa, 2013.

<sup>66</sup> Women’s Land and Property Rights in Kenya: Moving forward into an era of equality, available at <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Women-property-rights.pdf> accessed on 14 March 2016.

<sup>67</sup> Customary Law and Women’s Rights in Kenya, available at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> accessed on 14 March 2016.

The study also relies on Tom Ojienda's book, *'Principles of Conveyancing in Kenya: A Practical Approach'*. He describes the history of land laws in Kenya prior to the 2010 Constitution and dedicates a section on the jurisprudence of matrimonial property. Other books include *'An Introduction to South African Family Law'* and *'South African Family Law'*.

The Federation of Women Lawyers – Kenya (FIDA) has cut a niche for itself as a fearless women rights defender and earned respect and international recognition in women rights advocacy since its inception in 1985. This research therefore relies on FIDA periodic reports, annual reports and other relevant publications on protection of women's rights.<sup>68</sup>

Similarly, the Kenya Land Alliance (KLA) has been in the forefront in championing the cause of women with regards to their property rights especially land. It notes with concern that less than five (5) percent of land is registered in the names of women, yet they play a pivotal role in agricultural development in Kenya, which to date is the main stay of Kenya's economy. Specific reference to their publications will be made in this study.<sup>69</sup>

The study also outlines the decisions on landmark cases as regards division of matrimonial property such as *Echaria v Echaria and Kivuitu v Kivuitu*. The study also outlines the status of international law provisions on women discrimination as presented by the Kenya Human Rights commission.<sup>70</sup>

### 1.5. Research Objectives

The objectives of this research are:

- a) To identify existing laws that govern the distribution of matrimonial property in Kenya.
- b) To examine their adequacy or otherwise in determining the distribution of such property upon divorce, using a feminist theory approach.
- c) To compare the laws in Kenya with another jurisdiction that shares a history of discriminatory laws against women in division of matrimonial property.
- d) To recommend reform in the law relating to sharing of matrimonial property upon divorce.

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<sup>68</sup> Such resourceful publications are sourced from FIDA-Kenya official website. available at [http://fidakenya.org/?page\\_id=39](http://fidakenya.org/?page_id=39) accessed on 23<sup>rd</sup> February 2016

<sup>69</sup> Akinyi Nzioki, *Gender Aspects of Land Reform; Constitutional Principles*, Kenya Land Alliance, (2002) at 5. Published at [www.kenyalandalliance.or.ke](http://www.kenyalandalliance.or.ke)

<sup>70</sup> See, Kenya Human Rights Commission, 'Towards equality and anti-discrimination, An Overview of International and Domestic Law on Anti-Discrimination in Kenya.' (2010) 1.

## 1.6. Hypothesis

Women's rights to matrimonial property are not adequately protected when it comes to division of matrimonial property upon termination of marriage by divorce.

## 1.7. Justification

The question of whether the law governing division of matrimonial property upon divorce is adequate or not is prompted by the fact that initial research has indicated that women are the most vulnerable. This implies that reforms should be put in place in order to fill up the loopholes as presented initially in the existing laws.

## 1.8. Research Methodology

A number of text books, projects, discussion papers, academic papers, legal journals, academic reports and case law were used to obtain information relating to the history, development and the current legal framework division of matrimonial property in Kenya.

Since the study compares Kenya's legal framework with that of South Africa, their legislation will also be looked into in order to find out their position on the law of marriage and the proprietary consequences of various systems of matrimonial property in South Africa.

## 1.9. Chapter Breakdown

In this section, a brief overview of the arrangement of chapters is given as follows;

- a) **Chapter One:** Introduction – this section covers the history of the topic on division of matrimonial property, the importance of the research, the methodologies used in research, the objectives of the research and the theoretical framework used in the research. It also discusses the main issues, including statutes and case law for a clear and deeper understanding of the study.
- b) **Chapter Two:** Theoretical Framework – this section discusses the concept of equality from the feminist perspective in detail. It also proposes that culture is the main challenge towards progressive adjudication and legislation of matrimonial property rights. Noting that most African societies are patriarchal in nature, women have been subordinated without any recourse over the years. This is the starting point of the section and it continues to seek avenues where women can be empowered.

- c) **Chapter Three:** The legal framework governing division of matrimonial property in Kenya – this section is dedicated to the jurisprudence of matrimonial property rights. It looks into national and international legal instruments that make provisions for equal treatment of men and women. Not only does it consider existing laws, but also, it delves into repealed laws in order to provide an overview of the state of women’s rights over time. Also, judicial interpretation of matrimonial property rights will be discussed. Here, cases are analyzed one by one, pointing out the impact that such decisions had on legislation. This section aims to uncover the injustices that court decisions have caused to women over the years, more so because of the male dominance in courts.
- d) **Chapter Four:** A comparative study with South Africa – this section will compare the legal framework governing matrimonial property in Kenya with that of South Africa, noting the similarities and similarities in areas that need reform.
- e) **Chapter Five:** Conclusion – finally, the study ends by giving recommendations on the way forward in achieving equality.

## Chapter Two

### THEORETICAL FRAMEWORK

*“We all fight over what the label ‘feminism’ means but for me it’s about empowerment. It’s not about being more powerful than men – it’s about having equal rights with protection, support, justice. It’s not a badge like a fashion item.”*

Annie Lennox

#### 2.1. Introduction

According to Aristotle, there are two kinds of equality, numerical and proportional.<sup>71</sup> A form of treatment of others or as a result of it a distribution is equal *numerically* when it treats all persons as indistinguishable, thus treating them identically or granting them the same quantity of a good per capita. In contrast, a form of treatment of others or distribution is *proportional* or relatively equal when it treats all relevant persons in relation to their due.<sup>72</sup>

In relation to matrimonial property rights, numerical equality presupposes 50/50 distribution whereas proportional equality presupposes division based on the needs of each party or what they have actually contributed to the acquisition of the property. Existing legislation recognizes non-monetary contribution. The issue then becomes how to determine the value of non-monetary contribution that women make in their homes.

Taking the historical injustices that women have undergone in the different spheres of life, especially due to patriarchal customary laws, this study resorts to a feminist approach in the division of matrimonial property. The main aim of the feminist school of thought is to raise awareness.<sup>73</sup> Feminist legal theoretical approaches have impacted conceptions of gender equality, hence their use in this study to map equality. In as much as other theoretical approaches may prove useful in this work, feminist legal theory is useful because it tends to dig deep beneath the surface of the law, highlighting the various interests and conflicts that shape even the most ordinary legal standards.<sup>74</sup>

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<sup>71</sup> Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.

<sup>72</sup> Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/equality/#DefCon> , accessed on 13 March 2016.

<sup>73</sup> MacKinnon Catherine, *Consciousness Rising in: Towards a Feminist Theory of the State*, Cambridge: Harvard University Press (1989), 83-106.

<sup>74</sup> Martha Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen Law and Business, 1999)1.

It is therefore noted that most of the laws that have governed the family law regime in Kenya have defied the principles of equality between sexes. This inequality in the law dates back to the inherited laws upon the attainment of independence till the present day. The clamor for equality between men and women with respect to division of property and equality of rights is one of the concerns of the feminists.

The promulgation of the Constitution of Kenya in 2010 marked a herald in the rights of women as it placed the rights of women at par with that of men by recognizing equal rights between genders. It may well be stated that the Constitution of Kenya, 2010 was partly informed by a feminist view as it went a long way as far as emancipation of women from insubordination is concerned.

This focus on gender and the law offers a sound background for tackling issues affecting women in division of matrimonial property. The issues and major concepts identified and discussed from the feminist legal theory literature help formulate a working definition. This definition is subsequently applied to analysis of decisions on division of matrimonial property.

## 2.2. Matrimonial Property Regimes in Family Law

There are two general family law regimes in the area of property: *communio bonorum* and *separatio bonorum*.<sup>75</sup> *Communio bonorum* involves community property. This means that property is owned in common by husband and wife during marriage.<sup>76</sup> The property is presumed to be owned jointly, generally in equal shares, between the spouses.<sup>77</sup>

*Separatio bonorum* is founded on a system of separate property between spouses and is prevalent in common law jurisdictions. In this system the mere fact of marriage does not affect the property rights of the spouses. Each spouse remains a separate owner of those assets or interests to which he or she has acquired title to, pursuant to the general law.<sup>78</sup>

Being a common law jurisdiction, the separate ownership principle applies in Kenya.<sup>79</sup> Accordingly, Kenya's view of inter-spousal property rights have not only been a function of the African customary law but it has also been shaped by common law as defined by the

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<sup>75</sup> Kanjama C and Juma K, *Family Law Digest on Matrimonial Property*, Law Africa, 2013, 10.

<sup>76</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

<sup>77</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

<sup>78</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

<sup>79</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

English system. In both of these systems (i.e. African customary law and common law) the rights of the woman to own property have historically been greatly curtailed.<sup>80</sup>

In African cultures, the head of the family, more often than not the man, held land on behalf of other family members. Even upon divorce, it is the wife that left the matrimonial home leaving only with her self-acquired personal property. Any property which belonged to the matrimonial home and landed property remained with the husband.<sup>81</sup>

It is for this reason that the study analyses the implication of gender in a society through different roles and how equality can be achieved between men and women by taking a feminist legal theory approach.

### 2.3. What is Feminism

Before discussing what feminism entails, it is important to understand its background, that is, gender. Gender refers to the state of being either male or female.<sup>82</sup> Over the years, the term has acquired a social meaning where *gender* defines how the male and female genders relate in a society.<sup>83</sup> This comes out in the division of labour where the female gender is allocated duties such as cooking, washing and other domestic chores whereas the male gender is allocated non-domestic duties such as decision-making, bread winning among others.<sup>84</sup>

Due to the above reason, a body of knowledge which analyses the condition of women in a society arose.<sup>85</sup> When such studies are directed to the changing of women's condition in the society, then such body of knowledge is known as feminist studies. Feminism is therefore a political movement which aims at transforming gender relations, which are oppressive to women. As such, this jurisprudence not only seeks to explain, but also, it critiques the law on behalf and for the benefit of women.<sup>86</sup>

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<sup>80</sup> Kanjama C and Juma K, *Family Law Digest on Matrimonial Property*, Law Africa, 2013.

<sup>81</sup> Cotran E, *Restatement of African Customary Law: Laws of Marriage and Divorce*, (1968) Sweet and Maxwell, London.

<sup>82</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', *University of Nairobi Law Journal* (2003) 156.

<sup>83</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', *University of Nairobi Law Journal* (2003) 156.

<sup>84</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 156.

<sup>85</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 156.

<sup>86</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 156.

Feminism began during the industrial revolution in Europe, an era when women were discriminated against because of their gender.<sup>87</sup> They were seen as not able to do the jobs that their male counterparts were able to do. As men engaged themselves in well-paying jobs which came as a result of the industrial revolution, women remained behind because they were seen as weak and could not engage themselves in the “muscular” activities men were engaging themselves in. In this regard, there arose the need to fight for the needs of these women to be given equal treatment at places of work.

Feminist legal theory has developed through different stages since legal scholars began generating this theoretical approach in the early 1970’s.<sup>88</sup> The major feminist theories are;

- a) *Liberal feminism* – focuses on equal rights and individual choices. Seeks to identify ways in which law could remove the barriers that prevent women’s access to their rights.
- b) *Radical feminism* – focus on the different ways in which men control women’s sexuality and reproductive capacities to suit their needs. Also shows how men use different forms of violence to perpetuate women’s oppression.
- c) *Marxist feminism* – link women’s oppression to the forms of capitalist exploitation of labour and goes on to analyze women’s paid and unpaid work in relation to its foundation within the capitalist economy.

In this study, the approach taken is that of liberal feminism. Liberal feminists are of the view that women’s subordination is rooted in legal constraints, which prevent the full participation of women in the public sphere.<sup>89</sup> As Kameri-Mbote outlines in her paper on Gender issues, this approach seeks for equal treatment between men and women. As such, women view men as potential allies who might help them achieve the desired equality.

When women enter into marriage, they are already disadvantaged because they come in with less property and financial income compared to their male counterparts. Therefore, men could argue that the property they own is rightfully theirs and women are not entitled to it. On the other hand, women would seek a share in those properties based on the direct or indirect contribution they have made towards acquiring or maintaining such properties.

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<sup>87</sup> Kameri-Mbote P, ‘Gender Considerations in Constitution-Making: Engendering Women’s Rights in the Legal Process’. 156.

<sup>88</sup> D. Kelly Weisberg, *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press 1993), 3.

<sup>89</sup> Clarion “An Introduction to Gender, Law and Society: Constitutional Debate No. 11,” (Claripress Limited, Nairobi 2001) 2.

Consequently, courts are tasked with determining how to divide the matrimonial property in an “equal” manner, so that justice is served to both parties. What do feminists mean when they seek for equal treatment between men and women? To answer this question, the next section deals with conceptions of equality.

#### 2.4. Conceptions of Equality

The work of early women lawyers reflected a push for a liberal approach to law and its application, and extended to their feminist scholarship which theorized about equality as the need for men and women to be treated alike because their sexes were similar in law.<sup>90</sup> The formal equality approach was thus adopted and it remains the main feminist influence on law. They called for women’s access to all public institutions, benefits and opportunities on the same terms as those of men.<sup>91</sup>

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<sup>90</sup> E. A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Law Journal Vol 4 (2007/2008) 81.

<sup>91</sup> E. A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Law Journal Vol 4 (2007/2008) 81.

#### 2.4.1. Formal Equality

Formal equality gives all individuals the same choices and therefore allows them to maximize their well-being.<sup>92</sup> However, equality premised on equal treatment is difficult to achieve.<sup>93</sup> *De jure* equality can lead to *de facto* discrimination where the consequences of the law are not anticipated.<sup>94</sup>

The formal equality approach has achieved some level of success advocating for identical treatment of men and women, but a look into its effects on women's lives shows that it does not always lead to equality. Formal equality sometimes fails to enable women to achieve equality. Inclusion of women in areas where they were previously excluded no longer seems to be the only meaning of equality.<sup>95</sup>

#### 2.4.2. Substantive equality

The problems identified with the formal equality approach have led legal feminists seeking other routes to ensure that equality is achieved. Substantive equality advocates for the society to acknowledge the ways in which women's experiences are different from those of their male counterparts.<sup>96</sup> In promoting women's equality rights, substantive equality favours giving women 'a leg up' where necessary to ensure that women catch up with, and are equal to their historically advantaged male counterparts.<sup>97</sup>

Substantive equality leads to some form of differential treatment which is justified on account of levelling the playing field.<sup>98</sup> Merely placing men and women on an equal footing ensures that only men, who already have the advantage, are further advantaged, and the real equality is not achieved.<sup>99</sup>

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<sup>92</sup> Mary Becker, et al, *Feminist Jurisprudence: Taking Women Seriously; Cases and Materials*, (1994) 68-81

<sup>93</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process'.

<sup>94</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 156.

<sup>95</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process' 156.

<sup>96</sup> E. A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Law Journal Vol 4 (2007/2008).

<sup>97</sup> E. A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Law Journal Vol 4 (2007/2008).

<sup>98</sup> Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 156.

<sup>99</sup> MacKinnon Catherine, *Difference and Dominance: On Sex Discrimination* in Weisberg.

This definition of equality acknowledges that spouses may assume different roles and responsibilities for the smooth running of their family affairs. However, these different roles and responsibilities, and the fact that a male or female spouse undertakes them, should not make them any less significant as contributions to the acquisition of matrimonial property.<sup>100</sup>

CEDAW recognizes such differential treatment and states that;

*“Special temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objective of equality of opportunity and treatment have been reached”*<sup>101</sup>

## 2.5. Conclusion

Gender equality means a social order in which men and women share the same opportunities and the same constraints in the economic, social and political realms of life.<sup>102</sup> Due to the patriarchal nature of the society, the laws in place over the years have seemed to disadvantage women. Legal reforms have sought to achieve both formal and substantive equality.<sup>103</sup>

Formal equality involved textual changes in the law in order to secure the recognition and enforcement of fundamental guarantees of women, such as the constitutional amendment that barred discrimination on the basis of sex.<sup>104</sup> Substantive equality involved implementation of affirmative action plans designed to increase women’s capacity to engage effectively with the social, economic and political processes in the society.

A textual reading of the Constitution on matrimonial property would seem to suggest formal equality when it states that parties have equal rights before, during and at the dissolution of a marriage. This goes hand in hand with Aristotle’s view on numerical equality, where each person gets the same share of property regardless of their contribution. However, this does not guarantee equality for both men and women.

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<sup>100</sup> E. A Archampong, *Matrimonial Property Division at Marriage Breakdown: The way forward*, KNUST Law Journal Vol 4 (2007/2008) 83.

<sup>101</sup> Article 14, *Convention on All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13.

<sup>102</sup> Ruth A. Odhiambo and Maurice Oduor, ‘Gender Equality’ in Lumumba P.L.O, Mbondeyi Morris and Odera Steve, *The Constitution of Kenya: Contemporary Readings*, Law Africa, Nairobi, 2013, 115.

<sup>103</sup> Ruth A. Odhiambo and Maurice Oduor, ‘Gender Equality’ in Lumumba P.L.O, Mbondeyi Morris and Odera Steve, *The Constitution of Kenya: Contemporary Readings*, Law Africa, Nairobi, 2013, 115.

<sup>104</sup> Act No. 9 of 1997, amending section 82(3) of the Constitution (repealed).

It is, therefore, the recommendation of this study that the Constitution should be read together with the Matrimonial Property Act which states that matrimonial property shall be divided equally between the spouses, according to their contribution. This approach embraces Aristotle's idea of proportional equality which requires parties to be given what is due to them.

The issue that arises at this juncture is how to ascertain the non-monetary contribution which women make during the currency of the marriage. This is where the substantive equality approach comes in and suggests that laws can go against common standards of equality in a bid to enable the weaker party to access justice.

Courts should take into consideration the enormous input of women in terms of child birth, child care, taking care of the home, cooking and other roles in the house. Simply because they don't necessarily contribute financially does not mean that they should be left vulnerable when the marriage comes to an end. Rather, they should be left in position which enables them to support themselves and lead a normal life.

It is for this reason that the study has resorted to a feminist theory on equality by favoring the substantive equality approach when it comes to division of matrimonial property at the dissolution of marriage.

Chapter Three  
DEVELOPMENT OF LAWS RELATING ON DIVISION OF  
MATRIMONIAL PROPERTY IN KENYA

*“Although Kenya’s legal framework is progressive in its support for women’s land rights, patriarchal social and customary norms continue to limit women’s ability to exercise and enforce their rights to land and other property”*

Reem Gaafar

### 3.1. Introduction

This chapter traces the development of the legal framework governing division of matrimonial property in Kenya from the pre-colonial period through the colonial period and the post-independence period up to the promulgation of the 2010 Constitution and consequent legislations.

It looks specifically into the division of matrimonial property upon dissolution of a marriage. Women are particularly vulnerable in cases of divorce as the legal framework governing property rights upon dissolution of marriage has historically been vague. The different legal regimes also contained gaps that made it difficult, if not impossible, for most women to assert their property rights following a divorce.<sup>105</sup> These gaps in Kenyan law on matrimonial property and land during marriage and at divorce resulted in judicial decisions that undervalued the immense contribution of women to their families and the household.<sup>106</sup>

The first part of this chapter sets out the applicable laws in force before and after colonization. These include customary practices and formal legislation put in place by the colonial government. The second part looks into the judicial interpretation of statutes in place at the time and how court decisions were biased against women due to the patriarchal nature of the Kenyan society.

The third part is a discussion of the present laws and how they seek to protect women social injustices by providing for, *inter alia*, equal protection by the law, the right to own property, and protection from customary rules that go against the spirit of the 2010 Constitution. Finally, the chapter concludes by identifying the existing loopholes that still expose women to a discriminatory culture where they are seen as mere subordinates.

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<sup>105</sup> Reem Gaafar, Women’s Land and Property Rights in Kenya, Center for Women’s Land Rights, 6.

<sup>106</sup> Jennifer Smith et al, ‘Women’s Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation’, *Georgetown Journal of International Law*, 13.

## 3.2. Historical Development of the law on Matrimonial Property

### 3.2.1. The Pre-colonial period

In the pre-colonial times, land was considered as the greatest manifestation of property, along with cattle, houses, number of wives and number of children.<sup>107</sup> Land is also a social asset, crucial for cultural identity, political power and participation in local decision making process.<sup>108</sup>

Women were objectified and regarded as part of the property that a man owned. Prestige and respect was accorded to men by other members of the society according to the number of wives he had. Women were always viewed as the weaker gender and this sexual distinction was used as the basis for ascription of roles in the society. They were allocated duties such as cooking, washing and other domestic chores whereas men were allocated non-domestic duties such as decision-making, bread winning, among others.<sup>109</sup>

Since man was the head of the family, he held land on behalf of other family members.<sup>110</sup> Customary law stipulated that a woman was not supposed to own land.<sup>111</sup> Land was owned by the man, and in other cultures land belonged to the community. In some cases, a woman had to ask for permission to go and till the land.<sup>112</sup>

Women were beholden to patriarchal customary norms which treated them less equally with men, as they were not entitled to own land. All land was regarded as community land and was controlled by the Council of Elders' who were guided by customary norms which objectified women.<sup>113</sup>

Unlike the Christian view that marriage is a voluntary union between man and woman, the tradition African society held it differently; "Marriage here is like slavery, like enslavement. Once you are married, you cease to have any rights of your own, and if you divorce then you have no property independently – you cannot go back to where you came from."<sup>114</sup>

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<sup>107</sup> FIDA 2007, Unpublished Women Land Rights in Kenya Policy Brief, 2.

<sup>108</sup> FIDA 2007, Unpublished Women Land Rights in Kenya Policy Brief, 3.

<sup>109</sup> FIDA 2007, Unpublished Women Land Rights in Kenya Policy Brief, 3.

<sup>110</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

<sup>111</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 115.

<sup>112</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*.

<sup>113</sup> J Kenyatta, *Facing Mount Kenya: The Traditional Life of Gikuyu*, Vintage Books (1938) 21.

<sup>114</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 21: interview with Gitobu Imanyara, member of parliament, Nairobi.

As such, even upon divorce, it is the wife who left the matrimonial home, leaving with only the self-acquired property.<sup>115</sup> Any property which belonged to the matrimonial home remained with the husband.<sup>116</sup> To make matters worse, women were not allowed to own property save for those who remained unmarried as has been the practice of the Gikuyu and Kamba communities.<sup>117</sup>

### 3.2.2. The Colonial period

In the colonial period, the bias against women in ownership, control and management of property became more profound because of their subjection to two legal systems (customary laws and colonial rules) both of which were discriminatory.<sup>118</sup> While customary norms discriminated women, the colonial legal system reinforced the supposed inferiority of women.<sup>119</sup>

When the British colonial administration began, Kenya became a crown colony, where all land was assumed to belong to the crown.<sup>120</sup> The acquisition of land took place through the Crown Land Ordinance<sup>121</sup> and imposed English land tenure. In 1932, the Kenya Land Commission was appointed and charged with appropriating land to Kenyans and British settlers in accordance with the British laws.<sup>122</sup>

They also introduced the policy of individualization which transformed land from a shared form of property to individual ownership through registration.<sup>123</sup> Kenyan women were foreclosed from owning land because men owned land as “absolute proprietors”. In order to address issues of ownership, the colonialists imposed the MWPA 1882 into the Kenyan

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<sup>115</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 116

<sup>116</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 116.

<sup>117</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 116.

<sup>118</sup> Vayonda Jepchumba Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 2014.

<sup>119</sup> Y P Ghai & JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from colonial times to the Present*, Footprints (1970).

<sup>120</sup> Holdsworth, W.S., *A Historical Introduction to the Land Law*, Oxford (1972) 22.

<sup>121</sup> Crown Land Ordinance, 1915.

<sup>122</sup> Jemaiyo Chabeda-Barthe, “How European Concepts of Marriage and Land Ownership Excluded Women in Kenya from Accessing and Owning Property” in *Archives of Rural History, Institutional Encounters: European Property Rights in Colonial Contexts*, 27.

<sup>123</sup> Claris Ogaangaet. al., *Women’s Land and Property Rights in Kenya- Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation*. A paper presented at the International Women’s Human Right Clinic at Georgetown University Law Center on behalf of the Federation of Women Lawyers in Kenya.

courts to provide an avenue through which married women could access matrimonial property.<sup>124</sup>

Under common law, the view on inter-spousal property rights was the function of the doctrine of conjugal unity.<sup>125</sup> This doctrine was based on the belief that husband and wife are “one in flesh”.<sup>126</sup> The notion of conjugal unity was derived from a biblical metaphor that has been interpreted to mean that the matrimony is a holy state ordained by God.<sup>127</sup> Therefore, husband and wife became one person in the eye of the law upon marriage. It was believed that if husband and wife were one, that one was obviously the husband.<sup>128</sup>

In as much as this was the only legislation that provided that women could own property, the Act hindered many women from accessing and owning matrimonial property since most rural marriages were polygamous.

### 3.2.3. The Post-Independence period

When Kenya attained independence, it continued to apply the colonial policy of individualization which transformed land from a shared form of property to individual ownership through registration.<sup>129</sup> Along with that, there were several legislations in place which failed to secure women’s rights, as discussed below;

#### a) **The Registered Land Act**<sup>130</sup>

This Act provided that the first person to register title to a portion of land retained “absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.<sup>131</sup> Within the context of patriarchy, male household heads, actual or nominal, were registered as the sole proprietors of such land. This excluded women from land ownership.<sup>132</sup>

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<sup>124</sup> Jemaiyo Chabeda-Barthe, “How European Concepts of Marriage and Land Ownership Excluded Women in Kenya from Accessing and Owning Property” in Archives of Rural History, *Institutional Encounters: European Property Rights in Colonial Contexts*, 27.

<sup>125</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 116.

<sup>126</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 116.

<sup>127</sup> Genesis 2:24, Mathew 19:5, Mark 10:8

<sup>128</sup> L. Holcomber, *Wives and Property* (1983) 19.

<sup>129</sup> L. Holcomber, *Wives and Property* (1983) 19.

<sup>130</sup> *The Registered Land Act*, Cap 300, Law of Kenya, (repealed).

<sup>131</sup> Section 27, *Registered Land Act*, Cap 300.

<sup>132</sup> Vayonda Jepchumba Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 2014.

### **b) Married Women's Property Act**

This Act became applicable in Kenya by virtue of being a statute of general application in England on 12 August 1897.<sup>133</sup> In addressing the issue of division of matrimonial property, section 17 of the MWPA stated as follows:

*In any question between husband and wife as to the title to or possession of property, either party, ... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice... and the judge of the High Court... may make such order with respect to the property in dispute and to the costs of and consequent in the applications as he thinks fit....*<sup>134</sup>

The MWPA neither defined matrimonial property nor provided guidance about the equitable division of property. This led to various judicial interpretations as will be discussed later in this chapter.

### **c) The Independence Constitution**

The Constitution of Kenya, as drafted at Independence, was glaringly insensitive to gender.<sup>135</sup> In as much as Chapter 5 provided the fundamental rights and freedoms of the individual, both men and women, whose enjoyment was guaranteed by section 70, section 82 which was concerned with discrimination affected women more than men.

Section 82 (1) and (2) provided that no law shall make provision that is discriminatory 'either in itself or its effects and neither should a person manner by a person acting by virtue of any written law or in the performance of the function of a public office or public authority. Discrimination for purposes of section 82(3) meant giving preferential treatment to different persons on the basis of race, tribe, place of origin or residence, other local connection, political opinion, colour or creed. One's gender as a basis for discrimination was not provided for in section 82(3).<sup>136</sup>

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<sup>133</sup> Section 3, *Judicature Act (Cap 8 Laws of Kenya)*.

<sup>134</sup> Section 17, *Matrimonial Property Act*, (2013).

<sup>135</sup> Godwin R. Murunga and Shadrack W. Nasongo, *Kenya: The Struggle to Democracy*, 177.

<sup>136</sup> P. Kameri-Mbote and M.Nzomo, *The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya 2002: Have the Hens finally come home to roost for Kenyan women?* University of Nairobi Law Journal (1) 2004, available at <http://www.ielrc.org/content/a0408.pdf>.

Several laws were also exempted in section 82(4) from the provisions against discrimination. These included laws of adoption, marriage, divorce, burial, devolution of property on death and personal law matters. Coupled with section 82 (3) which omitted 'sex' as a ground for discrimination, women's enjoyment of fundamental freedoms was not fully guaranteed by the constitution.

#### **d) Marriage and Divorce laws**

There was a multitude of laws governing issues of marriage and divorce which led to confusion and an inability to effectively ensure adequate protection of women's rights to property. These included the Marriage Act,<sup>137</sup> the African Christian Marriage and Divorce Act,<sup>138</sup> the Hindu Marriage and Divorce Act,<sup>139</sup> the Mohammedan Marriage, Divorce and Succession Act,<sup>140</sup> and the Matrimonial Causes Act. Upon divorce, Kenyan women rarely took away their equal share of matrimonial property. Often, they were violently chased away and only able to take with them the clothes on their backs.<sup>141</sup>

The government tried to remedy the situation by taking a step in ensuring equality of both men and women as well as to consolidate the laws relating to family law.<sup>142</sup> In 1967 the President tasked two commissions with reviewing the law on marriage, divorce and succession. The tasks of the commissions were, *inter alia*, to ensure the recognition of equal rights to property in marriage both to men and women both in the subsistence and at the dissolution of marriage.<sup>143</sup>

However, Parliament rejected the proposed Marriage Bill of 1985 which sought to give equal rights to spouses in marriage in matters concerning the custody of children, divorce or division of matrimonial property. The Bill failed to go through Parliament for various reasons including; objections to interference with a man's right to chastise his wife, objections to adultery being made an actionable civil wrong, independence of divorce proceedings, and

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<sup>137</sup> The Marriage Act, 150 Laws of Kenya (repealed).

<sup>138</sup> The African Christian Marriage and Divorce Act, (1931) Cap 151, (repealed).

<sup>139</sup> Hindu Marriage and Divorce Act, (1960) Cap 157, (repealed).

<sup>140</sup> Cap 156, Laws of Kenya.

<sup>141</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 34.

<sup>142</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 34.

<sup>143</sup> Nancy Baraza, *Family Law Reforms in Kenya: An Overview*, presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30 April 2009.

objections to a wife having the right to object to her husband marrying a second wife.<sup>144</sup> This meant that the multiple laws were still in force.

Although the Matrimonial Causes Act enumerated grounds for divorce, it provided no legislative guidance as to the rights each spouse holds in the matrimonial property to be divided.<sup>145</sup> Because of the gap in divorce laws, women had to rely on wide judicial discretion, often resulting in adverse determinations of the percentage of contribution by women to their matrimonial property.<sup>146</sup>

### 3.3. Judicial Development on division of matrimonial property

Being a common law jurisdiction, Kenyan courts relied on English decisions to develop their jurisprudence on the division of matrimonial property. The case of *I v I* set the precedent for the use of the English Married Women Property Act of 1882 in Kenya.<sup>147</sup> The court held that the MWPA was applicable in Kenya as a statute of general application, as ordained by section 3 of the Judicature Act.<sup>148</sup>

The Act affirmed a married woman's capacity to own property separately from her husband.<sup>149</sup> It also granted power to the court to consider the respective shares of the parties to the property following a divorce.<sup>150</sup>

The MWPA was unevenly applied; some judges only used it for disputes that arose during the course of the marriage while others only applied it at the dissolution of a marriage, yet, others insisted that the party applying for division of matrimonial property had to first show an intention to dissolve the marriage, for example by filing a petition for divorce.<sup>151</sup>

The courts largely used customary law to determine cases. This was detrimental to women as customary law provided that a woman on marriage was wholly subsumed by her husband's culture as was stated in the case of *Otieno v Ougo & Another*.<sup>152</sup> Any insinuation that such

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<sup>144</sup> P. Kameri-Mbote and M.Nzomo, *The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya 2002: Have the Hens finally come home to roost for Kenyan women?* University of Nairobi Law Journal (1) 2004 available at <http://www.ielrc.org/content/a0408.pdf>

<sup>145</sup> The Matrimonial Causes Act, (1941) Cap 152(Kenya)

<sup>146</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 15.

<sup>147</sup> *I v I* (1971) EA 278.

<sup>148</sup> Section 3, *Judicature Act*, Cap 8 Laws of Kenya.

<sup>149</sup> Section 1, *Married Women Property Act* (1882).

<sup>150</sup> Section 17, *Married Women Property Act* (1882).

<sup>151</sup> Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*.

<sup>152</sup> *Otieno v Ougo and Another* (1982-1988) 1 KAR.

practice was discriminatory was rejected by the court on the ground that section 82(4)(b) of the Constitution allowed the application of customs even in situations where they would otherwise be discriminatory.<sup>153</sup>

### 3.3.1. English Courts' Interpretation of Section 17 of the Married Women's Property Act of 1882

#### a) *Pettitt v Pettitt*<sup>154</sup>

The case of *Pettitt v Pettitt*<sup>155</sup> was the first of the English decisions on family law to attempt a clarification of the law relating to property interests between spouses.<sup>156</sup> In this case, the wife purchased property and the husband undertook internal decoration work. The issue at hand was whether the decorations would entitle the husband to a beneficial interest in the property. It was held that a husband was not entitled to an interest in his wife's property merely because he had done in his free time jobs which husbands normally do.

The House of Lords also stated that section 17 of the Act is a purely procedural provision which did not entitle the court to vary the existing proprietary rights of the parties. Further, the status of the marriage did not result in any common ownership or co-ownership of the property and the term 'family property' was devoid of any legal meaning unless it refers to assets separately owned by one spouse.

#### b) *Gissing v Gissing*<sup>157</sup>

In this case, the husband purchased the matrimonial home which was registered in his sole name. There was no agreement as to how the beneficial interest in the house should be shared. The wife financed for some furniture and improvements. The court had to determine whether the wife was entitled to a beneficial interest in the house.

The court held that where there was no agreement between the spouses regarding the matrimonial home as to the beneficial interest of the other spouse, the question of whether that spouse had a beneficial interest would be dependent on the law of trust.

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<sup>153</sup> Vayonda Jepchumba Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 2014.

<sup>154</sup> *Pettitt v Pettitt* (1969) 2 All ER 385.

<sup>155</sup> *Pettitt v Pettitt* (1969) 2 All ER 385.

<sup>156</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 119.

<sup>157</sup> *Gissing v Gissing* (1971) AC 886.

It was also held that there was no distinction to be drawn in law between the position where a spouse makes direct contribution to the purchase of the property and where he/she makes indirect contribution.<sup>158</sup>

In this regard, the share of the contributing spouse would be proportionate to the contributions, either of the direct payments for the property or a fair estimate of indirect contribution.

3.3.2. Kenyan Courts' Interpretation of Section 17 of the Married Women's Property Act  
*Karanja v Karanja*<sup>159</sup> was the first case to apply the principles enunciated in *Pettitt and Gissing*. The parties in this acquired several properties during the marriage that were registered in the name of the husband. One property was acquired by the wife's money while the others with her direct or indirect contribution. The issue that came before court was whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in a salaried employment.

It was held that in cases where the property was acquired as a joint venture, it will be regarded as belonging to the spouses jointly no matter in whose name the property stands. Therefore, the husband in this case held the properties in dispute in trust for himself and his wife in proportions of two to one respectively.

In *Njuguna v Njuguna*,<sup>160</sup> the husband was unemployed at some point during the marriage for over a year. At the time, the wife made financial contributions to the property. On application for determination of her share in the property, it was held that the wife had satisfied the court of her direct and indirect financial contributions to the property. The court therefore declared joint ownership of the property which was to be divided in equal shares.

The case of *Kivuitu v Kivuitu*<sup>161</sup> considered whether the non-monetary contribution of a typical Kenyan housewife would be at par with indirect financial contribution of a wife in salaried employment. This case involved a husband who went abroad and left his wife in charge of obtaining an alternative matrimonial home, because he was dissatisfied with the location and security of some property that he had previously chosen.

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<sup>158</sup> Tom Ojienda, *Conveyancing Law and Practice*, (2009), 119.

<sup>159</sup> *Karanja v Karanja*, (1976) KLR 307.

<sup>160</sup> 1986 .

<sup>161</sup> *Kivuitu v Kivuitu*, Civil Appeal 26 of 1985, (1991) eKLR.

The wife paid for the deposit of the new property using moneys obtained from a business owned by the husband and a third party. The husband paid the balance from his salary and the property was registered in their joint names.

Upon dissolution of the marriage, the wife applied for the matrimonial home to be sold and the proceeds shared in equally between them. The court of Appeal held that the fact that the property was registered in the joint names of the husband and wife meant that each party owned undivided equal shares therein. Further, section 17 did not give the right of a sale but a determination and declaration of the wife's share in the property.

This decision was followed in the subsequent case of *Essa v Essa*<sup>162</sup> where the Court of Appeal stated that where property is acquired during the currency of the marriage and registered in the joint names of the spouses, the law assumes that the property is held in equal shares. It was also stated that the mere fact of marriage does not give one spouse an interest in the property of the other spouse, where such property was acquired before the marriage and registered in the sole name of that spouse.

In *Nderitu v Nderitu*<sup>163</sup>, the court stated that a wife's contribution more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. A judge hearing an application under section 17 should therefore take into account this form of contribution in determining the wife's interests in the assets under consideration.

For almost a decade, it seemed like the law was clear. A wife need not give evidence of her contribution, because once the court is satisfied that there was substantial contribution, equality of division would necessarily follow. There is a presumption that by carrying out her duties as a wife and mother, she has made substantial contribution to the acquisition of property.

This progressive standard was rejected by the Court of Appeal in *Echaria v Echaria*<sup>164</sup>, which effectively negated the ground Kenyan women gained under the *Kivuitu* decision. In this case, the property in question was acquired by the husband by cash deposit and a loan during the currency of the marriage. Upon dissolution, the wife claimed 50% of the property through section 17 MWPA application. The trial court held that that the property in question be divided into equal shares between the parties. This prompted an appeal by the husband.

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<sup>162</sup> *Essa v Essa* [1995] LLR 384 CAK.

<sup>163</sup> (1997) LLR 606 (CAK).

<sup>164</sup> *Echaria v Echaria*, Civil Appeal 75 of 2001 (2007) eKLR (CA)(Kenya).

The Court of Appeal rejected the assumption that a general principle of equality applicable to all property disputes had been created by the *Kivuitu* case. Additionally, it was stated that for the courts to consider non-monetary contribution, Parliament would have to pass legislation to provide for non-monetary contribution. Having looked at the circumstances of the case, the court assessed the wife's beneficial interest in the suit property at 25% and that of the husband at 75%.

This narrow interpretation of what constituted "contribution" severely limits Kenyan women's access to matrimonial property. Yet, even within the decision itself, the justices noted the unfairness of its holding in the Kenyan context and urged Parliament to take measures to rectify the law so that the division of matrimonial property is no longer at the whims of judicial panels.

In referring to the MWPA, the court lamented that "there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform Agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago"<sup>165</sup>

### 3.4. Current Legal Framework

The promulgation of the 2010 Constitution heralded a new dawn for women in Kenya. State organs, state officers and public officers are to be guided by the national values and principles of governance which include human dignity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.<sup>166</sup> This imposes a duty on decision makers and legislators to protect and promote equality for both men and women.

The Constitution invalidates customary laws to the extent that they are inconsistent with its provisions.<sup>167</sup> This is a big step since most land related disputes and personal law matters such as marriage and divorce were adjudicated at the clan level by Councils of Elders, who were mostly comprised of men.

The beginning point for issues relating to matrimonial property is Article 40 which states that every person has the right to acquire and own property.<sup>168</sup> In addition, parties to a marriage

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<sup>165</sup> *Echaria v Echaria*, Civil Appeal 75 of 2001 (2007) eKLR (CA)(Kenya) 522.

<sup>166</sup> Article 10 (2)(b), *Constitution of Kenya*, (2010).

<sup>167</sup> Article 2 (4), *Constitution of Kenya*, (2010).

<sup>168</sup> Article 40, *Constitution of Kenya*, (2010).

are entitled to equal rights at the time of the marriage, during the marriage and at dissolution of the marriage.<sup>169</sup>

Parliament is thus required to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.<sup>170</sup> It is in this spirit that the Marriage Act, the Matrimonial Property Act, the Land Act and the Land Registration Act as discussed below.

#### 3.4.1. National framework for protection of women's rights to land and property

##### a) **The Marriage Act**<sup>171</sup>

This statute came into force in 2014 and was enacted to amend and consolidate the various laws relating to marriage and divorce and for connected purposes. It defines marriage as the voluntary union of man whether in a polygamous or monogamous union and registered in accordance with the act.<sup>172</sup> The act reiterates Article 45(3) of the Constitution by providing that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at dissolution of the marriage.<sup>173</sup>

##### b) **The Land Act**<sup>174</sup>

The Act defines marriage as inclusive of civil, customary, and religious marriages and matrimonial home as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.<sup>175</sup> It also requires spousal consent for the execution of any charge on matrimonial property.<sup>176</sup>

##### c) **The Land Registration Act**<sup>177</sup>

The LRA includes strong protection for the land rights of spouses by allowing for joint tenancy<sup>178</sup> and including a presumption of joint tenancy for any land obtained for co-ownership and use by both spouses<sup>179</sup> granting spouses a legal interest in land held in one

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<sup>169</sup> Article 45(3), *Constitution of Kenya*, (2010).

<sup>170</sup> Article 68 (iii), *Constitution of Kenya*, (2010).

<sup>171</sup> Marriage Act, 2014.

<sup>172</sup> Section 3(1), *Marriage Act*, (2014).

<sup>173</sup> Article 3(2), *Marriage Act*, (2014).

<sup>174</sup> Kenya Land Act No 6 of 2012.

<sup>175</sup> Section 2, *Land Act*, (2012).

<sup>176</sup> Section 79(3), *Land Act*, (2012).

<sup>177</sup> Land Registration Act No.3 of 2012.

<sup>178</sup> Section 91(8), *Land Registration Act*, (2012)

<sup>179</sup> Section 93(1), *Land Registration Act*.

spouses name where the other has contributed to it through his or her labour<sup>180</sup> and requiring spousal consent for the disposition of any land or dwelling.<sup>181</sup>

The law recognizes joint tenancies and tenancies-in-common, with joint tenancy available between spouses.<sup>182</sup> A surviving spouse is entitled to the entirety of the property<sup>183</sup> and the Land Act<sup>184</sup> provides that on the death of a joint tenant the deceased's name will simply be struck out of register if a death certificate is produced.<sup>185</sup>

Property obtained during marriage for co-ownership and use by both (or all) spouses is presumed to fall under joint tenancy although the presumption may be rebutted with evidence the property was intended for sole ownership.<sup>186</sup>

#### **d) Matrimonial Property Act<sup>187</sup>**

This Act provides for the rights and responsibilities of spouses in relation to matrimonial property and for concerned purposes. It establishes that the default property regime is separate property for married couples, although parties have the right to enter into an agreement regarding property rights property rights prior to the marriage that will apply instead<sup>188</sup>

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<sup>180</sup> Section 93(2), *Land Registration Act*.

<sup>181</sup> Section 93(3) *Land Registration Act*.

<sup>182</sup> Section 91(8) , *Land Registration Act*.

<sup>183</sup> Section 60 and 91(4), *Land Registration Act*.

<sup>184</sup> Section 49, *Land Act*.

<sup>185</sup> Section 60, *Land Registration Act*.

<sup>186</sup> Section 14(b), *Matrimonial Property Act* (2013).

<sup>187</sup> *Matrimonial Property Act*, 2013.

<sup>188</sup> Section 6(3), *Matrimonial Property Act*, (2013).

Each spouse retains exclusive rights to property he or she held prior to entering the marriage, and is entitled to matrimonial property according to his her contribution.<sup>189</sup> Matrimonial property means the matrimonial home(s), household goods and effects in the matrimonial home(s) and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.<sup>190</sup>

Section 7 vests ownership of matrimonial property on the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.<sup>191</sup> Contribution means monetary and non-monetary contribution and includes domestic work, child care, companionship and farm work.<sup>192</sup>

There is a rebuttable presumption that when property is held jointly in the names of both spouses, their interests in the property are equal<sup>193</sup> while property held in the name of one spouse is presumed held in trust for the other.<sup>194</sup>

### 3.4.2. The Regional and International Framework on protection of women's right to land and property

Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. By virtue of this, the following instruments apply:

#### a) African Charter on Human and Peoples' Rights<sup>195</sup>

Every individual is entitled to the enjoyment of rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnicity, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>196</sup> Further, every individual is equal before the law and entitled to equal protection of the law.<sup>197</sup> As a state party, Kenya is required to safeguard the rights of both men and women, in terms management, control and ownership of land.

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<sup>189</sup> Section 6(3) and 7, *Matrimonial Property Act* (2013).

<sup>190</sup> Section 6(1), *Matrimonial Property Act* (2013).

<sup>191</sup> Section 7, *Matrimonial Property Act* (2013).

<sup>192</sup> Section 2, *Matrimonial Property Act* (2013).

<sup>193</sup> Section 14 (b), *Matrimonial Property Act* (2013).

<sup>194</sup> Section 14 (a), *Matrimonial Property Act* (2013).

<sup>195</sup> African Charter on Humans and Peoples Rights, entered into force on 21 October 1986.

<sup>196</sup> Article 2, *African Charter on Humans and Peoples Rights*.

<sup>197</sup> Article 3, *African Charter on Humans and Peoples Rights*.

It is also required to eliminate any form of discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>198</sup>

**b) East Africa Community Treaty<sup>199</sup>**

This treaty recognizes gender equality as one of its fundamental principles in governing the East African Community.<sup>200</sup> It also recognizes the promotion and protection of human and people's rights in accordance with the provisions of the African Charter, therefore prohibiting gender discrimination in land and property issues.

**c) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>201</sup>**

CEDAW is concerned exclusively with promoting and protecting women's human rights.<sup>202</sup> It is sometimes referred to as the international bill of rights for women as it offers the most comprehensive coverage of women's rights for both public and private spheres by bringing together all conventions and treaties that protect and promote the rights of women.<sup>203</sup>

States are obliged to ensure the equal treatment of men and women in land and agrarian reform. Land rights under marriage and inheritance laws should be based on equality.<sup>204</sup> Land tenure reform must also ensure women's property rights during marriage, at divorce and in the event of a husband's death.<sup>205</sup> These provisions have been echoed in the Kenyan Constitution.

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<sup>198</sup> Article 18, *African Charter on Humans and Peoples Rights*.

<sup>199</sup> East Africa Community Treaty, entered into force on 30 November 1999.

<sup>200</sup> Article 6(d), *East African Treaty* (1999).

<sup>201</sup> *Convention on the Elimination of All Forms of Discrimination Against women*, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), entered into force 3 Sept. 1981, G.A. Supp. (No. 46).

<sup>202</sup> Federation of Women Lawyers Training Handbook, 5.

<sup>203</sup> Federation of Women Lawyers Training Handbook, 5.

<sup>204</sup> Section 14, *Convention on the Elimination of All Forms of Discrimination Against women*, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), entered into force 3 Sept. 1981, G.A. Supp. (No. 46).

<sup>205</sup> Article 16, *Convention on the Elimination of All Forms of Discrimination Against women*, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), entered into force 3 Sept. 1981, G.A. Supp. (No. 46).

#### **d) The Universal Declaration of Human Rights (UDHR)<sup>206</sup>**

The UDHR represents the first global expression of the rights to which all human beings are inherently entitled. It provided for the right to equality before the law and equal protection of the law;<sup>207</sup> the right to own property;<sup>208</sup> and the right to adequate housing.<sup>209</sup> States therefore have a duty to ensure that both men and women have equal rights to property in land.

#### **3.5. Conclusion**

Looking at the development of laws in Kenya regarding acquisition, ownership and management of matrimonial property, the main factors which led to disentanglement of women are issues of inheritance; customary law and practices; inequalities in marriage and the process of land adjudication, consolidation and registration.<sup>210</sup> The laws on these areas have significantly changed over time to cater for women's rights.

However, as per the limitations of this study, women are still left to rely on wide yet varying interpretations of what is due to them upon dissolution of marriage. Indeed, the Matrimonial Property Act states that the property should be divided according to each party's contribution. Since contribution includes non-monetary input such as companionship and child care, it is left to the courts to quantify such input on a monetary scale and determine a party's share. This leaves women at the mercy of judges, most of whom are still men in a patriarchal society.

Notably also, the provision in the Marriage Act and Constitution on equality before, during and after the marriage is still unclear as to whether its 50/50 equality or equality based on contribution.

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<sup>206</sup> *Universal Declaration of Human Rights* is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

<sup>207</sup> Article 7, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 *U.N.T.S.* 302, entered into force March 23, 1976 (hereinafter *Universal Declaration of Human Rights*).

<sup>208</sup> Article 17, *Universal Declaration of Human Rights*.

<sup>209</sup> Article 25, *Universal Declaration of Human Rights*.

<sup>210</sup> Vayonda Jepchumba Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 2014, 16.

## Chapter Four

### A COMPARATIVE ANALYSIS OF KENYA'S MATRIMONIAL PROPERTY REGIME WITH SOUTH AFRICA

*Marriage is a union of economically separate individuals, with each acquiring properties for themselves and for the marital unit.*

Deborah H. Bell

#### 4.1. The Matrimonial Property Regimes in South Africa

South Africa inherited the Roman-Dutch legal system, which embraces the idea that parties entering into a marriage may contract out of the default matrimonial property system by concluding an ante-nuptial contract.<sup>211</sup> The default system refers to joint ownership of property when parties enter into a marriage. South Africa is a civil law jurisdiction which borrows from the systems of the Romans and the Dutch. Prior to the enactment of the Matrimonial Property Act 88 of 1984, parties to a civil marriage had two options;

- i) **In community of property system**; where the wife was subject to the husband's marital power.<sup>212</sup> This system placed a wife in the position of a minor under the husband's guardianship.<sup>213</sup> Despite this, women had an advantage in that; the wife was entitled to an undivided half share of the estate at the dissolution of the marriage.
- ii) **Out of community of property**; this came about insofar as parties entered into an ante-nuptial agreement. The parties were able to exercise their rights in respect of their estates independently of one another.<sup>214</sup> The advantage of this system was that the wife was not subject to the marital power of the husband. However, at the dissolution of the marriage, the financially weaker party (usually the wife, if she had elected to stay at home and care for the children and perform house duties) was placed in a position where she was not entitled to a share in the wealth her husband had accumulated over the years of the marriage.<sup>215</sup>

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<sup>211</sup> Bonthuys E, "Family Contracts" 2004, South African Law Journal, 881.

<sup>212</sup> Sonnekus JC "Matrimonial property" in Clark B (ed) *Family Law Service* (2012), 1.

<sup>213</sup> Sonnekus JC "Matrimonial property" in Clark B (ed) *Family Law Service* (2012), 3.

<sup>214</sup> Sonnekus JC "Matrimonial property" in Clark B (ed) *Family Law Service* (2012), 1.

<sup>215</sup> Sonnekus JC "Matrimonial property" in Clark B (ed) *Family Law Service* (2012), 1.

The disadvantaged position of women was highlighted and challenged in the area of family and matrimonial law by scholars.<sup>216</sup> These efforts were directed at disposing of the contention that marriage is a partnership of equals. The enactment of the Matrimonial Property Act was marked as the beginning of a perceived move towards spousal equality within civil marriages.<sup>217</sup>

#### 4.2. Current Legal Framework on Division of Matrimonial Property

South African matrimonial property law is primarily regulated by way of statutory law.<sup>218</sup> These statutes do not codify all the rules and certain areas are regulated by common law.<sup>219</sup> Within the current laws, parties to a marriage may choose which matrimonial property system will apply to their marriage before they get married.<sup>220</sup> The two systems of matrimonial property are In-Community of Property and Out-of Community of Property.

##### 4.2.1. In Community of Property

Also known as universal community, this is the default system of matrimonial property which applies to all civil marriages concluded without an ante-nuptial contract.<sup>221</sup> Essentially, the system combines all assets acquired by each party before and after the marriage into a joint estate, which is then divided between the spouses at the dissolution of the marriage.<sup>222</sup> This system also included the profits and losses of the spouse's estates in the joint estate.<sup>223</sup>

Consequently, there is no legal distinction between the parties' individual assets and liabilities, regardless of whether they were acquired prior to or during the marriage.<sup>224</sup> The spouses are equal and joint owners of all the assets in the joint estate irrespective of which party purchased the individual assets.<sup>225</sup> They are also joint debtors in respect of debts of the joint estate, regardless of which party incurred the debt.<sup>226</sup>

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<sup>216</sup> Kaganas F. and Murray C. "Law and Women's Rights IN South Africa: An overview" in Murray C. (ed) *Gender and the New South African Legal Order* (1994), 11.

<sup>217</sup> Gillian Lowndes, 'The Need for a Flexible and Discretionary System of Marital Property Distribution in the South Africa Law of Divorce'.

<sup>218</sup> The Matrimonial Property Act 88 of 1984 and the Divorce Act of 1979

<sup>219</sup> Mogammad Shamiel Jassiem, *Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes*, LLM Dissertation, 2010 University of Western Cape, 26.

<sup>220</sup> Section 21, *Matrimonial Property Act*, South Africa.

<sup>221</sup> Church J, "Proprietary consequences of marriage" in Joubert WA (ed) *The Law of South Africa* (2006) 73.

<sup>222</sup> Church J, "Proprietary consequences of marriage" 74.

<sup>223</sup> Section 17(1) Deeds Registries Act 47 of 1937.

<sup>224</sup> *In Estate Sayle v Commissioner of Inland Revenue 1945 AD 388.*

<sup>225</sup> Robinson JA, Human S and Boshoff A, Introduction to South African Family Law, 129.

<sup>226</sup> Robinson JA, Human S and Boshoff A, Introduction to South African Family Law, 144.

#### 4.2.2. Out of Community of Property

Prior to the enactment of the Matrimonial Property Act in 1984, the two systems that existed were marriages in community of property and profit and loss, and marriages out of community of property and profit and loss.<sup>227</sup> The enactment of the Matrimonial Property Act retained the two systems and in addition, it introduced the accrual system.

##### *a) Marriages 'out of community of property' excluding the accrual system*

Here, parties enter into a notarial contract known as an ante-nuptial contract and expressly agree to exclude the application of the community of property and community of profit and loss. The effect of this is that each party retains their respective assets acquired prior to or during the marriage.<sup>228</sup> Upon dissolution of the marriage, neither party has an automatic right to share in the other party's estate.

The exception to this rule is where a claim is made under section 7(3) of the Divorce Act for a redistribution of assets during the divorce proceedings on grounds of fairness and equity, based on the facts and circumstances of the marriage.

This provision was introduced in order to address the inequity which existed in the patriarchal society of South Africa where the husband was the main breadwinner and more economically secure in the marriage, thereby having the opportunity to build an estate.<sup>229</sup> The wife was the homemaker with limited or no economic security and negligibly resources to build up an estate.<sup>230</sup>

Generally, women have lower economic and occupational status and because of cultural and social norms, they are usually in a weaker bargaining position than men when it comes to negotiations regarding economic assets.<sup>231</sup> As such, the courts consider the misconduct by one of the parties which caused the breakdown in a marriage as well as other factors. The court enjoys a wide discretion in making a redistribution of assets order which the court may consider to be just and equitable.<sup>232</sup> In this way, women get an opportunity to share in an estate to which she had made a direct or indirect contribution.

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<sup>227</sup> Robinson JA, Human S and Boshoff A, Introduction to South African Family Law, 128.

<sup>228</sup> Robinson JA, Human S and Boshoff A, Introduction to South African Family Law, 144.

<sup>229</sup> In *Jordaan v Jordaan* 2001 3 SA 288 (C), 23, the court noted that the housewife made it possible for her husband to fully develop his business.

<sup>230</sup> In *Jordaan v Jordaan* 2001 3 SA 288 (C), 23.

<sup>231</sup> Bonthuys E, Family Contracts (2004) 121 SALJ 879, 896-897.

<sup>232</sup> Section 7(3), Divorce Act, 1979.

#### *b) Marriages 'out-of-community of property' with the Accrual System*

This system was introduced to ameliorate the harsh effects of complete separation of property, particularly in situations where one spouse has accumulated wealth during the marriage and the other has not been in a position to do so.<sup>233</sup> The accrual system is a form of sharing assets that are acquired during the marriage.<sup>234</sup>

Parties who enter into an ante-nuptial contract with the operation of the accrual system are financially independent during the course of the marriage and they retain ownership of their assets and liability for their debts. However, upon dissolution of the marriage, the party whose estate has shown a lesser accrual or profit will have a right to share 50% of the difference between the net values of the two individual estates.<sup>235</sup>

#### 4.3. Challenges faced by the matrimonial property systems

Although the two matrimonial property systems are available to all South Africans, they are often not accessible to indigent nationals who have limited access to information or are simply not educated enough on the topic of marriage and its proprietary consequences.<sup>236</sup>

For marriages in community of property, spouses are not afforded protection of their individual assets in the joint estate from the debts of the other spouse. On the other hand, for marriages out-of-community-of-property, spouses are unable to share in the financial benefits of each other. This is particularly detrimental to parties who were not able to accrue as much wealth during the subsistence of the marriage.

#### 4.4. Comparison between the matrimonial property regimes in South Africa and Kenya

##### 4.4.1. Introduction

In order to assess the adequacy of laws in protecting women rights in division of matrimonial property upon divorce, the study compares the laws in Kenya to the regime in the South Africa. Prior to independence in both jurisdictions, colonial laws were in place. These laws were discriminatory towards women in several aspects including division of matrimonial property.

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<sup>233</sup> Heaton J *South African Family Law 3 ed (2010)* 93.

<sup>234</sup> Heaton J *South African Family Law 3 ed (2010)* 93.

<sup>235</sup> Section 4(1)(a), *Matrimonial Property Act (2013)*.

<sup>236</sup> Mogammad Shamiel Jassiem, 'Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes, 2010.

Both Kenya and South Africa are patriarchal societies. The reforms in their legislations on matrimonial property have been influenced by the need to afford greater protection for women when in ownership of matrimonial property. Bonthuys E. for example, notes that the Matrimonial Property Act 1984 of South Africa was enacted in order to address the disadvantaged position of women.<sup>237</sup> This section compares the provisions of matrimonial property laws in both jurisdictions and concludes by pointing out the areas in which Kenya can borrow from South Africa in order to achieve substantial equality in the division of matrimonial property.

#### 4.4.2. Comparison between provisions of South African Law and Kenyan Law on division of matrimonial property

##### a) *Definition of matrimonial property*

Matrimonial property in Kenya includes the matrimonial home(s), household goods and any other property acquired jointly during the subsistence of the marriage.<sup>238</sup> On the other hand, there is no strict definition of what amounts to matrimonial property in South Africa. Instead, parties have an option of choosing which property regime to use in the marriage, that is, either jointly or separately. In this respect, Kenya is a step ahead because it specifies what matrimonial property entails and this prevents ambiguity when it comes to determining the value of matrimonial property.

##### b) *Ownership of matrimonial property*

Kenyan law provides for separate ownership by stating that the interest of any person in any immovable property or movable property acquired or inherited before marriages shall not form part of the matrimonial property.<sup>239</sup> Further, ownership vests in the spouses according to the contribution of either spouse towards its acquisition. South Africa has two regimes of ownership of matrimonial property. The *in community of property* system provides for joint and equal ownership of property that each spouse acquires before and during marriage. The *out of community* system retains separate ownership of the spouses' property.

##### c) *Division of matrimonial property*

Matrimonial property in South Africa is divided based on the matrimonial regime that parties choose when they enter into marriage. That is, either communal property or separate

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<sup>237</sup> Bonthuys E, "Family Contracts" 2004, South African Law Journal, 881.

<sup>238</sup> Section 6, *Matrimonial Property Act*, (2013), Laws of Kenya.

<sup>239</sup> Section 5, *Matrimonial Property Act* (2013).

property. In Kenya, it is divided according to the contribution of either spouse in acquiring the property.<sup>240</sup>

d) *Existence of prenuptial agreements*

Similar to South Africa, parties to an intended marriage in Kenya may enter into an agreement before the marriage to determine their property rights.<sup>241</sup> This agreement may be set aside if the court determines that it was influenced by fraud, coercion or manifestly unjust.<sup>242</sup>

e) *Liability for debts incurred by a spouse*

A spouse is not liable, solely by reason of marriage, for any personal debt contracted by the other spouse prior to the marriage.<sup>243</sup> Any liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it. In South Africa, there are two possibilities. The first is that the spouses' properties are combined into a joint estate, which included debts that had been incurred previously by either spouse. Second, the parties may retain the debts they incurred before the marriage and bear liability for it

f) *Effect of marriage on proprietary rights*

Kenyan law provides for separate ownership by stating that the interest of any person in any immovable property or movable property acquired or inherited before marriages shall not form part of the matrimonial property.<sup>244</sup> Marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.<sup>245</sup>

#### 4.5. Recommendations and Conclusion

The South African approach to matrimonial property embraces the concept of substantive equality. Without an ante-nuptial contract, property is automatically considered as communal and anything owned by spouses before the marriage and during the marriage is combined into a joint estate. Upon divorce, the property is divided equally on a 50/50 basis. This automatic regime protects women to the extent that their direct or indirect contribution towards matrimonial property does not go unrecognized. In the separate ownership regime,

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<sup>240</sup> Section 7, *Matrimonial Property Act*, (2013).

<sup>241</sup> Section 6(3), *Matrimonial Property Act*, (2013).

<sup>242</sup> Section 6(4), *Matrimonial Property Act*, (2013).

<sup>243</sup> Section 16, *Matrimonial Property Act*, (2013).

<sup>244</sup> Section 5, *Matrimonial Property Act* (2013).

<sup>245</sup> Section 13, *Matrimonial Property Act*, (2013).

substantive equality is achieved in the accrual system where the difference in profits of the spouses is shared equally between them.

Kenya should widen its approach on division of matrimonial property and not restrict it to only the contribution of either spouse towards the acquisition of the property. Indeed, contribution has been defined to include non-monetary aspects such as companionship and child care. However, there is lack of provision of how such contribution is to be quantified. As such, it is upon the courts to determine the worth of non-monetary contribution. In doing so, courts should consider the specific circumstances of each case and the interests of justice.

## Chapter Five

### FINDINGS, RECOMMENDATIONS AND CONCLUSION

#### 5.1. Introduction

The study set out to explore the concept of sharing matrimonial property upon divorce in Kenya and interrogate how adequate the law is in protecting women's property rights. This chapter gives a summary, recommendations and conclusions in respect of the foregoing chapters. It summarizes the discussions advanced in various chapters of the study. It also summarizes the gaps that exist in the legal framework on the various laws which seek to protect women when it comes to division of matrimonial property. Finally it makes recommendations based on a comparative study with the regime in the South Africa.

#### 5.2. Findings

From the onset, the case for this study has been that marriage is not a partnership of equals. It has advocated for substantive equality, which is of the view that women should be given an upper hand, in order for them to be at the same level as men. Men have historically held a dominant position in the society so that even when parties enter into marriage, women are still the financially weaker party.

The first objective of the study was to identify the existing legal framework on the division of matrimonial property. As such, Chapter One and Three looked into the historical development of the laws on division of matrimonial property from the colonial period to the promulgation of the 2010 Constitution. It also went through the judicial development on the issue and how courts have dealt with cases over the years. The provisions that laid the foundation for the study were Article 45(3) of the Constitution and Section 7 of the Matrimonial Property Act. The two key aspects from these provisions were 'equality' and 'contribution'.

The second objective was to examine the adequacy of the laws or otherwise in determining the distribution of such property upon divorce, using a feminist theory approach. Chapter Two discussed the feminist legal theory from the perspective of gender roles that society has assigned to men and women over time. It went on to argue that the roles taken up by men gave them more financial stability compared to women, who stayed at home and cared for the children and the household.

As such, feminist legal theorists pushed for the need to treat men and women equally. In this regard, the study explored conceptions of equality and took on a substantive equality approach whereby women are given an upper hand in order to be at par with men. It is only then that true equality is achieved.

The third objective was to compare the laws in Kenya with another jurisdiction that shares a history of discriminatory laws against women in division of matrimonial property. Chapter Four delved into a comparative study of the regime in Kenya with that of South Africa. It noted that both societies are patriarchal and their laws on matrimonial property have reformed over time in order to provide a mechanism where the vulnerability of women is taken into consideration when it comes to the division of matrimonial property.

Finally, the aim of this study was to recommend reform in the law relating to sharing of matrimonial property upon divorce and as such, the study points out that the courts should construe the provisions of the Constitution and the Matrimonial Property Act in a manner that achieves substantive equality. In doing so, they should consider the circumstances of each particular case in the interests of justice. Therefore, it is not enough to simply state that property should be divided equally. The court should consider the direct and indirect contribution of the spouses and ensure that parties get the share of property they deserve upon the dissolution of marriage.

### 5.3. Recommendations

There is need to re-interrogate the issue of division of matrimonial property upon divorce and consider the future needs of the divorced couples and not just their contribution towards the acquisition of the matrimonial property. Through feminist legal theories, courts should take into consideration the enormous input of women in terms of child birth, child care, taking care of the home, cooking and other roles in the house. Simply because they don't necessarily contribute financially does not mean that they should be left vulnerable when the marriage comes to an end. Rather, they should be left in position which enables them to support themselves and lead a normal life. This differential treatment advances equality, taking into account the roles played in society by both sexes.

Parliament needs to amend the Matrimonial Property Act to state how the forms of non-monetary contributions listed in the Act should be quantified in order to determine the share of the matrimonial property that a party can claim when the marriage is terminated.

Section 7 of the Matrimonial Property Act, which states that ownership of matrimonial property vests in the spouses according to their contribution to the acquisition of such property, should be amended to recognize other forms of contribution towards maintenance of property.

Parliament should also develop a standard system of division of matrimonial property instead of leaving a wide discretion to the courts in determining parties' shares to matrimonial property. As stated in previous chapters, judges are human beings who are bound to be persuaded by culture and traditions. Therefore, judges in a patrilineal society such as Kenya tend to be biased against women. Having a standard system of division of matrimonial property like South Africa gives parties a sense of security as they are aware of their property rights during the marriage and at its termination.

#### 5.4. Conclusion

The country has come a long way in reforming its family law regime in order to protect women from discrimination in the acquisition, ownership and management of property. It has also recognized the valuable contribution of women in the matrimonial home such as childcare, farm work and companionship. However, some ambiguities within the current legal framework still leave women, as the weaker financial parties in marriage, vulnerable. The hypothesis of the study, which was that women are inadequately protected when it comes to the division of matrimonial property, has been met.

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