

**PRENUPTIAL AGREEMENTS: NON- DISCLOSURE AS A DEFICIENCY TO FAIR
DISTRIBUTION OF MATRIMONIAL PROPERTY IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Abisai Aoleon Nyanduko

101075

Prepared under the supervision of

Dr Jennifer Gitahi

January 2021

Word count: 11024 (excluding footnotes and bibliography)

Table of Contents

Table of Contents.....	ii
Acknowledgements.....	iv
Declaration.....	v
Abstract.....	vi
List of abbreviations.....	vii
List of cases.....	viii
List of Legal Instruments.....	ix
Chapter One: Introduction.....	1
1.1 Background.....	1
1.2 Statement of the problem.....	2
1.3 Statement of objective.....	4
1.4 Hypothesis.....	4
1.5 Research questions.....	4
1.6 Justification of the study.....	5
1.7 Theoretical framework.....	5
1.8 Literature review.....	6
1.9 Research and design.....	11
1.9.1 Research design & methodology.....	11
1.9.2 Assumptions.....	11
1.9.3 Limitations.....	11
1.9.4 Chapter breakdown.....	12
Chapter Two: Shortcomings occasioned as a result of non-disclosure of facts.....	13
2.1 Introduction.....	13
2.2 Applicable Law.....	13
2.3 Non-Disclosure of Facts.....	13
2.3.1 Financial Disclosure.....	13
2.3.2 Material disclosure.....	16
2.4 Conclusion.....	18
Chapter Three: Shortcomings occasioned by lack of a standard formula for calculation of assets.	19

3.1 Introduction.....	19
3.2 Kenyan case law	19
3.3 Contempt of court	22
3.4 Conclusion	23
Chapter Four: Comparative analysis: Comparing Kenya to South Africa	24
4.1 Introduction.....	24
4.2 Matrimonial property systems	24
4.2.1 Marriage out of community property.....	24
4.2.1.1 Marriage out of community of property including the accrual system.....	24
4.2.1.1.1 Standard formula for calculation of accrual in estates.....	25
4.2.1.1.2 Declaration of net value of estate.....	25
4.3 Current position of prenuptial agreements in Kenya	27
4.4 Significance of standard formula for calculation of assets and incorporation of the element of disclosure of facts	27
4.5 Need for amendment of the Matrimonial Property Act 2013	27
4.6 Conclusion	28
Chapter Five: Recommendations and Conclusion	29
5.1 Introduction.....	29
5.2 Findings.....	30
5.3 Recommendations.....	30
5.4 Conclusion	31

Acknowledgements

I would like to thank the Almighty God for His grace has been sufficient. I could not do it without Him.

I would like to sincerely thank my supervisor Dr. Jennifer Gitahi for her wonderful insights and critiques throughout the whole writing process. This helped me to sharpen my skills. I would also like to thank my parents who have supported me all the way through their prayers, financial and emotional support that has made me reach this far I am forever grateful.

I would also like to thank Cerullo for his dedication in guiding me throughout the whole writing process. Your critiques made me look at different angles which I had not thought about. This would not have been possible without your input.

To Magdaline, I am sincerely grateful to you through this whole journey. You encouraged me throughout this whole journey and believed in me. To Purity, thank you for your prayers and emotional support when I thought I could not do it anymore.

I would like to thank my family and friends for their support.

Declaration

I, ABISAI AOLEON NYANDUKO, 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: *Aoleon*

Date: 28th July, 2021.

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

Signed: *JG* 13th October 2021

Dr Jennifer Gitahi

Abstract

The Matrimonial Property Act entered into force in 2013 in the jurisdiction of Kenya. One of the salient features of the Matrimonial Property Act is the recognition of prenuptial agreements pursuant to Section 6 (3). This was a very big step because they had never been recognized in Kenya's jurisdiction. Due to this, people have entered into prenuptial agreements.

Despite this, there are still shortcomings occasioned during the distribution of matrimonial property even after entering into prenuptial agreements. The main concern being lack of the element of disclosure of facts and lack of a standard formula for calculation of assets.

The aim of Section 6 (3) of the Act is to protect people's property rights in case of the dissolution of the marriage. The expected outcome is that fairness will be achieved during the distribution of matrimonial property. This has not been achieved in all cases. The shortcoming being the spouses not disclosing all their assets thinking the other will benefit unfairly. During the distribution of property, there are many claims of unfairness. Does this imply that there is more to be done in this sphere of law?

The aim of this dissertation is to understand the shortcomings occasioned as a result of non-disclosure of facts and lack of a standard formula for the calculation of assets. It will also propose reforms that should be put in place to ensure fair distribution of matrimonial property after entering into prenuptial agreements.

List of abbreviations

- | | |
|---------|-------------------------------|
| 1. MWPA | Married Women's Property Act |
| 2. MPA | Matrimonial Property Act 2013 |
| 3. SA | South Africa |

List of cases

1. *MBK v MB* (2016) eKLR.
2. *Radmacher v Granatino* (2010), The Supreme Court of the United Kingdom.
3. *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* (2011) eKLR.
4. *CYC v KSY* (2014) eKLR.
5. *MWM v JPM* (2016) eKLR.
6. *Echaria v Echaria* (2007), eKLR.
7. *NBR V JO* (2014) eKLR.
8. *Del Vecchio v. Del Vecchio* (1962), Supreme Court of Florida.
9. *Federation of Women Lawyers Kenya (FIDA) vs Attorney General and another* (2018) eKLR.

List of Legal Instruments

1. *Matrimonial Property Act* (Act 88 of 1984), South Africa.
2. *Matrimonial Property Act* (Act No 49 of 2013), Kenya.
3. *Contempt of Court Act* (Act No 46 of 2016), Kenya.
4. *Deeds Registries Act* (Act 47 of 1937), South Africa.
5. *Family Law Act*, (Act No 53 of 1975), Australia.
6. *Married Women's Property Act*, 1882, Kenya.

Chapter One: Introduction

1.1 Background

According to the Black's Law Dictionary, a prenuptial agreement is an agreement made before marriage to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse. It is also called an antenuptial agreement.¹ Prenuptial agreements first came into place in ancient Egypt two thousand years ago. The agreements were negotiated by the parents of the bride and the groom. The first legal document that gave a woman the rights to finances was called *ketubah*, which was a Hebrew marriage contract. In the years between 1461 and 1464, King Edward IV of England signed a prenuptial agreement with Eleanor Butler in accordance with Wars of the Roses.²

In 1744, Elizabeth Oglethorpe, who was Sir Nathan Wright's daughter, the Lord keeper of the seal of England,³ signed a prenuptial agreement with General James Edward Oglethorpe to protect her property rights before their marriage. As seen in the examples above, the prenuptial agreements helped the women in exercising their property rights outside marriage. In the 19th and 20th Century, parents still arranged for prenuptial dowries for their unmarried female children.⁴

Prenuptial agreements were first recognized in Kenya in 2013 when the Matrimonial Property Act 2013 was enacted.⁵ Prior to this, there was no legal recognition of prenuptial agreements in Kenya. Section 6 (3) of the Matrimonial Property Act gives parties to an intended marriage the liberty to enter into an agreement before marriage to determine their property rights.⁶ The aforementioned Act repealed the Married Women's Property Act of 1882. This repealed Act gave the married women the rights of holding property and contracting as a *feme sole*.⁷ A *feme sole* is a married woman handling the affairs of her separate estate.⁸ The repealed Act also gave a woman the rights to hold the property acquired before marriage and property

¹ Black's Law Dictionary, 9 ed.

² Stritof Sheri, 'The History of Prenuptial Agreements' The Spruce, 13th January 2020- <<https://www.thespruce.com/history-of-prenuptial-agreements>> on 9th October 2020.

³ Paterson M, 'Sir Nathan Wright (1653–1721), Recorder Of Leicester And Lord Keeper Of The Great Seal: A Re-Appraisal' Trans. Leicestershire Archaeol. and Hist. Soc., 89, 2015, 207.

⁴ Stritof Sheri, 'The History of Prenuptial Agreements' The Spruce, 13th January 2020- <<https://www.thespruce.com/history-of-prenuptial-agreements>> on 9th October 2020.

⁵ *Matrimonial Property Act* (Act No 49 of 2013).

⁶ Section 6(3), *Matrimonial Property Act* (Act No 49 of 2013).

⁷ Section 1, *Married Women's Property Act*, 1882.

⁸ Black's Law Dictionary, 9 ed.

acquired by her separately during the marriage.⁹ This rebutted the doctrine of coverture which is a common law concept which states that a married woman's legal identity was eclipsed by her husband.¹⁰ The woman was referred to as *femme covert*, where the notion was that the husband was the one "under whose wing protection and cover she performs everything."¹¹ The repealed Act had no provisions for prenuptial agreements.¹²

Despite prenuptial agreements being discretionary, as the wording of Section 6(3) of the Matrimonial Property Act uses the word 'may, they have provided a solution for distributing matrimonial property in an amicable way.¹³ However, a lot of issues have arisen as a result of non-disclosure and the manner in which matrimonial property is distributed. This points out to the fact that prenuptial agreements have not provided an ultimate solution hence the lacuna. The Matrimonial Property Act 2013 has provided for prenuptial agreements, but it has failed to provide a solution on how to distribute matrimonial property.¹⁴ The question that seeks to be addressed then is despite prenuptial agreements securing property rights before marriage how can disclosure of facts be achieved, and can there be a uniform way in which matrimonial property is distributed?

1.2 Statement of the problem

Prenuptial agreements are supposed to aid in the distribution of matrimonial property. This can be smoothly achieved as it enables both parties to it to declare any of their existing property rights before entry into the marriage thus making disclosure its whole basis. Another integral factor to the success of prenuptial agreements especially at its actualization or enforcement phase is the existence of a clear pattern or formula as to how the property under the prenuptial agreement is to be divided. This applies in the event the parties have not provided for an agreement criteria or where such is there but is in dispute.

⁹ Section 2, *Married Women's Property Act*, 1882.

¹⁰ Hammons P, 'Rethinking Women and Property in Sixteenth and Seventeenth Century England' Blackwell Publishing, 2006, 1390.

¹¹ Black's Law Dictionary, 9 ed.

¹² *Married Women's Property Act*, 1882.

¹³ Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

¹⁴ *Matrimonial Property Act* (Act No 49 of 2013).

However, both of the above, despite being so integral to the success of the prenup regime in Kenya, have not been achieved due to the ambiguity or lacuna in the legal framework governing prenups in Kenya, that is, the Matrimonial Property Act 2013.¹⁵

The Act acknowledges prenuptial agreements, but it does not recognize the element of disclosure of facts. Due to this parties think that it is not necessary to disclose all the assets they own prior to entry of the marriage. This in turn brings about a lot of conflict during the dissolution of a marriage. Additionally, The lack of a standard formula for calculation of assets during the distribution of assets is also another shortcoming portrayed by the statute. This in turn leads to a lot of unnecessary litigation resulting to backlog of cases in the Judiciary as well as dissatisfaction of parties during distribution of assets upon dissolution of a marriage. This is evidenced by various cases decided by Kenyan courts.

In the case of *CYC v KSY*, the applicant was dissatisfied with the award for maintenance claiming that it was not based on evidence, and he may suffer irreparable loss as a result. He claimed that there was no evidence of income from the respondent hence he had to bear the burden of providing for the children all by himself. The Respondent stated that the applicant ignored to provide the court with full particulars of his income and property hence could not lodge a complaint. The Court held that it was not satisfied that the applicant will suffer substantial loss by paying the amount of money as ordered by the Court. The application was therefore dismissed.¹⁶

From the analysis of the above case, we notice that the Court did not really pay attention to the element of disclosure of facts despite being pointed out by both parties and eventually dismissed the case. This will in turn make the Applicant to the case suffer substantial loss as a result. This could be avoided if the Matrimonial Property Act provided for element of disclosure.

In the case of *MWM v JPM*, the applicant sued the respondent claiming that she was entitled to half the share of movable and immovable properties that were listed. She alleged that they were acquired by the joint effort of the said parties during their marriage. The respondent replied to the allegations and stated that the applicant did not contribute to the acquisition of

¹⁵ Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

¹⁶ *CYC v KSY* (2014) eKLR.

the said properties. The court therefore awarded the applicant some of the assets.¹⁷ In this case if there could be a standard formula for calculation of assets then it would have been easier to ascertain what is due to each party.

There is the need to incorporate the element of disclosure of facts when entering into prenuptial agreements this will help parties to disclose their assets. There is the need for a standard formula for the distribution of assets to achieve fairness. This is because despite the Act outlining that matrimonial property shall be divided upon dissolution according to contribution made, there are still many claims of unfairness.¹⁸ There have also been claims of lack of transparency occasioned during the division of matrimonial property. The paper addresses the element of disclosure of facts and the need to have a standard formula for calculation of assets to achieve fairness.

1.3 Statement of objective

1. To assess the shortcomings that are occasioned as a result of non-disclosure of facts.
2. To explore the shortcomings occasioned by lack of a standard formula for calculation of assets.
3. To explore the steps that have been taken by South Africa when entering into prenuptial agreements that enable fair division of matrimonial property.
4. To assess reforms that should be put in place to enable the division of matrimonial property after entering into prenuptial agreements in Kenya.

1.4 Hypothesis

Fair distribution of matrimonial property can be achieved by implementing the element of disclosure of facts while entering into prenuptial agreements. This will enable both parties to declare their assets. The declaration of assets by both parties will help the court in the calculation to discern what belongs to each party. This will be achieved by having a standard formula for calculation of assets hence the fair distribution of matrimonial property.

1.5 Research questions

1. What shortcomings are occasioned as a result of non-disclosure of facts?

¹⁷ *MWM v JPM* (2016) eKLR.

¹⁸ Section 7, *Matrimonial Property Act* (Act No 49 of 2013).

2. What shortcomings are occasioned by lack of a standard formula for calculation of assets?
3. What are the steps South Africa has taken when entering into prenuptial agreements that enable fair division of matrimonial property?
4. What reforms should be put in place to enable the division of matrimonial property after entering into prenuptial agreements in Kenya?

1.6 Justification of the study

The research will help academically it will shed light in providing an amicable solution for distribution of matrimonial property achieving the principle of equality. The research will help in policy making. It will be a guide in amending the Matrimonial Property Act to help in the realization of property rights to achieve fairness in the distribution of matrimonial property. There is need for progressive jurisprudence in the sphere of law with regards to prenuptial agreements which is highly competent and indigenous as well.¹⁹ This can be achieved by developing the law to respond to the needs of the people and achieve the national values entrenched in the Constitution.²⁰ The research will suggest methods in which matrimonial property can be divided fairly after entering into prenuptial agreements.

1.7 Theoretical framework

Property theory

The property theory arises out of one owning property. The right to property was conceived as inherent by Aristotle. He advocated for people prioritizing private property instead of community property because this would help in encouraging people to attend to their own affairs rather than interfering with the affairs of others.²¹ In this context of prenuptial agreements, for parties to enter into these agreements then there has to be property involved so that people can secure their property rights. Aristotle stated that respect for private property would encourage liberality when dealing with matters of property. He viewed the right to exclude as a key component of property rights.

¹⁹ - <<http://kenyalaw.org/kenyalawblog/elements-of-progressive-jurisprudence-in-kenya-a-reflection/>> on 8th October 2020.

²⁰ Article 10, *Constitution of Kenya* (2010).

²¹ Bell A, Parchomovsky G, 'A Theory of Property' 90 *Cornell Law Review* 1,2005, 541.

This is because the right enabled the owners of property to waive their rights and share the benefits of property rights with others.²² In prenuptial agreements there is separate property involved which is property belonging to individuals exclusively and matrimonial property. The problem that is caused with non-disclosure of property when entering into prenuptial agreements is the conflict that arises upon dissolution of marriage. Having a standard formula for the distribution of assets can only work effectively if property rights are ascertained. The property theory is necessary in this research because it enables the waiving of rights for the share of the benefit of property rights. This enables one to retain what will rightfully belong to them after the dissolution of the marriage.

Contractual theory

It is a theory that addresses conceptual questions in contract law.²³ It is a theory that arises out of a contractual relationship. A prenuptial agreement is a contract like any other. The contracts are enforced to achieve bargains due to the element of offer and acceptance.²⁴ Charles Fried who is an American jurist and lawyer posits that the purpose of a contract is to enforce promises.²⁵ The prenuptial agreements also have their 'promises' which are achieved by honouring the terms of the agreement. The promises are everyone getting what was agreed upon during the execution of the agreement.

One of the requirements when entering into contracts is to disclose the facts that are necessary to enable the completion of the agreement. The element of disclosure of facts should be considered when entering into prenuptial agreements because the parties need to know what each person owns. This theory will be applicable in this research by the fact that people enter into these agreements. There is an obligation to honour them and to meet the requirements of the contract before contracting.

1.8 Literature review

In a dissertation written by Wangari Lucy, '*A Contractual Marriage: What is the place of prenuptial agreements in Kenya?*' the author questions the place of prenuptial agreements in

²² Bell A, Parchomovsky G, 'A Theory of Property' 90 Cornell Law Review 1,2005, 541.

²³ Zarrokh E, 'Practical Concepts In Contract Law', 14th August 2008, <https://mpra.ub.uni-muenchen.de/10077/> on 15th May 2021.

²⁴ Zarrokh E, 'Practical Concepts In Contract Law', 14th August 2008, <https://mpra.ub.uni-muenchen.de/10077/> on 15th May 2021.

²⁵ Zarrokh E, 'Practical Concepts In Contract Law', 14th August 2008, <https://mpra.ub.uni-muenchen.de/10077/> on 15th May 2021.

Kenya. She posits that prenuptial agreements are not being accepted by the society because they are believed to anticipate divorce. She talks about the benefits of prenuptial agreements and the limited legislation when it comes to prenuptial agreements in Kenya's jurisdiction hence proposing the need to enforce and recognize prenuptial agreements in Kenya.²⁶ The author acknowledges the need for enforcement of prenuptial agreements but does not address how it should be done.

In the same dissertation, she makes a comparative analysis of the various countries that have incorporated prenuptial agreements which include Australia, South Africa, and United States of America. It discusses the systems. This paper will discuss the shortcomings occasioned despite entering into prenuptial agreements due to the lack of disclosure of facts and lack of a standard formula. It will compare Kenya to other jurisdictions that have enacted prenuptial agreements in their systems and have succeeded so that Kenya can also borrow from that.

Nzomo Maria in her journal article '*The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities*' posits that, various organizations and statutes have been put in place to help women in the realization of their rights but have not succeeded.²⁷ She advocates for women empowerment to help women in the realization of their rights. The organizations are already put in place to empower women from this an assumption is drawn that women empowerment is not the ideal solution.

Rose Robert in her thesis '*Asset Protection Through the Use of Premarital Agreements*' posits that prenuptial agreements help in the protection of assets acquired by different spouses whereby, separate property should be given to owner and marital property being divided between both spouses. The irony in this is that the author does not envision a situation whereby assets were acquired by one spouse but have been developed by both spouses over the years.²⁸

Marston Allison in her article '*Planning for Love: The Politics of Prenuptial Agreements*' posits that parties should obtain independent legal advice before entering into prenuptial agreements to ensure understanding. This is highly recommended for transparency.²⁹

²⁶ Mwaura L, 'A Contractual Marriage: What is the place of prenuptial agreements in Kenya?' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2017.

²⁷ Nzomo M, 'The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities' 22 *A Journal of Opinion* 2, 1994, 17, 19.

²⁸ T Rose, 'Asset Protection Through the Use of Premarital Agreements' Unpublished Thesis, Claremont McKenna College, California 2012.

²⁹ Marston A, 'Planning for Love: The Politics of Prenuptial Agreements' 49 *Stanford Law Review* 4, 1994, 900.

Joanna Miles in her journal article '*Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money*' talks about the case of *Radmacher v Granatino*,³⁰ which is one of the landmark cases in the evolution of marital agreements. The journal article talks about independent legal advice on a different angle. She discusses independent legal counsel whereby the Court put more weight on party autonomy rather than obtaining independent counsel. It stated that what mattered is that the parties agreed to what they were signing up for. The articles by Marston Allison and Joanna Miles are contradictory with regards to independent legal advice when entering into prenuptial agreements.³¹

Sanders Anne in her journal article '*Private autonomy and marital property agreements*' also shares the same idea about prenuptial agreements bringing about the principle of autonomy with regards to marital property hence everyone has a say in the property.³²

Anuar Khailur in his journal article '*Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate*,' posits that achieving fairness during the distribution of matrimonial property can be achieved by the principle of autonomy. Both authors advocate for the principle of autonomy to achieve fairness, but they do not posit a standard for this fairness because fairness varies from one individual to another.

On the contrary, Amrita Ghosh and Pratyusha Kar in their journal article '*Prenuptial Agreements in India: An Analysis of Law and Society*' posit that, the enforcement of prenuptial agreements with regards to other religious communities has been dependent on judicial interpretation. The writers acknowledge that recently, societal perspectives have taken dominant role on prenuptial agreements as compared to what the key stakeholders of the agreements. There is a conflict as to whether the court requires parties to have autonomy to achieve fairness or rather have the societal perspectives play a dominant role on prenuptial agreements. This will help in the enforcement of prenuptial agreements.³³

J.D Ochieng in his article '*The Legal Framework Governing Division Of Matrimonial Property In Kenya*' gives a broad overview of family law in Kenya and includes historical development.

³⁰ *Radmacher v Granatino* (2010), (The Supreme Court of the United Kingdom).

³¹ Miles J, 'Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money' 74 *The Modern Law Review* 3,2011,434.

³² Sanders A, 'Private autonomy and marital property agreements' 59 *Cambridge University Press* 3, 2010.

³³ Ghosh A and Kar P, 'Prenuptial Agreements in India: An Analysis of Law and Society' 12 *NUJS Law Review* 3, 2019.

He analyses the existing status of Kenya's family law by looking at the different statutes and then does a comparative analysis to international standards. He addresses the various gaps that are present in the law in Kenya and proposes reforms. He acknowledges that women have been the affected party in the quest for distribution of matrimonial property. He proposes the need to re-interrogate the issue of division of matrimonial property and consider a realist approach.³⁴ Despite the author acknowledging that women are affected during the distribution of matrimonial property and advocates for a realist approach, the big question remains how this can be achieved.

In a report entitled "*Once you get everything you lose everything*" *Women and matrimonial property rights in Kenya*, the authors focus on barriers women face in claiming a share of property even in a 'gender-responsive' framework. It highlights the various laws in Kenya's jurisdiction that have been enacted to protect the women's rights to property during the marriage and even at the dissolution of the marriage. The finding of the study is that the laws have resulted to discrimination against women. International law on the other hand has a requirement that Kenya should ensure that property distribution at the dissolution of a marriage should comply with the principles of substantive equality in accordance with the Convention on Elimination of all forms of Discrimination Against Women.³⁵

In a thesis written by Mogammad Shamiel Jassiem, '*Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes*', the author addresses different matrimonial property regimes in South Africa. It addresses whether the default matrimonial system in South Africa infringes on one's right to equality. The paper also addresses whether the default matrimonial property system caters for the needs of the many people in this system. This includes the people who are unaware of the consequences of the default matrimonial system due to lack of information.³⁶

The findings are that the default matrimonial system does not cater for the needs of all the people in South Africa. That is why the people who are knowledgeable on the prenuptial

³⁴ Ochieng J.D, '*The Legal Framework Governing Division Of Matrimonial Property In Kenya*' https://www.academia.edu/11935870/THE_LEGAL_FRAMEWORK_GOVERNING_DIVISION_OF_MATRIMONIAL_PROPERTY_IN_KENYA on 15th May 2021.

³⁵ Human Rights Watch, "*Once you get everything you lose everything*" *Women and matrimonial property rights in Kenya*, 25th June 2020.

³⁶ Jassiem M, '*Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes*' Unpublished LLM, University of the Western Cape, Cape Town, 2010, 5.

agreements opt for that system provided for by the law. The other finding was that the default matrimonial property system of South Africa does not infringe on indigent party's right to equality. The rationale behind that was that more affluent counterparts who have access to education and resources can conclude a marriage of their choice after having an informed decision.³⁷ The article points out that entering into prenuptial agreements in South Africa is a big advantage and the people who are informed opt for them. This is a good basis for comparative analysis in this research.

In an article written by Ifemeje Sylvia, '*A case for global enforceable prenuptial agreements*' she advocates for the recognition and enforcement of prenuptial agreements. She says that prenuptial agreements have been stigmatized by the society overtime. This has started to change due to the unpredictability, uncertainty and gender discrimination often observed in the sharing of marital property in court actions.

She talks about the challenges occasioned when contracting into prenuptial agreements. They include loss of the sanctity of marriage, among others. The author states that prenuptial agreements help in curbing the gender discrimination that is experienced when distributing matrimonial property.³⁸ The author talks about the need of enforcing prenuptial agreements stating their advantages. She does not address the elements the prenuptial agreements should entail.

It has been observed that prenuptial agreements are essential during the distribution of matrimonial property. There is need for independent legal advice and principle of autonomy. In some instances, the societal perspectives take up the dominant role in entering into prenuptial agreements rather than the key stakeholders. There is the need for a solution in relation to division of matrimonial property. From the works cited above, none addresses the need to have a standard formula for calculation of assets and the disclosure of assets when entering into these agreements. This is the gap this paper seeks to address.

³⁷ Jassiem M, 'Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes' Unpublished LLM, University of the Western Cape, Cape Town, 2010, 69.

³⁸ Ifemeje SC, 'A case for global enforceable prenuptial agreements' *Africa Journals Online*, 2010, <<https://www.ajol.info/index.php/naujilj/article/view/138187>>.

1.9 Research and design

1.9.1 Research design & methodology

The research methodology will be doctrinal research. It will be qualitative.³⁹ There will be the use of primary sources which will include the various statutes and case law. They will be accessed through the Kenya Law Reports website. Secondary sources which will include journal articles and books. They will be accessed through Strathmore University Library. The study will focus on the specific topic and objectives that are being discussed to get a clear view of the topic and gather information. There will also be comparative analysis.

1.9.2 Assumptions

The quest of distribution of matrimonial property upon dissolution of marriage is still a big challenge. Implementing a standard formula for calculation of assets will provide a solution for the distribution of matrimonial property. This will be achieved if parties to a prenuptial agreement disclose the assets that they have hence making the courts discern easily what will belong to each party.

1.9.3 Limitations

There are various limitations occasioned in the study. Many scholars have written on prenuptial agreements in Kenya. In that event, they are proposed as a remedy for distribution of matrimonial property in case of divorce or marriage. Despite that there is the need for specificity in how the assets need to be distributed hence there is scarcity in Kenyan literature. This then prompts the researcher to benchmark from other jurisdictions. Some of the online resources require subscriptions hence it is a big challenge.

The corona virus pandemic has also been a challenge due to the various lockdowns occasioned hence the researcher was not able to access the school facility. Delimitation is that the scope will lean on women's side even though some men are also affected, this is because women are the ones who are mostly disadvantaged with regards to this area of study.

³⁹ Mugenda O, Mugenda A, 'Research Methods Quantitative and Qualitative Approaches' Acts Press, 1999,197.

1.9.4 Chapter breakdown

Chapter One

Introduction. This chapter explains the historical background of the prenuptial agreements, introduces the problem, and outlines the whole dissertation by giving a summary of the whole paper.

Chapter Two

This chapter will look at various shortcomings that are occasioned as a result of non-disclosure of facts.

Chapter Three

This chapter will explain the various shortcomings that are occasioned as a result of lack of a standard formula for the calculation of assets.

Chapter Four

Comparative analysis. The paper will compare South Africa to Kenya. It will discuss the situation in South Africa because it has incorporated prenuptial agreements in its system. This has led to the fair distribution of matrimonial property. It is also a common law county so there is a great possibility Kenya will do well if what is done in South Africa is incorporated in the system.

Chapter Five

Conclusion and recommendation. This chapter explains reforms that can be put in place to ensure fair distribution of matrimonial property after entering into prenuptial agreements.

Chapter Two: Shortcomings occasioned as a result of non-disclosure of facts

2.1 Introduction

This chapter will analyse the element of disclosure of facts and shortcomings occasioned as a result of non-compliance to it. South Africa has recognized the element of disclosure of facts hence one can disclose the net value of the estate this makes it easier during dissolution of the marriage in case depending on the marriage system that was chosen. In Kenya there is no provision for disclosure of facts.⁴⁰ Different cases will be examined to find out if the element of disclosure of facts is necessary when entering into prenuptial agreements.

2.2 Applicable Law

Section 6 (3) of the Matrimonial Property Act 2013 gives parties the liberty to enter into a prenuptial agreement.⁴¹ Despite this there is need to amend law that governs these agreements to incorporate disclosure of facts as a prerequisite when entering into prenuptial agreements. The law as per now is not clear enough thus very open to manipulation.

2.3 Non-Disclosure of Facts

Non-disclosure is when one does not make information known to another party. In prenuptial agreements there is the need for disclosure. In this context there will be examination of both financial disclosure and material disclosure. Financial disclosure comes into place whereby before people enter into the marriage, they could be having finances which they both own separately. Material disclosure also comes into place whereby both parties could be having assets that they own separately before marriage. The relevance of both financial and material disclosure when entering into prenuptial agreements is for parties to determine their property rights before the marriage.⁴² The failure to disclose the various facts leads to conflicts as it will be discussed below.

2.3.1 Financial Disclosure

⁴⁰ Section 6 (4) (b), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁴¹ Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

⁴² Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

Financial disclosure is a full statement of one's current financial earnings and any assets, along with supporting documents this acts as evidence.⁴³ The importance of financial disclosure is that it is in the interests of the payee whom the prenuptial agreement provides for a sum of money. The payee can confirm whether the payer is able to pay the sum of money that has been agreed upon. ⁴⁴According to the English Law Commission Report 2014, it stipulates the conditions for qualifying nuptial agreements.⁴⁵

One of the conditions for a qualifying nuptial agreement is disclosure and the report illustrates the reasons for disclosure. They include the parties entering into the prenuptial agreement being well acquainted with the financial consequences. There is need for both parties to know each other's financial conditions before the completion of the agreement. The second reason is that financial disclosure is crucial in financial order proceedings. This is necessary when the court makes an order with regards to a prenuptial agreement.⁴⁶

In the case of *Del Vecchio v. Del Vecchio*, the petitioner applied to the court to set aside a prenuptial agreement between her and her deceased husband on the grounds of lack of full disclosure of the extent of the husband's property. The court held that the decedent was worth about a half-million dollars and that no full and fair disclosure was made to the petitioner of the extent of the decedent's holding. The prenuptial agreement was declared invalid, and it was set aside.

The decision was reversed on appeal, and it further went on appeal again where the decision of the appellate court was quashed. The court held that a prenuptial agreement is valid if it contains a full and frank disclosure to the wife, before the signing of the agreement, of the husband's worth.⁴⁷ From the above case, there is need for full and frank financial disclosure when entering into prenuptial agreements.

Financial disclosure should be considered a very important aspect when entering into prenuptial agreements. This is because in when decisions are made based on information that turns out false the law always deals with the matter. It would turn out to be mistake and

⁴³ Miller C, 'What is financial disclosure?' 6th September 2019 -<https://kmjsolicitors.com/what-is-financial-disclosure/> on 28th May 2021.

⁴⁴ The Law Commission, 'Matrimonial Property, Needs and Agreements,' 26th February 2014, 55.

⁴⁵ The Law Commission, 'Matrimonial Property, Needs and Agreements,' 26th February 2014.

⁴⁶The Law Commission, 'Matrimonial Property, Needs and Agreements,' 26th February 2014, 116.

⁴⁷ *Del Vecchio v. Del Vecchio* (1962), Supreme Court of Florida.

misrepresentation when it comes to contract law. It would also turn to mistaken payments in the law of unjust enrichment, to lack of disclosure in consent orders in family law.⁴⁸

Misrepresentation is an untrue statement of fact made by one party to the other while negotiating a contract that induces the other party to enter into the contract.⁴⁹ Contract Law therefore ensures that one does not enter into the contract misinformed. In Maryland prenuptial agreements are governed by contract law. The agreements are set aside by contract law defences that parties may raise such as misrepresentation and fraud.⁵⁰ In this context misrepresentation is supposed to be prohibited when entering into prenuptial agreements just like any other contract as it is in Maryland. This can only be achieved by incorporating the element of disclosure of facts when entering into a prenuptial agreement to avoid misinformation. Parties are supposed to make full financial disclosure so that one can decide whether to enter into the agreement or not. The lack of full financial disclosure brings about misrepresentation which is prohibited by the law.

In the case of *MBK v MB*, the parties entered into a prenuptial agreement. The agreement consisted of two clauses which stated that they will get married at the District Commissioner's office at Malindi after the publication of the wedding bans. The second clause stated that property that was acquired by either party before the marriage shall remain the sole property of the party after the marriage. In this case, the Plaintiff wanted an apartment in Kilifi to be declared matrimonial property and sold so that he could get his share. The Defendant had decided to liquidate an endowment proceeds which she had held for over nineteen years before the marriage and paid the purchase price of the Kilifi house.

The Defendant did not disclose that she had endowment proceeds which she liquidated. This amounted to lack of financial disclosure on her end. This made the Plaintiff claim a share of the sale proceeds of the said apartment which he was not entitled to because of lack of contribution. The plaintiff made a claim because it formed part of matrimonial property. The court held that the apartment in Kilifi was matrimonial property, but the plaintiff's contribution

⁴⁸ Anuar K, 'Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate' 1 *Oxford University Undergraduate Law Journal* 6, 2017, 52.

⁴⁹ Oxford Dictionary, 6 ed.

⁵⁰ Skok S, 'How Can I Ensure My Prenuptial Agreement Is Enforceable In Maryland?' Lawyer Monthly, 30th April, 2020 <https://www.lawyer-monthly.com/2020/04/how-can-i-ensure-my-prenuptial-agreement-is-enforceable-in-maryland/> on 2nd June 2021.

was quite minimal hence he was not entitled to the sale proceeds.⁵¹ There was the need for the defendant to disclose the endowment proceeds that she owned before entering into the prenuptial agreement. This would have led to transparency and prevented the conflict between the parties.

From the analysis of the cases discussed above there is need for full financial disclosure when entering into prenuptial agreements. This enhances transparency and reduces conflicts during the dissolution of the marriage.

2.3.2 Material disclosure

Material disclosure is making it known what an individual owns. It helps both parties to know what they own. According to Australian jurisdiction, one of the conditions for binding financial agreements is full material disclosure of facts.⁵²

The case of *Radmacher v Granatino*⁵³ which is one of the landmark cases for the evolution of marital agreements, established principles famously known as Radmacher guidance, that need to be taken into consideration when drafting prenuptial agreements. One of the principles is full material disclosure of the relevant information that will enable a spouse to decide if he or she will complete the agreement and being well acquainted with its terms.⁵⁴

In the case of *CYC v KSY* the Applicant sought court orders that the order for maintenance be stayed pending the hearing and final determination of the intended appeal. The applicant was dissatisfied with the award for maintenance claiming that it was not based on evidence, and he may suffer irreparable loss as a result. He claimed that there was no evidence of income from the other party hence he had to bear the burden of providing for the children all by himself.

The Respondent opposed the application claiming that the Court stated that prenuptial agreements can only be considered by the court after it is satisfied that the party has met the requirements for obtaining a divorce. She further stated that the applicant ignored to provide the court with full particulars of his income and property hence cannot lodge a complaint. The Court did not also award her custody of the children or money for their maintenance. The Court

⁵¹ *MBK v MB* 2016 eKLR.

⁵² Section 90K(1)(a), *Family Law Act*, (Act No 53 of 1975), Australia.

⁵³ *Radmacher v Granatino* (2010), The Supreme Court of the United Kingdom.

⁵⁴ Efe C, 'Rethinking The Property Rights Of Spouses On Civil Marriage Breakdown In Nigeria: Inspiration From Other Countries' Unpublished LLD Thesis, University of Pretoria, South Africa, 2017,157.

held that it was not satisfied that the applicant will suffer substantial loss by paying the amount of money as ordered by the Court. The application was therefore dismissed.⁵⁵

The above case covers both financial and material disclosure. Financial disclosure has already been discussed and the Applicant ought to have disclosed full particulars of his income. On material disclosure, the respondent claimed that the applicant did not furnish the court with full particulars of his property. The lack of disclosure by the Applicant will make him to suffer substantial loss. The Court did not also pay attention to the element of disclosure of facts despite being pointed out by both parties and eventually dismissed the case. This will in turn make the Applicant to the case suffer substantial loss as a result. The loss that will be incurred by the Applicant includes him providing for all the needs of the children alone. This could be avoided by both parties disclosing what they owned when entering into the prenuptial agreement. The Court should have delegated the power to investigate what both parties possessed to make a sound judgement in awarding maintenance.

From a property law perspective, a person's intent when making a transfer of property is of great significance. People would not give away their property voluntarily without conditions attached unless there is evidence to prove otherwise. Due to this fact, then prenuptial agreements should also fall in this category.⁵⁶ This is because the parties often sign away their property rights that they have been entitled to when entering into these agreements. There is the need for material disclosure people should disclose the property they own so it can be easier to discern what belongs to each party during the dissolution of marriage.

Prenuptial agreements help in determining property rights.⁵⁷ The applicant may claim in court that the lack of full material information affected his or her consent when entering into the agreement. The burden of proof should then fall on the party depriving an applicant property rights to prove that he or she presented the applicant with all material information. This is presumed to have been done prior to signing the agreement.⁵⁸ The respondent can defend themselves for lack of providing material information.

⁵⁵ *CYC v KSY* (2014) eKLR.

⁵⁶ Anuar K, 'Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate' 1 *Oxford University Undergraduate Law Journal* 6, 2017, 53.

⁵⁷ Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

⁵⁸ Anuar K, 'Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate' 1 *Oxford University Undergraduate Law Journal* 6, 2017, 53.

Marston in his journal article addressed inequities in prenuptial negotiations and said that it heightens unfairness of both bargaining process and result. He addressed the failure of the courts in acknowledging impact of unequal bargaining power on the provisions of prenuptial agreements. They pay attention to the contract itself rather than the legal rights the parties have forgone by signing the agreement.⁵⁹ The inequality in the bargaining process is the lack of material information. This leads to a party foregoing their right because a party should know what the other party owns when entering into a prenuptial agreement.

From the discussions above, the lack of disclosure of facts brings about lack of transparency in the division of assets during the dissolution of a marriage. This results to a lot of conflicts when discoveries are made regarding to a party's assets. There is need for both full material and financial disclosure when entering into prenuptial agreements. This gives both parties full information hence they can decide whether to enter into the agreement or not without being misinformed.

2.4 Conclusion

In conclusion, from the case law analysed, there is need for incorporation of element of disclosure of facts when entering into prenuptial agreements. It enhances transparency and it even makes the courts to make a sound judgement during the distribution of matrimonial property. It also prevents backlog of cases in court. There is need for amendment of the Matrimonial Property Act to incorporate the element to eliminate the shortcomings occasioned.

⁵⁹ Marston A, 'Planning for Love: The Politics of Prenuptial Agreements' 49 *Stanford Law Review* 4, 1994, 912.

Chapter Three: Shortcomings occasioned by lack of a standard formula for calculation of assets.

3.1 Introduction

In the previous chapter, there has been the analysis of court decisions on taking into consideration the element of disclosure of facts when entering into prenuptial agreements. There has also been analysis of the element of disclosure of facts in detail. From the analysis of the various cases the finding was that the element of disclosure of facts is very crucial when entering into prenuptial agreements. Despite this, there is still a missing element that needs to go concurrently with the element of disclosure of facts. This chapter will look at different case laws to scrutinize the deficiency that arises as a result of the missing element.

3.2 Kenyan case law

In the case of *Federation of Women Lawyers Kenya (FIDA) vs Attorney General and another*⁶⁰, the petitioner was challenging the constitutionality of Section 7 of the Matrimonial Property Act. The Section addresses ownership of matrimonial property according to contribution of spouses towards its acquisition subject to the prenuptial agreement.⁶¹ The petitioners claimed that the aforementioned section is contrary to Section 45 (3) of the Constitution of Kenya which gives parties to a marriage equal rights even at the dissolution of a marriage.⁶² The section puts women in a disadvantageous state because women must prove their contribution towards the acquisition of the property despite the statute providing for non- monetary contribution. The women have no proof of their contributions despite contributing.

The Petitioner sought for orders declaring section 7 of the Matrimonial Property Act invalid in as far as distribution of matrimonial property is based on contribution it goes contrary to the aforementioned section of the Constitution of Kenya hence it should be null and void. Secondly an order compelling the Respondent to amend Section 7 of the Matrimonial Property Act for it to state that “*Subject to Section 6 (3), ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.*”

⁶⁰ *Federation of Women Lawyers Kenya (FIDA) vs Attorney General and another* (2018) eKLR.

⁶¹ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

⁶² Article 45 (3), *Constitution of Kenya* (2010).

The Court held that, article 45 (3) of the Constitution of Kenya and Section 7 of the Matrimonial Property Act does not command 50:50 sharing of property. It relied on the decision that was made in the case of *Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes*. In this case the Court held that at the dissolution of a marriage each partner of a marriage should walk away with what they deserve. The criteria for discerning what one deserves is whether there was monetary or non- monetary contribution. The one who makes a bigger contribution gets a bigger entitlement to a share of the property.

In instances where the non-monetary contribution guarantees the spouse half the property then the Courts should ensure the spouse is given what is due. If Article 45(3) commanded the 50:50 it would jeopardize the marriage institution. It would give an opportunity to fortune seekers to reap what they have not sowed without making any contribution. This will not achieve equality hence it is repressive to the party that makes a larger contribution.⁶³

Following the case above, the petitioners were seeking fairness which clearly implies that Section 7 of the Matrimonial Property Act that addresses contribution is insufficient. Despite there not being automatic 50: 50 allocation of property in every situation, there needs to be a better method to show transparency during the distribution of matrimonial property. This aids in reducing conflicts.

In the case of *MWM v JPM*, the applicant sued the respondent claiming that she was entitled to half the share of movable and immovable properties that were listed. She alleged that despite the said properties not being registered in her name, they were acquired by the joint effort of the said parties during their marriage. The respondent also replied to the allegations by the applicant and stated that the applicant did not contribute to the acquisition of the said properties. He produced exhibits in court to prove that he had purchased the said properties.

The court relied on section 7 of the Matrimonial Property Act which states that ownership of matrimonial property will vest in the spouses according to contribution.⁶⁴ The court held that the applicant had met the threshold standard of proof which is a balance of probabilities in

⁶³ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* (2011) eKLR.

⁶⁴ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

proving her case. This proved that she had contributed directly or indirectly towards the acquisition of the said properties. The court therefore awarded the applicant some of the assets.⁶⁵

From the analysis of this case, the Respondent had alleged that the Applicant had not contributed towards the acquisition of the properties that were at stake. The court on the other end decided that the Applicant contributed towards the acquisition of the said properties. Despite contribution being acknowledged by the Matrimonial Property Act, it is still an issue between the parties because they have contradictory allegations on contribution. There is the need to have a better solution during the division of matrimonial property. This is because the assets were disclosed but that alone was not enough hence the need for a solution.

In the case of *NBR V JO*, the applicant filed a notice of appeal against the order and ruling of the High Court that ordered him to pay a monthly sum of Kshs 100,000.00 to the respondent as maintenance pendente lite. The applicant was seeking stay of execution of that order pending the hearing and determination of his intended appeal.

The parties got married and they were blessed with one issue. They separated later, and the Respondent moved out of the matrimonial home with the issue (SAR). The applicant sued in a children's court wanting the custody of SAR. The settled by signing a consent order that the respondent would have the custody of the child and the applicant would have unhindered access to the child. The parties agreed that the applicant would pay the respondent Kshs. 175,000 per month for maintenance and upkeep and Kshs. 65,000 for payment of rent. The applicant later filed a petition for divorce and the respondent applied Kshs.1,000,000 alimony pendente lite.

The judge awarded the respondent Kshs.100,000 above the Kshs. 175, 000 that was agreed by the parties by signing of the consent order. The applicant sought stay in the application. He claimed that he was not able to pay Kshs. 275,000 awarded by the Court. He alleged that the High Court had failed to consider that the applicant had paid the respondent Kshs. 6,000,000 pursuant to a prenuptial agreement. He further deposited Kshs. 6,000,000 in a fixed account to cater for SAR's school fees. The court took into consideration the applicant's financial position.

⁶⁵ *MWM v JPM* (2016) eKLR.

The court therefore reduced the amount of money that the applicant was supposed to pay the respondent.⁶⁶

From the analysis of this case, there ought to be a solution on distribution of matrimonial property. This is seen by the fact that despite the parties entering into a prenuptial agreement, there was still a dispute on maintenance. There still needs to be a better solution for the division of matrimonial property after entering into a prenuptial agreement.

The need to show financial contribution was seen in the case of *Echaria v Echaria*. The case has been essential in examining the rights of spouses over property acquired before marriage, during the marriage and at the dissolution of a marriage. The parties were contesting over the decision of matrimonial property. The high court ruled that they were entitled to the property in equal shares.

The court of appeal revoked the high court's decision ruled for a proportionate division of the property between the husband and wife. This was to be realized by producing evidence on their contributions in its purchase. This was disadvantageous to the wife. This was before the enactment of the Matrimonial Property Act 2013. When the Act came into place, it took into consideration both monetary and non-monetary contributions. Despite the case being considered bad law, we still notice that the same problems keep on repeating themselves. There are still many cases in court with regards to contribution. This insinuates that there is the need for a better solution.⁶⁷

3.3 Contempt of court

Contempt of court is the disobedience of a court order, judgement decree, direction, or a process of the court.⁶⁸ The courts experience this challenge when enforcing some prenuptial agreements. They give orders but the orders are not adhered to by a party. This is occasioned due to the loopholes in the law. The court gives orders but because the parties do not know how the court arrived at that decision then the order is disobeyed. This in turn leads to some people losing faith in the court process and as a result many people do not enter into these

⁶⁶ *NBR v JO* (2014), eKLR.

⁶⁷ *Echaria v Echaria* (2007), eKLR.

⁶⁸ Section 4 (1), *Contempt of Court Act* (Act No 46 of 2016).

agreements. There needs to be a transparent method that is uniform to everyone that should be used by the courts. This will in turn enhance transparency.

3.4 Conclusion

In conclusion, from the analysis of the cases above, despite taking into consideration the element of disclosure of facts it should go concurrently with a method that will help in the division of assets. This will help in curbing the challenges that still exist. This will be discussed in the next chapter by comparing Kenya to South Africa.

Chapter Four: Comparative analysis: Comparing Kenya to South Africa

4.1 Introduction

This chapter will compare Kenya to South Africa. South Africa is a common law jurisdiction, and it is one of the countries located in Africa just like Kenya. South Africa is more suitable for this comparative analysis because Kenya is also a common law jurisdiction. South Africa has also incorporated prenuptial agreements in its system, and it has done well. This implies that if Kenya implements what South Africa has implemented in relation to prenuptial agreements then they have a high possibility of doing well. South Africa also relates to some of our struggles as an African country. South Africa recognizes the element of disclosure of facts, and it also has a standard formula for the calculation of assets. This chapter will analyse the matrimonial property systems in South Africa and how beneficial they are to the people.

4.2 Matrimonial property systems

There are two matrimonial property systems in South Africa. They include marriages in community of property⁶⁹ and marriages out of community of property.⁷⁰ Section 21 of the Matrimonial Property Act of South Africa gives parties to a marriage the liberty to change the matrimonial property system that they want to be under by applying to the court.⁷¹

4.2.1 Marriage out of community property

This chapter will focus on this system because this is the system that provides for parties entering into a valid prenuptial agreement whereby community of property is excluded.⁷²

4.2.1.1 Marriage out of community of property including the accrual system

The accrual system was introduced after the commencement of the Marriage Act in 1984 hence anyone who contracted in the out of community marriage was subjected to the accrual system. The exception was that unless it is expressly stated in the prenuptial agreement that it will exclude the accrual system.⁷³

⁶⁹ Section 14, *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁷⁰ Section 2, *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁷¹ Section 21, *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁷² Robinson J, 'Matrimonial property regimes and damages: the far reaches of the South African constitution' 10 *African Journals Online* 3, 2007, 74.

⁷³ Jassiem M, 'Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes' Unpublished LLM, University of the Western Cape, Cape Town, 2010, 39.

4.2.1.1.1 Standard formula for calculation of accrual in estates

In this system, in the event of divorce the party that has lesser accrual will get the half the difference in the growth or profit of the two individual estates. Both parties always retain their individual estates during the marriage and are responsible for the debts they incur but during the dissolution of the marriage there is the sharing of profits of both estates.⁷⁴ The Matrimonial Property Act outlines how to calculate accrual in the estates between the two parties during the dissolution of the marriage.⁷⁵ The growth of the estate is calculated by subtracting the net value of the estate at the beginning of the marriage as it was stated in the prenuptial agreement from the value of the estate during its dissolution.⁷⁶

From this, we observe that South Africa is so advanced in its system. It has the standard formula to calculate accrual in the estates of both parties and even shows how the growth of the estates is calculated. This helps in reducing conflicts as to how property should be distributed during dissolution of the marriage after entering into prenuptial agreements. This in turn leads to the enforcement of many prenuptial agreements in the jurisdiction of South Africa.

This system also takes into consideration the one with the lesser accrual he or she gets the half the difference in the growth or profit of the two individual estates. This shows that both parties are well catered for in the event of the dissolution of the marriage hence nobody is disadvantaged. It brings about fairness to both parties.

4.2.1.1.2 Declaration of net value of estate

According to Section 6 (1) of the Matrimonial Property Act, a party to a marriage may before the commencement of the marriage or within six months in the marriage declare their net value of his estate in a prenuptial agreement. It shall be signed by the other party and attested by a notary.⁷⁷ This is proof of commencement of value of the estate. Pursuant to the aforementioned section, we see the incorporation of the element of disclosure of facts when entering into a prenuptial agreement. The declaration of the net value of estate helps in knowing what one owns before entry into the marriage. This shows the progress South Africa has achieved in this sphere of the law unlike Kenya's jurisdiction.

⁷⁴ Welsh S, 'The Law Giveth And The Law Taketh Away: Marriages Out Of Community Of Property Excluding Accrual Post 1984/88' Unpublished LLM Thesis, University of South Africa, Pretoria, 2000, 9.

⁷⁵ *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁷⁶ <https://www.vandeventers.law/Services/Marriage-and-Matrimonial-Property/Antenuptial-Contracts/Antenuptial-Contracts-with-Accrual> on 15th June 2021.

⁷⁷ Section 6 (1) (a), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

Section 6 (4) of the Matrimonial Property Act stipulates that net value of the estate of a spouse shall be deemed nil at the commencement of the marriage if the liabilities exceed the assets.⁷⁸ The estate of a spouse shall also be deemed nil if the value of his estate was not declared in the prenuptial agreement or in a statement sworn by the spouse.⁷⁹ Due to this all the property the spouse will have accrued will be deemed to have accrued after the marriage unless proved otherwise. The Act further illustrates that if the value of the estate is not declared in the prenuptial agreement it will be deemed nil hence property will be deemed to have accrued after the marriage unless proved otherwise. This shows the motive of protecting the rights of both parties in case of dissolution of the marriage hence nobody is disadvantaged. Everybody will be provided for at the dissolution of the marriage hence minimizing the conflicts that arise during dissolution of a marriage as a result of not benefiting anything.

Section 4 (1) (b) (iii) of the Matrimonial Property Act further posits that the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference that may exist in the value of money at the commencement and dissolution of the marriage and for that purpose the; weighted average of the consumer price index as published from time to time in the *Gazette* serves as *prima facie* proof of any change in the value of money.⁸⁰ The South African Matrimonial Property Act is very transformative in its nature. This is because it even envisions the discrepancies that might arise as a result of the value of money at the commencement and dissolution of the marriage. The Kenyan Matrimonial Property Act has not envisioned this hence Kenya should emulate this when it provides for the element of disclosure of facts.

A prenuptial agreement that is entered into by the parties and registered at the Deeds office is proof that parties are married out of community of property. Section 86 of the Deeds Registries Act 1937 provides for the registration of prenuptial agreements and registration in the Deed's office.⁸¹ From the analysis of this system, it is evident why Kenya still encounters many problems during the dissolution of marriages despite entering into prenuptial agreements.

⁷⁸ Section 6 (4) (a), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁷⁹ Section 6 (4) (b), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁸⁰ Section 4 (1) (b) (iii), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁸¹ Section 86, *Deeds Registries Act* (Act 47 of 1937), South Africa.

4.3 Current position of prenuptial agreements in Kenya

Prenuptial agreements in Kenya were incorporated in 2013. Despite this the law has not really developed in this area hence it has not responded conclusively to the needs of the people. This can be seen by lack of recognition of the element of disclosure of facts when entering into prenuptial agreements. There is also lack of a standard formula for calculation of assets during the dissolution of a marriage despite entering into prenuptial agreements.

South Africa has recognized the element of disclosure of facts hence one can disclose the net value of the estate this makes it easier during dissolution of the marriage in case depending on the marriage system that was chosen.⁸² South Africa has a standard formula for calculating assets that will be accorded to someone this brings more transparency to the people.⁸³ From the analysis, Kenya is still lagging behind with regards to prenuptial agreements.

4.4 Significance of standard formula for calculation of assets and incorporation of the element of disclosure of facts

When there is a standard formula for calculation of assets, both parties can easily discern what belongs to each of them during the dissolution of a marriage. The family is the basic unit of the society, and the sanctity of marriage should be protected even at the dissolution of the marriage. This is to take into consideration the parties involved and most importantly the minors. This eliminates conflicts that may arise and enhances fairness to both parties.

The element of disclosure of facts brings about transparency because both parties state what they own and their liabilities. This helps in fair distribution of assets during the dissolution of the marriage. Both of them go concurrently in that when assets are disclosed, then it is possible to calculate what belongs to each party by using the standard formula. This is analysed from the South African jurisdiction that provides for marriage out of community of property system.⁸⁴ In the end they enhance fairness and reduce conflicts.

4.5 Need for amendment of the Matrimonial Property Act 2013

⁸² Section 6 (4) (b), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁸³ Jassiem M, 'Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes' Unpublished LLM, University of the Western Cape, Cape Town, 2010, 40,41.

⁸⁴ Section 2, *Matrimonial Property Act* (Act 88 of 1984), South Africa.

There is the need to amend the provision of prenuptial agreements in the Matrimonial Property Act. Section 6 (3) of the Matrimonial Property Act does not incorporate the element of disclosure of facts and does not provide for a standard formula for the distribution of assets.⁸⁵ Despite prenuptial agreements being voluntary, the ones who opt for the system should be well catered for by the law.

The South African Matrimonial Property Act⁸⁶ is detailed in its nature because it has looked deeper into many circumstances for example any discrepancy that may exist in the value of money at the commencement and dissolution of the marriage.⁸⁷ This is well tied to the element of financial disclosure that was discussed earlier. It has addressed the need for disclosure of assets.⁸⁸ It also has a standard formula for calculation of assets.⁸⁹ As a country there is need to emulate such a legislation because of its enlightening nature towards prenuptial agreement. It will help in reducing the conflicts that arise during the dissolution of marriage. By incorporating the different components that have been discussed above, Kenya will transition in the sphere of prenuptial agreements.

4.6 Conclusion

In conclusion, South African jurisdiction is very transformative as it has been discussed above. It has incorporated a standard formula for calculation of accrual in the estates and the element of disclosure of facts. Kenya as a country has a long way in the field of prenuptial agreements. The problem starts with the law. By amending the law, that is the incorporation of the element of disclosure of facts and having a standard formula for calculation of assets it will help in the distribution of matrimonial property. Kenya can emulate South Africa. It will enhance transparency even in the whole process and enhance fairness.

⁸⁵ Section 6 (3), *Matrimonial Property Act* (Act No 49 of 2013).

⁸⁶ *Matrimonial Property Act* (Act 88 of 1984).

⁸⁷ Section 4 (1) (b) (iii), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁸⁸ Section 6 (4) (b), *Matrimonial Property Act* (Act 88 of 1984), South Africa.

⁸⁹ Jassiem M, 'Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes' Unpublished LLM, University of the Western Cape, Cape Town, 2010, 40,41.

Chapter Five: Recommendations and Conclusion

5.1 Introduction

This paper sought to advocate for the need to incorporate the element of disclosure of facts when entering into prenuptial agreements. It also sought to advocate for the need of having a standard formula for distribution of assets in case of dissolution of a marriage. This was discussed in Chapter one which addressed the various gaps that are occasioned in this sphere of law making it hard to divide matrimonial property despite entering into prenuptial agreements. This was observed by the fact that there is lack of clear law that governs the distribution of property upon dissolution of the marriage.

A problem that was identified was that despite the law recognizing prenuptial agreements it is still ambiguous because it does not envision the division of matrimonial property afterwards. It points out the aspect of contribution⁹⁰, but it is not sufficient because there are many parties that still contest on those grounds. One cause of the ambiguity stems up from the law not recognizing the element of disclosure of facts. This makes it a great challenge in distribution of matrimonial property after parties realizing that some assets were not disclosed when entering into the prenuptial agreements. This was observed in chapter two when it addressed the challenges faced as a result of not taking into consideration the element of disclosure of facts.

From this we notice that this is an important element that has not been recognized which can aid in the distribution of matrimonial property after entering into prenuptial agreements. This points out the problem about having lack of clear law that governs the distribution of matrimonial property. There is the need to have the Matrimonial Property Act amended to incorporate the element of disclosure of facts.

Chapter three highlighted the other cause of the ambiguity which stems up from the law not having a standard formula for calculation of assets. This makes it a great challenge in distribution of matrimonial property and even when the courts intervene and determine what belong to each party, there are claims of unfairness. This therefore points out to the need for having a standard formula for the calculation of assets that belong to each party. This brings about transparency, so each party understands how assets were distributed. This has not been

⁹⁰ Section 7, *Matrimonial Property Act* (Act No 49 of 2013).

pointed in the Matrimonial Property Act hence there is the need for the Act to be amended to incorporate a standard formula for calculation of assets.

Chapter four looked at the jurisdiction of South Africa. This jurisdiction has incorporated prenuptial agreements in its system. There was analysis of the system. This jurisdiction has really advanced in its system. This makes it easier to distribute matrimonial property after entering into prenuptial agreements. It contains a standard formula to use when calculating the assets that belong to one in case of dissolution of the marriage. It has a provision for declaration of assets as well which brings about the element of disclosure of facts. The chapter advocates for the need to borrow ideas from this jurisdiction and enforce them in our own country.

Chapter five will make a conclusion as to the findings of the whole research and give recommendations.

5.2 Findings

The recognition of prenuptial agreements is a positive step in the Kenyan jurisdiction. Despite this, it is still insufficient because it leaves gaps both to the courts and the citizens at large in the quest for distribution of matrimonial property. The law is too shallow hence it is open to manipulation hence the need for amendment of the Matrimonial Property Act on prenuptial agreements as proposed.

5.3 Recommendations

The following recommendations have been proposed:

- i. Implementing the element of disclosure when entering into prenuptial agreements

There is the need to amend the Matrimonial Property Act when addressing prenuptial agreements. There is the need for implementation of the element of disclosure of facts as it is seen in South Africa. This should include both material and financial disclosure. When this element is implemented, then both parties will have to declare the assets. This helps in the distribution of matrimonial property upon dissolution of marriage. It brings about transparency of the whole process.

- ii. Having a standard formula for calculation of assets

There is need to amend the Matrimonial Property Act 2013 to include a standard formula for calculation of assets upon dissolution of a marriage. This can be borrowed from the jurisdiction of South Africa as it was discussed earlier. This can be achieved by declaring assets by the

parties then the courts can calculate what belongs to each party using the standard formula. This brings about the aspect of fairness. This is because each party can ascertain how they each get what is due to them. It also brings about transparency.

iii. Implementing a method for registration of prenuptial agreements

Despite prenuptial agreements being discretionary, there should be a proper system that should be implemented to govern the agreements. South Africa has implemented a system for the registration of prenuptial agreements.⁹¹ The registration of the agreements brings about a binding effect to the parties hence enforcement of the agreements is easier taking into consideration the laws put in place.

5.4 Conclusion

In conclusion, the law has recognized prenuptial agreements but still has not envisioned an amicable way of distributing matrimonial property after the dissolution of marriage despite entering into this agreement. It is not elaborative enough to the citizens. There is need to have amend the law on prenuptial agreements to make it easier to distribute matrimonial property.

⁹¹ Section 86, *Deeds Registries Act* (Act 47 of 1937), South Africa

Bibliography

Kenyan legislation

Constitution of Kenya (2010).

Matrimonial Property Act (2013).

Married Women's Property Act (1882).

Contempt of Court Act (2016).

Journal articles

Nzomo M, 'The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities' 22 *A Journal of Opinion* 2, 1994.

Marston A, 'Planning for Love: The Politics of Prenuptial Agreements' 49 *Stanford Law Review* 4, 1994.

Miles J, 'Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money' 74 *The Modern Law Review* 3, 2011.

Sanders A, 'Private autonomy and marital property agreements' 59 *Cambridge University Press* 3, 2010.

Anuar K, 'Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate' 1 *Oxford University Undergraduate Law Journal* 6, 2017.

Ghosh A and Kar P, 'Prenuptial Agreements in India: An Analysis of Law and Society' 12 *NUJS Law Review* 3, 2019.

Qaisi G, 'A Student Note: Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts' 15 *Journal of law and religion* ½, 2000-2001.

Servidea K, 'Reviewing Premarital Agreements to Protect the State's Interest in Marriage' 91 *Virginia Law Review* 2, 2005.

Greenberg-Kobrin M, 'Civil Enforceability of Religious Prenuptial Agreements' 32 *Columbia Journal of Law and Social Problems* 4, 1999.

Ifemeje SC, 'A case for global enforceable prenuptial agreements' *Africa Journals Online*, 2010, <<https://www.ajol.info/index.php/naujilj/article/view/138187>>

Bell A, Parchomovsky G, 'A Theory of Property' 90 *Cornell Law Review* 1, 2005.

Robinson J, 'Matrimonial property regimes and damages: the far reaches of the South African constitution' 10 African Journals Online 3, 2007, 74.

Dissertations and theses

Mwaura L, 'A Contractual Marriage: What is the place of prenuptial agreements in Kenya?' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2017.

T ma, 'Asset Protection Through the Use of Premarital Agreements' Unpublished Thesis, Claremont McKenna College, California 2012.

Ndikwe A, 'The Use of Marital Property Agreements for the Division of Matrimonial Property upon divorce in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2017.

Biemiller C, 'The uncertain enforceability of prenuptial agreements: why the "extreme" approach in Pennsylvania is the right approach for review' Published, Drexel University, Pennsylvania, 2014.

Jassiem M, 'Critical Overview Of The Application Of The Default System In South Africa's Matrimonial Property Regimes' Unpublished LLM, University of the Western Cape, Cape Town, 2010.

Efe C, 'Rethinking The Property Rights Of Spouses On Civil Marriage Breakdown In Nigeria: Inspiration From Other Countries' Unpublished LLD Thesis, University of Pretoria, South Africa, 2017.

Welsh S, 'The Law Giveth And The Law Taketh Away: Marriages Out Of Community Of Property Excluding Accrual Post 1984/88' Unpublished LLM Thesis, University of South Africa, Pretoria, 2000.

Self -published articles

Hammons P, 'Rethinking Women and Property in Sixteenth and Seventeenth Century England' Blackwell Publishing, 2006.

Reports

The Law Commission, 'Matrimonial Property, Needs and Agreements,' 26th February 2014.

Human Rights Watch, "*Once you get everything you lose everything*" *Women and matrimonial property rights in Kenya*, 25th June 2020.

Internet sources

<<http://kenyalaw.org/kenyalawblog/elements-of-progressive-jurisprudence-in-kenya-a-reflection/>> on 8th October 2020

Stritof Sheri, 'The History of Prenuptial Agreements' The Spruce, 13th January 2020- <<https://www.thespruce.com/history-of-prenuptial-agreements>> on 9th October 2020.

Zarrokh E, 'Practical Concepts In Contract Law', 14th August 2008, <https://mpa.ub.uni-muenchen.de/10077/> on 15th May 2021.

Ochieng J.D, '*The Legal Framework Governing Division Of Matrimonial Property In Kenya*' https://www.academia.edu/11935870/THE_LEGAL_FRAMEWORK_GOVERNING_DIVISION_OF_MATRIMONIAL_PROPERTY_IN_KENYA on 15th May 2021.

Miller C, 'What is financial disclosure?' 6th September 2019 -<https://kmjsolicitors.com/what-is-financial-disclosure/> on 28th May 2021.

Skok S, 'How Can I Ensure My Prenuptial Agreement Is Enforceable In Maryland?' Lawyer Monthly, 30th April, 2020 <https://www.lawyer-monthly.com/2020/04/how-can-i-ensure-my-prenuptial-agreement-is-enforceable-in-maryland/> on 2nd June 2021.

<https://www.vandeventers.law/Services/Marriage-and-Matrimonial-Property/Antenuptial-Contracts/Antenuptial-Contracts-with-Accrual> on 15th June 2021.