

**Spousal Claims to Matrimonial Property held in Trusts and Companies:
A Kenyan Perspective**

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Declaration

I, ALEXANDER AYOO OTUKA, 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: 
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This dissertation has been submitted for examination with my approval as University Supervisor.

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Abstract

This study investigates the hiding of matrimonial property by dishonest spouses in trusts or companies to frustrate the rights of the other spouse to the same property. The frustration of such rights usually takes place during divorce proceedings. The objective of the study is to highlight the importance of the issue, and offer a critique of the Kenyan legal system's ability to resolve it. Where Kenya cannot effectively deal with the problem, recommendations will be made on how the legal system could be improved to do so. The study is conducted mainly through a comparative study of legislation and case law from South Africa and England, since there is a lack of local jurisprudence and information on the issue. The major findings were that Kenya's legal system in fact heightened the dangers sought to be avoided. However, the arguments raised in South Africa and England show that Kenyan courts still have adequate powers to resolve the problem, notwithstanding legislation drafted without prior consideration of the issues highlighted in the study. It is recommended that certain provisions of the Matrimonial Property Act be amended by providing for specific powers of the court in the distribution of matrimonial property, and that the powers grant wide discretion in this exercise.

List of Abbreviations

A	Appeal
AC	Law Reports, Appeal Cases (UK)
All ER	All England Law Reports
C	Civil
Ch	Law Reports, Chancery Division (UK)
EALR	East Africa Law Reports
eKLR	Electronic Kenya Law Reports
EWHC	England and Wales High Court
FLR	Family Law Reports (UK)
GH Trust	Groothoek Trust
HC	High Court
JJ Trust	Johannes Jordaan Trust
KLR	Kenya Law Reports
LLR	LawAfrica Law Reports
LN	Legal Notice
LR P&D	Law Reports, Probate and Divorce Cases (UK)
MWPA	Married Women's Property Act
No.	Number
PRL	Petrodel Resources Limited
SA	South Africa Law Reports
SASCA	South Africa Supreme Court of Appeal
SCA	Supreme Court of Appeal
UKSC	Supreme Court of the United Kingdom
ZASCA	South Africa Supreme Court of Appeal
1968 Commission	1968 Commission on the Law of Marriage and Divorce

List of Cases

Kenya

Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes [2011] Civil Appeal No 127.

China Wu Yi Company Ltd v Edermann Property Ltd & 2 Others (2013) eKLR.

Essa v Essa [1995] LLR 384.

Fatuma binti Athuma v. Ali Baka [1918] 7 EALR 171.

Kivuitu v Kivuitu [1991] KLR 248.

Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another (2014) eKLR.

RPM v PKM [2015] eKLR.

UMM v IMM [2014] eKLR.

WMM v BML [2012] eKLR.

United Kingdom

Adams v Cape Industries plc [1990] Ch 433.

Ben Hashem v Al Shayif [2009] 1 FLR 115.

Gissing v Gissing [1970] All ER 780.

Hyde v Hyde [1866] LR 1 P&D 130.

I v I [2008] EWHC 1167 (Fam).

Pettit v Pettit [1969] All ER 2.

Prest v Petrodel Resources Limited and Others [2013] UKSC 34.

Salomon v A Salomon and Co Ltd [1897] AC 22.

South Africa

Badenhorst v Badenhorst [2006] 2 All SA 363 (SCA).

Commissioner for Inland Revenue v MacNeillie's Estate [1961] (3) SA 833 (A).

Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust [1992] (4) SA 39 (A) 59F.

Jordaan v Jordaan and 3 Others [2012] HC.

Jordaan v Jordaan [2001] (3) SA 288 (C).

Land and Agricultural Bank of South Africa v. Parker [2005] (2) SA 77 (SCA).

WT & others v KT [2015] ZASCA 9.

List of Statutes

Kenya

African Christian Marriage and Divorce Act (Act No. 51 of 1931), *Repealed*.

Companies Act (Act No. 17 of 2015).

Constitution of Kenya 2010.

Hindu Marriage and Divorce Act (LN 142/1963, LN 2/1964), *Repealed*.

Hindu (Marriage, Divorce and Succession) Ordinance (No. 43 of. 1946), *Repealed*.

Judicature Act (Act No. 16 of 1967).

Land Registration Act (Act No 3 of 2012).

Marriage Act (Act No. 4 of 2014).

Marriage Act (Act No. 30 of 1902), *Repealed*.

Marriage Ordinance of 1902, *Repealed*.

Matrimonial Causes Act (Act No. 33 of 1939), *Repealed*.

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

Mohammedan Marriage and Divorce Registration Act (Act No. 13 of 1906), *Repealed*.

Mohammedan Marriage, Divorce and Succession Act (Act No. 34 of 1920), *Repealed*.

Native Christian Marriage Ordinance (No. 9 of 1904), *Repealed*.

Native Courts Regulations 1897 (No. 15 of 1897), *Repealed*.

Subordinate Courts (Separation and Maintenance) Act (Act No. 34 of 1928), *Repealed*.

United Kingdom

England and Wales

Matrimonial Causes Act 1973 Chapter 18.

Married Women's Property Act of 1882.

Scotland

Family Law Act 1985, Chapter 37.

South Africa

Matrimonial Property Act of 1984.

CHAPTER ONE:

Introduction to the Study

1.1. Background to the Problem

Marriage laws in Kenya span farther back than the country's independence in 1963, beginning with the Marriage Ordinance of 1902.¹ Matrimonial property was governed by the Married Women Property Act 1882 of England which was received into Kenyan law on 1st August 1897 as a statute of general application.² The statute was repealed only recently by the Matrimonial Property Act³ of 2013, which aims to "provide for the rights and responsibilities of spouses in relation to matrimonial property".⁴

At first glance, matrimonial property and trust property appear to be vastly differing legal regimes of law. The Matrimonial Property Act⁵ itself states that "trust property, including property held in trust under customary law, does not form part of matrimonial property".⁶ However, where property rights are concerned, they become linked where each regime gives different parties claim to the same property. The law of trusts began to take effect in Kenya on the 18th of August 1897,⁷ when the common law system was received as part of the laws of Kenya.

There is a growing trend in South African courts where courts are increasingly "going behind the trust form"⁸ to determine whether assets within them form part of matrimonial property. If the answer is positive, the court will ignore the entire trust,⁹ and proceed to redistribute the property in the trust between the spouses.¹⁰

Trusts are not the only entities to be affected. In England and Wales (hereinafter "England"), companies have also been under siege.¹¹ Where it is suspected that matrimonial property is hidden in a company, the court may 'pierce the veil' of incorporation, or at minimum look behind the veil.¹² In the former, the court disregards the separation of owner

¹ *Marriage Ordinance* of 1902.

² *I v I* [2008] EWHC 1167 (Fam).

³ (No. 49 of 2013)

⁴ Preamble to the Matrimonial Property Act (No. 49 of 2013).

⁵ (No. 49 of 2013).

⁶ Section 6(2), *Matrimonial Property Act* (No. 49 of 2013).

⁷ *Judicature Act* (No. 16 of 1967).

⁸ De Wael MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 76(4) *The Rabel Journal of Comparative and International Private Law* (2012), 2.

⁹ De Wael MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 2.

¹⁰ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA), para13.

¹¹ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34.

¹² *Prest v Petrodel Resources Limited and others* [2013] UKSC 34 para, 28.

or controller of the entity treating them as jointly liable, while in the latter the court only peels back the cover to reveal the true owner or controller of the entity.¹³

These radical actions by South African and English courts are in response to dishonest spouses who seek to use the legal principles of trust or company law to defeat or frustrate the enforcement of their former spouses matrimonial property rights.¹⁴ It may at first appear that the holding of property within a trust or company is legitimate, for example in a trust for tax and other economic advantages, but later becomes malicious when the marriage turns sour.¹⁵ This study argues that despite the lack of local jurisprudence on the issue, the principles used by South African and English courts may be applied under Kenyan law in the interests of justice.

The study will begin by outlining the legal framework of matrimonial property in Kenya, before examining cases of dishonest spouses who attempt to hide property in trusts and companies. The circumstances of the claims are limited to the end of a marriage through divorce. Divorce is important to the study since in all the cases studied, it is the main reason for dishonest spouses to hide matrimonial property.¹⁶ Whether the spouses were married in community of property or separate property, under a prenuptial agreement, both permitted under the Matrimonial Property Act¹⁷ is also investigated.

The principled approach to the problem taken by South African and English courts will then be outlined, while reviewing the circumstances in which the courts may go behind or pierce the veils of trusts and companies respectively. The study will then conclude with recommendations on how to best apply the principles to existing circumstances in Kenya.

As there is little available information on the subject, the research methodology will involve a comparative study of case law and legislation on matrimonial property law from South Africa and England. The selected jurisdictions are South Africa, which has dealt with the issue in question in relation to trusts, and the England, which has dealt with companies.

The theoretical framework relied on in this study is that of "justice as fairness" as framed by John Rawls and Aristotle. The concept of justice is often a key consideration of courts in determining the need to investigate entities where matrimonial property is alleged to be hidden.

¹³ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34 para, 28.

¹⁴ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 28.

¹⁵ *WT & others v KT* (933/2013) [2015] ZASCA 9.

¹⁶ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34; *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA); *Jordaan v Jordaan and 3 Others* [2012] HC; *Ben Hashem v Al Shayif* [2009] 1 FLR 115.

¹⁷ Section 6(3), *Matrimonial Property Act* (No. 49 of 2013).

1.2. Problem Statement

In a trust, there is a separation between legal ownership by the trustee and the beneficial ownership by the beneficiary.¹⁸ In companies, there exists a separate legal personality from the person. Section 2 of the Companies Act¹⁹ of Kenya provides that natural persons may incorporate as entities with perpetual succession. This entity is considered separate and distinct from the persons constituting it.²⁰ Thus, where one spouse hides matrimonial property in a trust as a trustee, or in a company, any claim to the property made by their former spouse is frustrated.

This is because the spouse hiding the property can raise the defence that they have no individual right to distribute the property should a court make an order against them personally for redistribution of the property. In many cases however, the dishonest spouse has some form of *de facto* control of the trust or company that allows them to control the hidden matrimonial property as if they had the individual rights to do so.²¹ The dishonest spouse therefore uses the separation of beneficial ownership in a trust, and the separate legal entity concept of a company, merely as a front to frustrate or defeat their former spouse's rights to the property.

Yet, South African and English courts have found ways to go behind the trust form or pierce the veils of companies, respectively, to mete out justice between the parties.²² In a trust, going behind the trust form effectively ignores the existence of a valid trust to distribute the property held in it.²³ For companies, piercing the veil ignores the separation of the legal personalities of the company and the dishonest spouse.²⁴ Where it is found that the dishonest spouse is indeed in control of the matrimonial property subject to distribution, the courts may go behind the trust or pierce the corporate veil to grant relief to the innocent spouse.

¹⁸ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 11.

¹⁹ (Act No. 17 of 2015).

²⁰ *Salomon v Salomon & Co Ltd* [1897] AC 22.

²¹ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA), para 9.

²² See, *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 13, and *Prest v Petrodel Resources Limited and others* [2013] UKSC para 34; respectively.

²³ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 2.

²⁴ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 34.

Despite the growing jurisprudence in South Africa and England, Kenyan courts and lawmakers are yet to recognise and apply the principled approaches used in other jurisdictions to resolve such issues.

1.3. Research Questions and Objectives

1. What are the laws governing matrimonial property in Kenya?
2. How do dishonest spouses hide matrimonial property in trusts or companies?
3. Can a spouse make a claim to matrimonial property held in trusts and companies, and under what circumstances can a court go behind the trust or pierce the corporate veil to give redress?
4. What conclusions findings and recommendations can be made from the principles applied in South Africa and England? How can they be applied to the Kenyan context?

1.4. Theoretical Framework

The guiding theoretical framework is based on the theory of “justice as fairness” as proposed by John Rawls. The same theory is also proposed by Aristotle. Justice is a key concept forming the core of the study. Each time a court determines whether a spouse has a claim to property, there always arises a question of what is just as between married partners, even where prenuptial agreements are present. John Rawls’ conception of justice revolves around the idea of what is “fair”. Fairness is taken to be foundational, and a precursor to forming the principles of justice.²⁵

Aristotle proposed the same notion of justice in his work *Nicomachean Ethics* (Book IV). He divided the idea of justice into two, one of them being justice as being “fair and equal”.²⁶ Aristotle held that justice is a virtue in all persons who must possess a sense of fairness in making good judgement – a virtue of importance to those who rule and judge.²⁷ Further, fairness encompassed an idea of equality, to give a specific example, equality before the law despite any difference between two persons.

These two ideas are observable in court jurisprudence relating to matters of matrimonial property. The case of *Kivuitu v Kivuitu*²⁸ held that non-financial contribution to property gave rise to rights towards such property. This of course conforms to Rawls idea of fairness with regards to the “uneconomic” household labour often put in by wives.²⁹ The

²⁵ Sen A, *The Idea of Justice*, Penguin Books Ltd, London, 2010, 55.

²⁶ Solomon R and Murphy M, *What is Justice*, Oxford University Press, 1990, 38.

²⁷ Solomon and Murphy, *What is Justice*, 39.

²⁸ [1991] KLR 248.

²⁹ *Kivuitu v Kivuitu* [1991] KLR 248.

case of *WMM v BML*³⁰ conformed more closely to Aristotle's idea of justice. It noted that: "the rights enshrined in...Article [45(3) of the Constitution] connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms".³¹ This proposes the idea that under Kenya's matrimonial laws, spouses have equal rights to property acquired in marriage. Such equality serves the aim of fairness as a basis for justice between spouses.

1.5. Literature Review

1.5.1. Defining Matrimonial Property

Matrimonial property in Kenya is defined as:³²

- (a) *the matrimonial home or homes;*
- (b) *household goods and effects in the matrimonial home or homes; or*
- (c) *any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.*

This sets out a community of property regime, wherein the spouses share all property accruing from the beginning of the marriage to its possible end through divorce. A separate property regime is also provided for where the parties agree to it. Section 6(3) states that the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.³³

The Act further provides that: "trust property, including property held in trust under customary law, does not form part of matrimonial property".³⁴ As will later be argued, this provision may be detrimental to the innocent spouse from whom the matrimonial property is hidden. It only reinforces the arguments made by a dishonest spouse: that the property hidden in the trust cannot be considered when distributing matrimonial property. Moreover, the aspect of trust property "held under customary law"³⁵ brings to mind the discrimination and disenfranchisement of women through customary law practices.³⁶ These practices often

³⁰ [2012] eKLR.

³¹ *WMM v BML* [2012] eKLR.

³² Section 6(1), *Matrimonial Property Act* (Act No. 49 of 2013).

³³ Section 6(3), *Matrimonial Property Act* (Act No. 49 of 2013).

³⁴ Section 6(2), *Matrimonial Property Act* (Act No. 49 of 2013).

³⁵ Section 6(2), *Matrimonial Property Act* (Act No. 49 of 2013).

³⁶ Kimani EN & Maina LW, 'Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement' 19 *Journal of Ethnic & Cultural Diversity in Social Work* (2010), 259.

dictated that, to a large extent, only men could hold, access and control property.³⁷ As will be highlighted in this study, each case brought before the South African and English courts involved husbands hiding matrimonial property from women. A provision protecting customary practices may result in the continuance of customary discrimination with the support of modern matrimonial laws.

In South Africa, the Matrimonial Property Act of 1984³⁸ also prescribes two regimes for matrimonial property: (i) marriage in community of property and, (ii) out of community of property, i.e. separate property. Marriage out of community of property can in some circumstances be subject to South Africa's unique accrual system.³⁹ In the accrual system, although property is separate, the spouses are entitled to an equal share of the accrual or growth of their estates during the subsistence of the marriage.⁴⁰ At the end of a marriage, a spouse experiencing no growth or lesser growth has a claim to an equal share of the growth experienced by the other spouse.⁴¹ The application of the accrual system is dependent on any prenuptial agreements between the spouses.⁴² However, other than outlining the two different regimes, the South African Matrimonial Property Act of 1984 does not expressly define matrimonial property. Matrimonial property can thus be deduced to be any property held by the spouses under the community of property regime, or any accruing assets where the marriage is under the separate property regime but subject to accrual. A spouse will only be able to make a claim where property from any of these two situations is hidden in a trust or company.

Our focus in the United Kingdom will be England and Wales ("England") which are governed by the Matrimonial Causes Act.⁴³ Scotland in contrast has its own Family Law Act.⁴⁴ The Matrimonial Causes Act⁴⁵ also does not expressly define matrimonial property. Instead, it gives the court wide discretion to make any order it finds appropriate relating to

³⁷ Kimani EN & Maina LW, 'Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement', 258.

³⁸ *Matrimonial Property Act* of 1984.

³⁹ Section 2, *Matrimonial Property Act* of 1984.

⁴⁰ 'Clement Marumoagae: The beginning of the end – dissolution of marriage under accrual system' *De Rebus*, 29 June 2015 <http://www.derebus.org.za/the-beginning-of-the-end-dissolution-of-marriage-under-accrual-system/> on 7 February 2017.

⁴¹ Section 3, *Matrimonial Property Act* of 1984.

⁴² Section 2, *Matrimonial Property Act* of 1984.

⁴³ 1973, Chapter 18.

⁴⁴ 1985, Chapter 37.

⁴⁵ 1973, Chapter 18.

property of spouses in a marriage.⁴⁶ Section 24(1) provides that a court may make “order that a party to the marriage shall transfer to the other party...such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion”.⁴⁷ This effectively means that a court may distribute property to which dishonest spouse is entitled, to the innocent spouse whom they sought to disenfranchise. Furthermore, Section 25 provides that “it shall be the duty of the court in deciding whether to exercise its powers under section...24...to have regard to all the circumstances of the case”.⁴⁸ These circumstances include the “income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future”.⁴⁹

These wide powers which may be exercised by the English courts thus provide an adequate safety measure for the actions of dishonest spouses. Unlike Kenya’s Matrimonial Property Act, it widens the powers of the court with regard to matrimonial property as opposed to creating more barriers to property in held in trusts or companies. It will later be demonstrated that the wide discretion of the courts is key to resolving the issue of dishonest spouses hiding matrimonial property.

1.5.2. *Background to Trust Law*

A trust is defined as a relationship under equity in which a settlor, who creates the trust, vests his or her property in a person or persons known as a trustee(s).⁵⁰ The trustees are charged by the settlor with a legal duty to hold the property for the benefit of a third person or persons known as beneficiaries.⁵¹ The effect of a trust is that the trustee becomes the legal owner of a property.⁵² The trustee holds the legal title of the property in the eyes of the law, and has the right to use and dispose of the property as anyone with absolute ownership of the property could do.⁵³ However, because of the charge placed on the settlor on the trustee, the beneficiary is the only one allowed to benefit from the property, and holds this benefit in equity.⁵⁴ The separation between legal ownership, or control, of the property

⁴⁶ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, 3.

⁴⁷ Section 24(1)(a), *Matrimonial Causes Act 1973*, Chapter 18.

⁴⁸ Section 25(1), *Matrimonial Causes Act 1973*, Chapter 18.

⁴⁹ Section 25(2)(a), *Matrimonial Causes Act 1973*, Chapter 18.

⁵⁰ Bakibinga D, *Equity and Trusts*, Law Africa Publishing (K) Ltd, Nairobi, 2011, 176.

⁵¹ Bakibinga, *Equity and Trusts*, 176.

⁵² Warner-Reed E, *Equity and Trusts*, Pearson Education Limited, London, 2011, 15

⁵³ Warner-Reed, *Equity and Trusts*, 15.

⁵⁴ Warner-Reed, *Equity and Trusts*, 15.

– of the trustee – and beneficial ownership or enjoyment – by the beneficiary – is what creates a trust.⁵⁵

This study will focus on instances of abuses of the trust form, which enables spouses to hide matrimonial property. An abuse arises when a trustee attempts to have both control and enjoyment of the trust property.⁵⁶ In carrying this out, a trustee may give no regard to the existence of the trust and treat trust property as his or her own.⁵⁷ Essentially, but for the trust form, the property would be vested in the trustee.⁵⁸ Thus, where matrimonial property is hidden in a trust, the dishonest spouse as trustee controls access and other rights to the property for his or her own benefit. This benefit is not for any purpose of the trust, and specifically to the detriment of the former spouse's rights.

1.5.3. *Background to Company Law*

At law, companies are separate legal entities from the persons that incorporate them.⁵⁹ This was the general rule set out in the case *Salomon v A Salomon and Co Ltd*.⁶⁰ The case involved the liquidation of the company A Salomon and Co Ltd, which was incorporated by a Mr. Salomon. Mr. Salomon who also sold his sole proprietorship to the company⁶¹. The liquidator brought suit on behalf of the company to cancel pay outs for debentures held by Mr Salomon claiming Mr Salomon used the company as his agent to carry out business without risk on his part⁶². The House of Lords stated that no action claiming Mr Salomon and the company were one and the same could be brought. The House of Lords stated that "if the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain co-operators, but a distinct and independent corporation".⁶³

This separation between the company and those who incorporate it became one of the central points of hidden matrimonial property in the case of *Prest v Petrodel Resources Limited and Others*.⁶⁴ In this case before the Supreme Court of the United Kingdom (UKSC), the former husband had hidden a matrimonial home behind the company Petrodel Resources

⁵⁵ Warner-Reed, *Equity and Trusts*, 15.

⁵⁶ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 14.

⁵⁷ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 14.

⁵⁸ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 14.

⁵⁹ *Salomon v A Salomon and Co Ltd* [1897] AC 22, p 27.

⁶⁰ [1897] AC 22.

⁶¹ *Salomon v A Salomon and Co Ltd* [1897] AC 22, p 23.

⁶² *Salomon v A Salomon and Co Ltd* [1897] AC 22, p 26.

⁶³ *Salomon v A Salomon and Co Ltd* [1897] AC 22, p 27.

⁶⁴ [2013] UKSC 34.

Limited which he controlled. The intended effect was that where an action was brought against him, much like Mr. Salomon, he could claim that he was wholly separate from the company and had individual power to transfer all or part the value of the property to his former wife.

This separation between owner or controller of the company, and the company itself is also present under Kenyan company law. The Companies Act⁶⁵ provides that one or more natural persons may "incorporate as entities with perpetual succession",⁶⁶ so long as the entity is formed and registered under the Companies Act.⁶⁷

1.6. Hypothesis

It is hypothesised that based on the interests of justice, spouses have a claim to matrimonial property held in companies and trusts under Kenyan law; notwithstanding the rigidity in legislation, or lack of court jurisprudence in Kenya as compared to South Africa and England.

1.7. Justification of Research

The core of the Matrimonial Property Act⁶⁸ lies in Section 6 which provides exactly what constitutes matrimonial property in Kenya. It is noted however, that section 6(2) hastily brushes aside trust property as being entirely separate from matrimonial property. Considering the issues highlighted regarding matrimonial property hidden in trusts in other jurisdictions, and the possibility of such occurrences in Kenya, it appears that such a provision leaves room for an avoidable mischief. A strict application of Kenyan law could allow a dishonest spouse to hide matrimonial property within a trust, and the innocent spouse would have no claim considering Section 6(2).⁶⁹

Although no other jurisdiction makes specific provision for companies, their courts are granted wide powers that allow them to make orders with respect to matrimonial property hidden in companies. The legislative gap in Kenya in this respect is however understandable, given the low occurrence of such mischief in Kenya. Considering this, there exists a need for a comparative study on the occurrences of this mischief in South Africa and England and the principles applied by South African and English courts to curb it. The aim of this study

⁶⁵ (Act No. 17 of 2015).

⁶⁶ Section 2, *Companies Act* (No. 49 of 2013).

⁶⁷ Section 3, *Companies Act* (No. 49 of 2013).

⁶⁸ (No. 49 of 2013).

⁶⁹ *Matrimonial Property Act* (No. 49 of 2013).

is to form a practical guide based on the legislations and jurisprudence in South Africa and England, in the hopes that it may be applied to gaps in Kenya's legal framework.

1.8. Research Scope and Study Limits

In considering the circumstances in which spouses have rights towards property held in companies and trusts, the study considers the types of marriage under Kenyan law. These are set out under Section 6(1) of the Marriage Act.⁷⁰ The circumstances of the claims are limited to the end of a marriage through divorce. Moreover, the matrimonial property system prevailing in the marriage is also considered. That is, whether the spouses were married in community of property, or separate property through a prenuptial agreement; both of which are permitted under the Marriage Act.⁷¹

Trusts and companies are studied due to the high occurrence of their use to hide matrimonial property. Trusts allow a dishonest spouse to separate their legal ownership of the property and their beneficial ownership such that they maintain control as trustees, but no claims may be made against property owned as the beneficial owner. Companies on the other hand create a separate legal entity that dishonest spouses rely on to claim that they have no form of ownership or control over the matrimonial property. However, they often control the company itself through management to reap personal benefits from the property owned by the company.

1.9. Research Methodology

The study was conducted mainly through a comparative study of legislation and case law from South Africa and England. This is a preferable method as there is little available local information on the subject, most especially in terms of judicial decisions. The jurisdictions of interest are South Africa, and England and Wales in the United Kingdom. These jurisdictions were selected as the questions raised in the study have arisen and been examined by their courts.

Primary sources of information for the study included the Constitution of Kenya and local statutes relating to matrimonial property. Statutes relating to matrimonial property in Kenya, and the chosen jurisdictions for the comparative study, further were primary sources of information. The required legislation was accessed online through government websites where they are readily available. These set out the legal position in Kenya as well as other jurisdictions relevant to the study. Secondary sources included books, journal articles and

⁷⁰ (No. 4 of 2014).

⁷¹ Section 6(3), *Matrimonial Property Act* (No. 49 of 2013).

local case law together with case law drawn from South Africa and England for comparison. Journals were accessed online through online journal websites such as JSTOR and Oxford Journals, while case law was readily found online on government websites. The required books were obtained from local libraries in Kenya.

The study was conducted mainly through desk research as a majority of the required information was easily available online. The study involved a qualitative analysis of the cases, legislation and prior analyses made in journal articles. First, the Kenyan legislative framework is analysed to understand the local approach to property in marriage. Second, a description of how partners use trusts and companies to hide property is given. Finally, an analysis is made on how the South African and English jurisdictions have resolve claims to matrimonial property hidden in trusts and companies. The analysis is carried out by reviewing legislation and courts cases in the two jurisdictions, and making a comparative analysis with Kenya's legislation and any similar cases. Journal articles that have commented and analyse the legal positions in South Africa and England with also be used in the comparative analysis of the jurisdictions in relation to Kenya. This final analysis then aids in making conclusions, findings and recommendations that may be applied in Kenya to address local legislative gaps on the issue.

1.10. Chapter Breakdown

a) Chapter One – Introduction to the Study

The first chapter will provide the foundation of the study and shall include the background the problem, the problem statement and research questions, the theoretical framework, literature review, hypothesis, the scope and limits of the study, as well as the research methodology.

b) Chapter Two – Legal Framework of Matrimonial Property in Kenya

The second chapter examines the current legal framework for matrimonial property in Kenya. In line with this, the historical development of this area of law is also discussed.

c) Chapter Three – Hiding of Matrimonial Property in Trusts and Companies

This chapter considers cases in which dishonest spouses have hide property in companies and trusts. It also examines the common methods of hiding property by partners and the motivations for such methods prior to and during divorce proceedings.

d) Chapter Four – Spousal Claims to Property in Trusts and Companies, and Judicial Justifications for Going Behind the Trust or Piercing the Corporate Veil

This chapter considers the possible claims the innocent spouse may have to matrimonial property hidden behind trusts and companies as outlined in chapter three. It further investigates the jurisprudential arguments and circumstances that allow South African and English courts to go behind trusts, or to pierce the corporate veils of companies, respectively, to settle claims by the innocent spouse.

e) Chapter Five – Conclusions, Findings and Recommendations for Application to the Kenyan Context

This final chapter considers the findings from chapters three and four, and makes conclusions on the research questions and hypothesis. The closing recommendations are drawn from the principles applied in South Africa and England to settle the problem of hiding matrimonial property in trusts and companies. Each recommendation is directed at closing gaps identified in Kenya's legislative framework and attempts to bolster Kenya's ability to respond to the issues raised in the research questions.

CHAPTER TWO:

Legal Framework of Matrimonial Property in Kenya

2.1. Introduction

In discussing the current legal framework governing Kenya's matrimonial property regime, it is important to outline the historical developments that led to its creation. On the face of it, legislation and case law in Kenya appears to employ western ideas of matrimonial property stemming from statutes of general application and case law from courts in England. However, upon closer inspection, strong cultural and religious ideas of matrimonial property have remained matters of consideration to lawmakers and judges alike. Cultural and religious conceptions of matrimonial property, they were of great importance to the 1968 Commission on the Law of Marriage and Divorce⁷² (1968 Commission) which sought to streamline matrimonial laws in Kenya after independence.⁷³ The permeation of these considerations into the law each have their own consequences on the division of property in marriage.

2.2. Historical Development of Matrimonial Property Law in Kenya

Formal laws on marriage in Kenya began in 1897 when the East Africa Order in Council applied Indian and British Acts and common law in force at the time⁷⁴. Notwithstanding, African customary laws and their corresponding matrimonial property laws were already in existence.⁷⁵ The British system of governance in colonized territories began with reception statutes that stipulated sources of law and their internal hierarchy.⁷⁶

The Marriage Act⁷⁷ was enacted in 1902 and provided for Christian and Civil marriages.⁷⁸ The Act further recognized customary marriages⁷⁹ while providing that a

⁷² Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 5-6.

⁷³ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968.

⁷⁴ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 8.

⁷⁵ Muigai G, 'Women and Property Rights in Kenya' in Mbeo MA and Ooko-Ombaka O, *Women and Law in Kenya*, Public Law Institute, Nairobi, 1989.

⁷⁶ Kang'ara SW, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought' *Comparative Law Review* (2012), 6.

⁷⁷ *Marriage Act* (Act No. 30 of 1902).

⁷⁸ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 9.

⁷⁹ Section 37, *Marriage Act* (Act No. 30 of 1902).

customary marriage was an impediment to a statutory marriage.⁸⁰ This was an important development as the polygamous nature of customary marriages inherently contradicted the common law conception of Civil, and indeed Christian, marriages.⁸¹ The Native Christian Marriage Ordinance⁸² was passed in 1904 to ease the formalities of Civil and Christian marriages under the Marriage Act for African Christians.⁸³ The Ordinance was later replaced by the African Christian Marriage and Divorce Act⁸⁴ which applied optionally in relation to the Marriage Act if either of the parties to the marriage professed the Christian faith.⁸⁵

Islamic law, an important aspect of matrimonial laws in Kenya, was at the time recognized as operating only within the 10-mile coastal strip that was administered as part of the Protectorate. The Mohammedan Marriage and Divorce Registration Act⁸⁶ allowed British legislators to extend their administrative reach by requiring the registration of Islamic marriages.⁸⁷ The Act applied to “to any area or to any tribe sect or community within any area” and “all native Mohammedans in the mainland dominions of H.H. the Sultan of Zanzibar and the Sultanate of Witu”.⁸⁸ The Act however faced legal challenges. Although it sought to provide for the registration of Islamic marriages, it was held in case of *Fatuma binti Athuma v. Ali Baka*⁸⁹ that Islamic marriages, not being held under the Marriage Act were “not in accordance with the law of the Protectorate”.⁹⁰ The 1968 Commission comments that this was likely the motive behind passing the Mohammedan Marriage, Divorce and Succession Act⁹¹ which acted retrospectively to validate all existing Islamic marriages in Kenya.⁹²

⁸⁰ Section 11(1)(d), *Marriage Act* (Act No. 30 of 1902).

⁸¹ See *Hyde v Hyde* [1866] LR 1 P&D 130, where the court held that Civil marriages follow the Christendom conception of marriage which is the marriage to one partner, for life, to the exclusion of all others.

⁸² *Native Christian Marriage Ordinance* (No. 9 of 1904).

⁸³ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 9.

⁸⁴ *African Christian Marriage and Divorce Act* (Act No. 51 of 1931).

⁸⁵ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 10.

⁸⁶ *Mohammedan Marriage and Divorce Registration Act* (Act No. 13 of 1906).

⁸⁷ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 10.

⁸⁸ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 10.

⁸⁹ *Fatuma binti Athuma v. Ali Baka* [1918] 7 EALR 171.

⁹⁰ *Fatuma binti Athuma v. Ali Baka* [1918] 7 EALR 171.

⁹¹ *Mohammedan Marriage, Divorce and Succession Act* (Act No. 34 of 1920).

⁹² Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 11.

Hindu marriages were recognised by the Hindu (Marriage, Divorce and Succession) Ordinance⁹³ in 1946.⁹⁴ This Act also applied retrospectively validating all existing Hindu marriages, while additionally providing for matrimonial reliefs.⁹⁵ This was later replaced by the Hindu Marriage and Divorce Act⁹⁶ which required Hindu marriages to be monogamous and reliefs to Hindu marriages were provided for under the Matrimonial Causes Act⁹⁷ and the Subordinate Courts (Separation and Maintenance) Act.⁹⁸

Customary marriages however, were largely ignored by the colonizers, and held to be invalid as classical legal thought cast African and European conceptions of family as irreconcilable.⁹⁹ Moreover, to supplant African customary laws, English legal sense and positions on morality applied variedly and unpredictably.¹⁰⁰ Interestingly, classical legal thought opposed state regulation of the family in the West, categorizing it as a private institution,¹⁰¹ yet colonizers did afford the same protection to colonies and instead considered the Non-western families pre-modern and therefore not within the protective cover of “the private”.¹⁰² However, by 1930-1950, a shift in legal thought occurred following findings that non-western peoples had sophisticated institutions for self-governance.¹⁰³ To ease the costs of governing large territories without giving up control to local communities, the colonizers created native courts. It thereafter appointed the judges of the courts and regulated their jurisdiction.¹⁰⁴ The Native Courts Regulations of 1897¹⁰⁵ were passed and

⁹³ *Hindu (Marriage, Divorce and Succession) Ordinance* (No. 43 of 1946).

⁹⁴ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 11.

⁹⁵ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 11.

⁹⁶ *Hindu Marriage and Divorce Act* (LN 142/1963, LN 2/1964). All Ordinances subsisting on 12th December 1963, were restyled Acts by LN 2 of 1964.

⁹⁷ *Matrimonial Causes Act* (Act No. 33 of 1939).

⁹⁸ *Subordinate Courts (Separation and Maintenance) Act* (Act No. 34 of 1928).

⁹⁹ Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 5.

¹⁰⁰ Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 5.

¹⁰¹ Marela MR, 'Critical Family Law' *American University Journal of Gender, Social Policy & the Law* (2011), 722.

¹⁰² Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 5.

¹⁰³ Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 6.

¹⁰⁴ Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 6.

¹⁰⁵ *Native Courts Regulations 1897* (No. 15 of 1897).

made to apply to the “personal status” of “native Christians” as well as “natives not professing either the Christian or the Mohammedan faiths”.¹⁰⁶ Through these processes, customary law was in part formalized, bureaucratized, and left vulnerable to systemic incoherence, evidenced by inconsistent judicial findings on the validity of customary marriages as per western conceptions of law and morality.¹⁰⁷

2.3. Forms of Marriage and Property Regimes Post-Independence

2.3.1. African Customary Marriages

Under customary marriages, women do not own property.¹⁰⁸ In fact, women do not own property exclusively of their own at any point in their lives,¹⁰⁹ and in many communities, women could not inherit from their fathers.¹¹⁰ Unwed adult daughters have rights of usage under their father's lands and upon marriage; any property she brings with her to the marriage comes under the ownership of her husband.¹¹¹ These general rules however did not apply to registered property which is protected by formal property law.¹¹² As a result of the husband's cultural appropriation of his wife's property, the question of division of matrimonial property did not arise at the end of a marriage.¹¹³ The woman was effectively dispossessed of any property and was meant to rely on the social protection of returning to her father's home.¹¹⁴ However, these traditions are unlikely to be applied in their pure form under modern matrimonial property regimes.

2.3.2. Islamic Marriages

Islamic marriages hold an interesting dichotomy in terms of the property held by spouses. Women maintain their individuality much in the same way as was later developed in common law. Her legal personality is not merged with her husband's and her property remains her own.¹¹⁵ Moreover, any interference by the husband with her exclusive control over her property is considered cruelty and may suffice as a reason to dissolve the

¹⁰⁶ Regulation 64, *Native Courts Regulations 1897* (No. 15 of 1897).

¹⁰⁷ Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought', 6.

¹⁰⁸ Muigai G, 'Women and Property Rights in Kenya', 115.

¹⁰⁹ Kiage PO, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica, Nairobi, 2016, 243-242.

¹¹⁰ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 243.

¹¹¹ Muigai, 'Women and Property Rights in Kenya', 115.

¹¹² Muigai, 'Women and Property Rights in Kenya', 115.

¹¹³ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 242.

¹¹⁴ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 242.

¹¹⁵ Muigai, 'Women and Property Rights in Kenya', 116.

marriage.¹¹⁶ Yet despite this strong protection for a women's individual property, matrimonial property itself is always held by the husband, and no proprietary interest can be gained by the wife – although she maintains access, use and enjoyment rights while the marriage subsists.¹¹⁷

Evidently, the purely Islamic position on matrimonial property contradicts the statutory and case law developments that have come about. The 1968 Commission noted that although Islam is regarded as a complete way of life by the Islamic community, it was still

“...necessary to enact laws which restrict the application of Islamic law...marriage and divorce and the structure of the family are matters which vitally concern the State and we do not think that the fact that they are also intimately bound up with religion would justify or excuse the State abdicating its responsibility”.¹¹⁸

A final point of interest however arises from the case for *Essa v Essa*.¹¹⁹ In this case, Omollo JA continued the Court of Appeal practice of applying the English Married Women's Property Act 1882 as a statute of general application in Kenya. He further held that the Married Women's Property Act 1882 was also applicable to Muslims in Kenya. Authors have commented that this was an implicit rejection of the application of the principles of Islamic law to matrimonial property.¹²⁰ However, this position appears to have been reversed by the Matrimonial Property Act which provides that all persons “professing the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property”.¹²¹

2.3.3. *Hindu Marriages*

In the report of the 1968 Commission, the Hindu community made no claim to a privileged position arising from the right to freedom of religion under the 1963 Constitution.¹²² The 1968 Commission remarked that this may have been because of the

¹¹⁶ Mulla DF, *Principles of Mahomedan Law*, Thacker & Company, Bombay, 1905.

¹¹⁷ Muigai, 'Women and Property Rights in Kenya', 116.

¹¹⁸ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 5.

¹¹⁹ *Essa v Essa* [1995] LLR 384.

¹²⁰ Juma & Kanjama, *Family Law Digest on Matrimonial Property*, 30.

¹²¹ Section 3, *Matrimonial Property Act* (No. 49 of 2013).

¹²² Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 6.

already major interference by statute in Hindu practices¹²³ at the time of the Commission's mandate. These interferences include the prior abolition of polygamous marriages by Hindus under the Hindu Marriage and Divorce Act,¹²⁴ and bringing of some Hindu matrimonial causes under the Matrimonial Causes Act.¹²⁵

Nevertheless, some unique aspects of matrimonial property arising from Hindu marriages are worth noting. Property rights of Hindu women are enshrined in the concept of *stridhana* – *stri*, meaning woman and *dhana* meaning property.¹²⁶ A woman may acquire movable property and immovable property in the form of absolute gifts from many sources. These sources may include gifts and bequests from relatives, all of which remain *stridhana*.¹²⁷ At the start and throughout her marriage, a Hindu woman retains an enforceable dominion over her property.¹²⁸ As such, the Hindu conception of matrimonial property, especially concerning women, is similar to that which English courts sought to create through years of jurisprudence – that there may be shared matrimonial property, yet a woman may also hold property of her own exclusively during the marriage. This arrangement of property ownership may relate back to the comments of the 1968 Commission; the Hindu community likely did not object to the Commission's recommendations since they did not perceive any encroachment on their personal law in its existing form.¹²⁹

2.3.4. *Christian and Civil Marriages*

Christian and Civil marriages in Kenya began with the Marriage Act of 1902.¹³⁰ The formalities of the Act were later simplified for locals through the Native Christian Marriage Ordinance,¹³¹ and the African Christian Marriage and Divorce Act.¹³² In these marriages, it was envisioned that the personality of the woman was absorbed into her husband's.¹³³ The

¹²³ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 6.

¹²⁴ *Hindu Marriage and Divorce Act* (LN 142/1963, LN 2/1964).

¹²⁵ *Matrimonial Causes Act* (Act No. 33 of 1939).

¹²⁶ Muigai, 'Women and Property Rights in Kenya', 115.

¹²⁷ Muigai, 'Women and Property Rights in Kenya', 115.

¹²⁸ Muigai, 'Women and Property Rights in Kenya', 115.

¹²⁹ Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, August 1968, 6.

¹³⁰ *Marriage Act* (Act No. 30 of 1902).

¹³¹ *Native Christian Marriage Ordinance* (No. 9 of 1904).

¹³² *African Christian Marriage and Divorce Act* (Act No. 51 of 1931).

¹³³ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 242.

result was that property she could hold outside marriage as a *femme sole* become part of her husband's property. Thereafter, she could not sell or gift the property without his consent.¹³⁴

However, the position has undergone substantial changes. The case of *I v I*¹³⁵ applied the Married Women's Property Act of 1882 (MWPA) in Kenya as a statute of general application under Section 3 of the Judicature Act. Moreover, the High Court held that the Act ranked higher than customary law when applied to Kenya.¹³⁶ The MWPA's removal of a husband's interest in his wife's property¹³⁷ was the genesis of the modern position in Christian and Civil marriages, in which a wife maintains her ability to dispose of her personal property without interference from her husband. Through *I v I*¹³⁸ interpretations of the principles of matrimonial property under the MWPA enunciated by the House of Lords decisions in *Pettit v Pettit*¹³⁹ and *Gissing v Gissing*¹⁴⁰ were thus applicable to Kenya.

Pettit v Pettit was among the early foundational cases on matrimonial property. Among the key findings of the case was that the role of the court is merely to determine the existing property rights between spouses.¹⁴¹ Therefore, a judge cannot vary such rights even where successive events would make the allocation appear unfair. The court cannot grant a party legal title to property that the party did not already have title to.¹⁴² Further, the court stated that the fact of marriage does not automatically result in co-ownership of property, granting one spouse immediate interest in property of the other.¹⁴³

Another foundational case, *Gissing v Gissing*,¹⁴⁴ inquired into whether a spouse can acquire an interest in the property of the other during the marriage. This was of importance in the case, as the matrimonial home was solely in the name of the husband. The wife did however make indirect contributions to the purchase by relieving the husband of other household costs such that he could focus on paying off the cost of the home.¹⁴⁵ Strictly applying the rules in *Pettit v Pettit*, meant that the wife may be effectively disposed of her

¹³⁴ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 242.

¹³⁵ *I v I* [1970] EA 2786.

¹³⁶ *I v I* [1970] EA 2786.

¹³⁷ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 244.

¹³⁸ *I v I* [1970] EA 2786.

¹³⁹ *Pettit v Pettit* [1969] All ER 2.

¹⁴⁰ *Gissing v Gissing* [1970] All ER 780.

¹⁴¹ *Pettit v Pettit* [1969] All ER 2.

¹⁴² *Pettit v Pettit* [1969] All ER 2.

¹⁴³ *Pettit v Pettit* [1969] All ER 2.

¹⁴⁴ *Gissing v Gissing* [1970] All ER 780.

¹⁴⁵ *Gissing v Gissing* [1970] All ER 780.

right to at least part of the home. However, Lord Reid held that a spouse could acquire interest by making both direct, and indirect financial contributions as the wife did.¹⁴⁶ Moreover, where the property is in the name of one of the spouses, a resulting trust is created.¹⁴⁷ The trust is formed when the legal owner of the property acts or induces another, spouse or stranger, to believe that they are acquiring an interest in the property.¹⁴⁸

These principles were brought to Kenya through the general application of the MWPA, and continued in cases like *Kivuitu v Kivuitu*.¹⁴⁹ In this case it was held that where property is held in the joint names of the spouses, unlike in *Gissing*, it is assumed that the property is held in equal shares.¹⁵⁰ Moreover, where both spouses have made contributions to the acquisition of the property in addition to holding the property jointly, they are said to have acquired an interest in the property. Here the term “contribution” was also expanded. It was held to extend to more than simply monetary contributions – direct or indirect.¹⁵¹ The court held that the carrying on of household duties by the wife in a typical African household amounted to non-financial contribution, granting an interest in the acquired matrimonial property.¹⁵² This expanded definition appears to be an extrapolation of the holding in *Gissing* on indirect contribution. The contribution is indirect since the payment of other household expenses such as electricity by one spouse relieves the other spouse who may then focus on paying the rent or cost of the matrimonial home. In *Kivuitu*, a wife completing household duties contributes to the home by relieving the husband of those same duties.¹⁵³ Therefore, the husband can expend his energies in business, or acquisition of assets. Such assets are thus family property since they were acquired by joint efforts within the home – the wife working household duties freeing the husband to take up such activities.

2.4. Modern Framework of Matrimonial Property Law in Kenya

The modern framework of matrimonial property begins with the 2010 Constitution. Article 45 is dedicated to the family which is recognised as the fundamental unit of society and is to enjoy the protection of the State.¹⁵⁴ In relation to marriage, the Constitution provides

¹⁴⁶ *Gissing v Gissing* [1970] All ER 780.

¹⁴⁷ *Gissing v Gissing* [1970] All ER 780.

¹⁴⁸ *Gissing v Gissing* [1970] All ER 780.

¹⁴⁹ [1991] KLR 248.

¹⁵⁰ *Kivuitu v Kivuitu* [1991] KLR 248.

¹⁵¹ *Kivuitu v Kivuitu* [1991] KLR 248.

¹⁵² *Kivuitu v Kivuitu* [1991] KLR 248.

¹⁵³ *Kivuitu v Kivuitu* [1991] KLR 248.

¹⁵⁴ Article 45(1), *Constitution of Kenya* 2010.

that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.¹⁵⁵ This is particularly important considering the desire of dishonest spouses to frustrate the matrimonial property rights of their former spouse at the dissolution of the marriage. This importance of protecting the equality of the spouses is elevated by Article 68(c)(iii) which calls for legislation to protect matrimonial property during and at the end of a marriage, most especially the matrimonial home. The protection envisioned in this provision is applicable not only to third parties outside the marriage, but also as a measure of safety between the spouses where one may be in danger of being excluded from matrimonial property. This is especially important in the Kenyan context where women have often been the targets of cultural discriminatory practices that alienate them from their share in matrimonial property.¹⁵⁶ These provisions are further supported by Article 27 of the Constitution which provides that all are equal before the law,¹⁵⁷ and that women and men have the right to equal treatment.¹⁵⁸ Article 27 embodies Aristotle's conception of justice as equality before the law.

The Matrimonial Property Act¹⁵⁹ was enacted in 2013 to discharge Parliament's mandate to enact legislation that recognises and protects matrimonial property, especially the matrimonial home.¹⁶⁰ Under the Matrimonial Property Act, the matrimonial home or homes, household goods and effects in the matrimonial home or homes, and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage all form part of matrimonial property.¹⁶¹ Trust property, including property in customary trusts, is however excluded.¹⁶² The ownership of matrimonial property vested in the spouses according to each spouses' contribution towards its acquisition, and is to be divided according to such contribution upon the dissolution of the marriage.¹⁶³ The word "contribution" is given specific meaning under Section 2 of the Matrimonial Property Act, and codifies the sentiments of Omollo JA in *Kivuitu v Kivuitu*.¹⁶⁴ Contribution is both

¹⁵⁵ Article 45(3), *Constitution of Kenya* 2010.

¹⁵⁶ Kimani EN & Maina LW, 'Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement', 258.

¹⁵⁷ Article 27(1), *Constitution of Kenya* 2010.

¹⁵⁸ Article 27(3), *Constitution of Kenya* 2010.

¹⁵⁹ (Act No. 49 of 2013).

¹⁶⁰ Article 68(c)(iii), *Constitution of Kenya* 2010.

¹⁶¹ Section 6(1), *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁶² Section 6(2), *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁶³ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁶⁴ [1991] KLR 248.

monetary and non-monetary and defined to include: domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work. The Matrimonial Property Act mainly describes the community of property regime, but also provides for a separate property regime. Section 6(3) allows for property rights to be predefined by prenuptial agreements, while Section 13 allows spouses to separately own property to which they are entitled to, for example, inherited property.

The meaning of equality under Article 45 of the Constitution has been interpreted to mean that “each partner...walk[s] away with what he/she deserves. What one deserves [is] arrived at by considering her/his respective contribution whether it be monetary or non-monetary”.¹⁶⁵ This interpretation resembles Aristotle and Rawls’ notion of justice and fairness that form the theoretical framework of the study. Aristotle proposed that fairness encompassed an idea of equality, to give a specific example, equality before the law despite any difference between two persons.¹⁶⁶ The difference is crucial in the African context where gender has caused women to face discrimination through cultural practices.¹⁶⁷ To Rawls, fairness is taken to be foundational, and a precursor to forming the principles of justice.¹⁶⁸ The foundational nature of fairness to the parties should therefore always be at the forefront of the decisions made by Kenyan courts.

The decision of the High Court in *UMM v IMM*,¹⁶⁹ reflected this understanding of justice and fairness, and conformed with the provisions of Section 2, 6 and 7 of the Matrimonial Property Act. In its judgement, the High Court in *UMM v IMM*¹⁷⁰ was guided by the statements by the Court of Appeal in *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*,¹⁷¹ which made its judgement before the Matrimonial Property Act was passed. The Court of Appeal stated that:

“ Article 45(3) of the Constitution 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 the marriage. This article clearly gives both parties to a marriage equal

¹⁶⁵ *UMM v IMM* [2014] eKLR, para 21.

¹⁶⁶ Solomon and Murphy, *What is Justice*, 39.

¹⁶⁷ Kimani EN & Maina LW, 'Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement', 259.

¹⁶⁸ Sen A, *The Idea of Justice*, Penguin Books Ltd, London, 2010, 55.

¹⁶⁹ [2014] eKLR.

¹⁷⁰ [2014] eKLR.

¹⁷¹ [2011] Civil Appeal No.127

rights...[which]arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home” .¹⁷²

Without clarification on the law by Parliament, the Courts held that matrimonial property holding to be 50-50 when guided only by the Constitution. The Matrimonial Property Act however, ensures that spousal contributions are only limited to the contribution they make to the marriage. The High Court in *UMM v IMM*¹⁷³ justified the new position set by Parliament by noting that an automatic 50:50 sharing could imperil the marriage institution by giving opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property.¹⁷⁴

2.5. What Constitutes Matrimonial Property in Kenya

The contents of matrimonial property are set out definitively in Section 6(1) of the Matrimonial Property Act. These items are thus what may be divided between the parties upon the conclusion of a marriage through divorce. A further point of interest is Section 6(2) which provides that property held in a trust of any form does not form part of matrimonial property. To date two main classifications of matrimonial property, remain. These are:

2.5.1. Community of Property

The first system, community of property – *communio bonorum*, is born out of civil law.¹⁷⁵ The system provides that all property is jointly held by both spouses from the beginning of the marriage.¹⁷⁶ There also exist quasi-community of property systems where property acquired during a marriage does not become jointly held property simply by virtue of marriage.¹⁷⁷ However, quasi-community of property systems act as exceptions to the general rule. Under community of property, any property acquired during marriage is jointly

¹⁷² *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] Civil Appeal No 127.

¹⁷³ [2014] eKLR.

¹⁷⁴ [2014] eKLR, para 21.

¹⁷⁵ Kariuki F et al, *Property Law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁶ Kariuki F et al, *Property Law*, 261.

¹⁷⁷ Kariuki F et al, *Property Law*, 261.

held, as it is said to be a product of the effort of both spouses.¹⁷⁸ Essentially, this should promote the equality of the parties. Following the theoretical framework of the study, the theory of fairness would dictate that no one gender should be granted the upper hand to property that has been acquired by joint efforts. Neither the law, nor any *de facto* situation should be permitted to allow one spouse, for example the husband, greater or exclusive rights to what the wife also made equal efforts in acquiring.

Where monetary contributions are concerned the 'joint effort' is manifestly visible and more so quantifiable. Yet what is more common is the case of wives who stay at home completing domestic tasks. A wife in such a position is said to have contributed to the acquisition of such property as much as her employed husband.¹⁷⁹ Omollo JA was of this opinion in the key case of *Kivuitu v Kivuitu*¹⁸⁰ finding that a wife who carries on domestic tasks cannot be said to depend solely on the charity of the husband in the acquisition of property in marriage.

The system was designed to foster family unity, solidarity, and equality between spouses,¹⁸¹ and as much can be gathered from the interpretations in law discussed above. However, the husband generally had an absolute pre-eminence over the wife in property ownership.¹⁸² The separate ownership system was then born to redress the imbalance in the legal system.¹⁸³

2.5.2. *Separate Property*

The second system of separate property – *separation bonorum* advocates for a total separation of private property in marriage. The fact of marriage will have no effect on the pre-existing property rights of the spouses.¹⁸⁴ This is generally done through prenuptial agreements. The rights remain unaltered between the parties, and with third parties.¹⁸⁵ This system favours certainty in the property rights of the spouses, which may be determined at any point in time of the marriage.¹⁸⁶ The system does not seek to foster the equality or

¹⁷⁸ Kariuki F et al, *Property Law*, 261.

¹⁷⁹ Kariuki F et al, *Property Law*, 261.

¹⁸⁰ [1991] KLR 248.

¹⁸¹ Juma K & Kanjama C, *Family Law Digest on Matrimonial Property*, Law Africa Publishing (K) Ltd, Nairobi, 2009, 2.

¹⁸² Juma & Kanjama, *Family Law Digest on Matrimonial Property*, 2.

¹⁸³ Juma & Kanjama, *Family Law Digest on Matrimonial Property*, 2.

¹⁸⁴ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 246.

¹⁸⁵ Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 246.

¹⁸⁶ Juma & Kanjama, *Family Law Digest on Matrimonial Property*, 3.

fairness between the parties promoted by this study, but instead seeks to escape the possibility of having to share property by maintaining legal distance between the estates of the spouses.

2.6. Adequacy of Kenya's Legal System

2.6.1. *The issue of Trusts*

Kenya's legal system appears to be unable to deal with matrimonial property hidden in trusts. If presented with the issue in *Badenhorst v Badenhorst*,¹⁸⁷ Kenyan courts would face difficulty in resolving the issue. In *Badenhorst v Badenhorst*, the question before the court was whether trust property that the husband controlled as a trustee should be considered part of his personal estate and thus subject to distribution when dividing matrimonial property between the former spouses.¹⁸⁸ Section 6(1) of the Matrimonial Property Act¹⁸⁹ would exclude the consideration of trust property when determining what is considered part of matrimonial property. The Section states that "trust property, including property held in trust under customary law, does not form part of matrimonial property".¹⁹⁰

This would clearly limit the rights of former spouses to matrimonial property where their dishonest counterpart has hidden it in a trust. Moreover, land that may be held as matrimonial property faces further impediments. Among the overriding interests on land are trusts, including customary trusts.¹⁹¹ Thus, when land that was matrimonial property is hidden in a trust, the trust becomes an overriding interest over a former spouse's registered interest, or acquired interest under Section 93. Enforcement of the provisions of the Land Registration Act could therefore result in the disenfranchisement of an innocent spouse. The aspect of customary trust land may also be used to discriminate against, and disenfranchise women. The Land Registration Act also provides that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, then the property is deemed matrimonial property and shall be dealt with under the Matrimonial Property Act.¹⁹² However, it is unclear whether the overriding interests of trusts and customary will also supersede the provisions of the Matrimonial Property Act where a spouse obtains an interest in land during the marriage.

¹⁸⁷ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA).

¹⁸⁸ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA), para 1.

¹⁸⁹ (No. 49 of 2013).

¹⁹⁰ Section 6(2), *Matrimonial Property Act* (No. 49 of 2013).

¹⁹¹ Section 28, *Land Registration Act* (Act No 3 of 2012).

¹⁹² Section 93, *Land Registration Act* (Act No 3 of 2012).

2.6.2. *The issue of Companies*

The Companies Act of Kenya provides that natural persons may incorporate as entities with perpetual succession.¹⁹³ This entity is considered separate and distinct from the persons constituting it.¹⁹⁴ Matrimonial laws in Kenya make no specific mention of marital property held in companies. There may exist remedies for claims made by innocent spouses to matrimonial property hidden in companies under Kenyan company law. The Companies Act, allows Kenyan courts to appoint an inspector to investigate and report on the affairs of a company where circumstances suggest that the company's business is being conducted for a fraudulent or unlawful purpose.¹⁹⁵ However an application for investigation may only be made by members of a company.¹⁹⁶ Further, where dishonest spouses attempt to hide behind the cover of a company, Section 134 of the Companies Act provides safeguards for the transparency of companies. Companies are to keep their register of directors open for inspection at their registered office, during ordinary business hours, for inspection by members at no cost, or by any other person upon payment of a prescribed fee.¹⁹⁷ Parties denied this right have recourse to the courts.¹⁹⁸ It can be noted from these two provisions that although an aggrieved spouse can show that his or her dishonest spouse is a director on a company under Section 134, they cannot apply for investigations of fraudulent use of the company under Section 786 to support their claim that matrimonial property is being hidden. Kenyan case law further provides more guidance on any finding of a fraudulent use of a company. In *China Wu Yi Company Ltd v Edermann Property Ltd & 2 Others*¹⁹⁹ the court held that the "veil of incorporation could not be lifted as against...unless there were allegations of fraud brought by the Plaintiff".²⁰⁰

2.7. **Conclusion**

Post-independence Kenya has mainly relied on its courts to formulate its matrimonial property framework. Few legislative changes took place before the Matrimonial Property Act, and the Marriage Act of. This allowed the law to develop in a flexible manner as courts could adapt to past or emerging matrimonial property issues on a case by case basis. The

¹⁹³ Section 2, *Companies Act* (Act No. 17 of 2015).

¹⁹⁴ *Salomon v Salomon & Co Ltd* [1897] AC 22, p 27.

¹⁹⁵ Section 787(2)(a)(i), *Companies Act* (Act No. 17 of 2015).

¹⁹⁶ Section 786(1), *Companies Act* (Act No. 17 of 2015).

¹⁹⁷ Section 134(4), *Companies Act* (Act No. 17 of 2015).

¹⁹⁸ Section 134(5) and 134(6), *Companies Act* (Act No. 17 of 2015).

¹⁹⁹ (2013) eKLR.

²⁰⁰ *China Wu Yi Company Ltd v Edermann Property Ltd & 2 Ors* (2013) eKLR.

Matrimonial Property Act therefore only serves as an interim codification of the development of the law so far.

The case law demonstrates that courts have been continually guided by the idea of justice that forms the basis of this study. The developments in jurisprudence have always resulted from questioning whether a particular decision by the court would be fair and equal between the parties.

The next chapter will examine the motivations and methods used by dishonest spouses to hide matrimonial property in companies and trusts. These will be largely comparative due to the greater experience of South African and English jurisdictions in resolving this issue. The chapter will further analyse whether Kenya's legal framework, as it has developed so far, is adequately equipped to respond to the legal issues demonstrated in the comparative jurisdictions, South Africa and England.

CHAPTER THREE:

Hiding of Matrimonial Property in Trusts and Companies

3.1. Introduction

This chapter considers cases in which dishonest spouses have hide property in companies and trusts. Using examples from case law in South Africa and England, it examines the methods of hiding property in trusts and companies respectively and the motivations for such methods prior to and during divorce proceedings. It further makes comparisons of similar occurrences in Kenya where any have been found.

3.2. Hiding Matrimonial Property in Trusts

The issue of hidden property in companies and trusts has arisen most frequently in South Africa. More specifically, it has concerned the use of trusts by spouses. François du Toit notes that in the South African conception of a trust, there exists: "a functional separation between trustees' control over the trust property on the one hand, and trust beneficiary's enjoyment of the benefits yielded by that control on the other hand".²⁰¹ This is much like the conception of trusts applied in Kenya. Under Kenyan trust law, the settlor charges the trustee to hold property for the benefit of the beneficiary.²⁰² The beneficiary hold this right in equity.²⁰³ This creates a separation between legal ownership, or control, of the property by the trustee, and beneficial ownership or enjoyment by the beneficiary.²⁰⁴ As such, trust property is:

" in principle, excluded from the determination of the...consequences of that divorce. The...consequences of the divorce impact on the divorcing spouses' personal estates, or, in the case of a marriage in community of property, on the spouses' joint estate".²⁰⁵

This understanding of the separation between marital property and trust property is generally in line with the provision of Section 6(2) of the Matrimonial Property Act²⁰⁶ of Kenya which

²⁰¹ Toit F, 'South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa' *Journal of Civil Law Studies* (2015), 656.

²⁰² Warner-Reed, *Equity and Trusts*, 15.

²⁰³ Warner-Reed, *Equity and Trusts*, 15.

²⁰⁴ Warner-Reed, *Equity and Trusts*, 15.

²⁰⁵ Toit F, 'South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa', 657.

²⁰⁶ Act No. 49 of 2013.

states: "trust property, including property held in trust under customary law, does not form part of matrimonial property".²⁰⁷

Surprisingly however, this position has been challenged in South African courts. The challenges arise when:

"the trust form is employed not to separate trust beneficiaries' beneficial interest from trustees' control over trust property, but rather to permit everything to remain 'as before'. This occurs typically when a trust's trustees are also among the beneficiaries of that trust or, stated differently, when some of the trust beneficiaries control the self-same trust as its trustees".²⁰⁸

Essentially, when persons set up a trust such that they enjoy both control and enjoyment of the property, South African courts refer to such trusts as "alter-ego trust[s]".²⁰⁹

Among the leading cases that demonstrate this lack of separation between control and enjoyment of trust assets is *Jordaan v Jordaan*.²¹⁰ In the case the defendant was a trustee of land transferred to a trust by his mother for the sake of estate planning aimed at reducing or avoiding estate duties on his death.²¹¹ The defendant was not a beneficiary of the trust. Yet due to his control as a trustee, the court found that the defendant continued to treat the farm and the rental income of the trust as his own in all but name.²¹² The *Jordaan v Jordaan*²¹³ case demonstrates one of the reasons behind the creation of a trust, as well as subsequent abuse by ignoring the control-enjoyment separation.

However, the issue of abuse to specifically hide or cut off a former spouse from matrimonial property was seen in *Jordaan v Jordaan and 3 Others*.²¹⁴ This case arose from similar facts as *Jordaan v Jordaan* and involved the same former spouses. It was noted in *Jordaan v Jordaan and 3 Others* that both spouses were trustees of the Johannes Jordaan Trust ("the JJ Trust") and the Groothoek Trust ("the GH Trust").²¹⁵ In the latter *Jordaan* case it is revealed that the husband formally removed the wife as a trustee of both trusts as soon as the marriage relationship came to an end. Well after the marriage, the husband continued

²⁰⁷ Section 6(2), Matrimonial Property Act (Act No. 49 of 2013).

²⁰⁸ Toit F, 'South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa', 657, See also *Land and Agricultural Bank of South Africa v. Parker*, 2005 (2) SA 77 (SCA), para. 26.

²⁰⁹ *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) 59F.

²¹⁰ *Jordaan v Jordaan* [2001] (3) SA 288 (C).

²¹¹ *Jordaan v Jordaan* [2001] (3) SA 288 (C) para 44.

²¹² *Jordaan v Jordaan* [2001] (3) SA 288 (C) para 44.

²¹³ *Jordaan v Jordaan* [2001] (3) SA 288 (C) para 44.

²¹⁴ *Jordaan v Jordaan and 3 Others* [2012] HC.

²¹⁵ *Jordaan v Jordaan and 3 Others* [2012] HC, para 5.

to treat trust property as his own, using the JJ Trust to pay his personal debts pertaining to the divorce settlement with his wife and for his personal maintenance obligations. Moreover, the husband's liquidation of the trust funds made it impossible for the trust to repay loans it owed to his wife.

3.2.1. Occurrences of Matrimonial Property held in Trusts in Kenya

No jurisprudence in Kenya so far suggests whether Section 6(1) is to apply strictly or flexibly, and no cases have dealt directly with this issue. However, some inferences of property hidden in trusts may be inferred. In the 2015 case *RPM v PKM*,²¹⁶ the respondent was the son of the former president of Kenya, and by all accounts given by his former wife, lived a high standard life during their marriage. In this case involving maintenance however, the court had this to observe:

" unlike the Petitioner, the Respondent has not been forthcoming about what he owns; his testimony has been inconsistent, less than candid, and was an exercise by the Respondent of concealment of material facts and information from the court. Indeed, the Respondent denied ownership of all properties associated with him, claiming that they belonged to his father, his sister, his family, his friends, or people not known to him. While doubt was cast to many of his responses during the hearing, he did not seek to support his claims with convincing evidence. The only conclusion that this court reached... is that the Respondent is a person of substantial means and of substantial income who has over time perfected the art of concealing what he actually owns".²¹⁷

Although the court did not delve further into how the respondent concealed his property and whether it had powers to make orders for maintenance regardless, some points of interest may be drawn here. First, the respondent had been separated from his wife for 5 years before the above case began. It is plausible to conclude, as the court did, that he had found ways to hide his property to protect himself from such a suit. Second, any property associated with him was apparently owned by relatives and friends. This suggests he may have employed trusts to hide his property. By making friends and relatives trustees, he could not be said to be the legal owner of any of his property but may still enjoy use of the same. If the trusts are employed effectively, he may in law claim that he truly "owns nothing". Indeed, he stated before the court that "he was literally a pauper dependant on the goodwill of his

²¹⁶ [2015] eKLR.

²¹⁷ *RPM v PKM* [2015] eKLR, p 10.

relatives...[and] that [the] court should not accord him special treatment on account of his surname".²¹⁸

However, this case may be distinguished in that it concerned an order for maintenance and not distribution of matrimonial property. In the former, the court need only ascertain what is a fair amount given the facts before it, while in the later, the applicant has a right to the property and so the court may have delved further to discover its whereabouts and determine which orders it can make. Another distinction that may be made is that the respondent did not seek to control the property in the trust as a trustee, but rather may have settled the trusts with friends and family members as trustees, and have himself as the legal beneficial owner of the trust property. Thus he may have been able to sustain himself while effectively "owning nothing" by having no legal ownership to his own properties.

3.3. Hiding Matrimonial Property in Companies

The use of a company to hide matrimonial property is discussed in the UKSC case of *Prest v Petrodel Resources Limited and Others*.²¹⁹ In the case, the husband owned the company Petrodel Resources Limited (PRL) that held legal title to the matrimonial home. Here the actions of the husband were complicated on two fronts. First, he attempted to conceal his ownership and control of the company PRL, and second the court had to contend whether orders for redistribution of matrimonial property could be made against the company, a separate legal entity. The second issue is of particular interest, bringing together elements of company law and family law.

The UKSC held that as a general rule, no orders could be made against PRL for the actions of the husband due to the rule in *Salomon v A Salomon and Co Ltd*²²⁰ - that at law, a company is a separate person from its shareholders²²¹. The court found that the rule applied even where the company was owned or controlled by one person.²²² The issue of other shareholders is key since an asset, such as the matrimonial home in question, belonging to the company is meant to generate profits for all shareholders.

A similar case appeared before the family division of the English courts. In *Ben Hashem v Al Shayif*,²²³ the wife sought the transfer of a property she occupied. She alleged

²¹⁸ *RPM v PKM* [2015] eKLR, p 9.

²¹⁹ [2013] UKSC 34.

²²⁰ [1897] AC 22.

²²¹ *Salomon v A Salomon and Co Ltd* [1897] AC 22, p 27.

²²² *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, 23.

²²³ [2009] 1 FLR 115.

that the property was owned by a company controlled by the husband. The case provides the same issues as before. Although the husband was less concealed in terms of his control of the company, the separation between the husband as owner or controller and the company itself still provided a legal issue. To satisfy the wife's request for transfer would be to strip away the rights of the company – and by extension its shareholders, while to ignore it would be to deny her rights to the whole or at least part of the property as a spouse. Moreover, Munby J who heard the *Ben Hashem* case was also on the bench in the Chancery division of the English courts in which the same company of the *Ben Hashem* case sought orders for possession of the same property that the wife brought a case for.²²⁴

3.3.1. Occurrences of Matrimonial Property held in Companies in Kenya

The issue has also not come up in Kenya with respect to companies. Although no specific provision of the law may hinder the courts from dispensing justice, Kenyan courts will still face the same barrier between family law and company law as experienced in England. The Companies Act of Kenya provides that natural persons may incorporate as entities with perpetual succession.²²⁵ Since the company is a legal entity, there arises a question as to which rights should prevail with respect to the matrimonial property concerned. The rights of the former spouse, or the rights of the company and its respective shareholders. Either side has some claim to the matrimonial property. This dual claim to the property is among the main considerations discussed in the next Chapter, where courts justify piercing the corporate veil.

3.4. Conclusion

Courts are unlikely to simply leave applicants unsatisfied simply because of conflicts between differing areas of law. Chapter four will discuss the approaches made by courts in South Africa with respect to trusts holding matrimonial property, and the approaches of English courts with respect to companies holding matrimonial property. These approaches will then inform the final recommendations that could bolster Kenya's ability to resolve similar issues.

²²⁴ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, 25.

²²⁵ Section 2, *Companies Act* (Act No. 17 of 2015).

CHAPTER FOUR:

Spousal Claims to Property in Trusts and Companies, and Judicial Justifications for Going Behind the Trust or Piercing the Corporate Veil

4.1. Introduction

This chapter considers the possible claims the innocent spouse may have to matrimonial property hidden behind trusts and companies as outlined in the previous chapter. It further investigates the jurisprudential arguments and circumstances that allow South African and English courts to go behind trusts, or to pierce the corporate veils of companies, respectively, to settle claims by the innocent spouse.

4.2. Going Behind the Trust Form

Where an ideal trust is set-up there exists a separation between the right of ownership and the right of enjoyment of the property. The rights of ownership and control are vested in the trustee while the right of enjoyment is granted to the beneficiary of the trust.²²⁶ However, in most cases where a dishonest spouse, acting as trustee, wishes to hide matrimonial property, there is often an attempt to maintain both rights of control and enjoyment. In this latter set-up the:

“ trustee controls the trust affairs with self-interest and with an utter disregard for the existence of the trust as a separate estate in which the trust beneficiaries are beneficially interested: the trust is nothing but the trustee’s alter-ego”.²²⁷

This type of action is seen in the *Badenhorst* and *Jordaan* cases. The South African Supreme Court of Appeal (SASCA) held that once this is *discovered, the court may be allowed to find that* “ the trust form is a veneer that in justice should be pierced” .²²⁸

Author De Waal identifies key principles often violated by trustees, prompting courts to look into the trust: (i) the duty to exercise independence of judgment and independent discretion; (ii) the duty to give effect to the trust deed, properly interpreted; (iii) and the principle that trustees must act with care, diligence and skill in the performance of their duties and the exercise of their powers.²²⁹ A failure to adhere to these principles essentially amounts to an abuse of the trust. Du Toit argues that the joint-action rule, which requires co-

²²⁶ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 11.

²²⁷ Toit F, 'South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa', 658.

²²⁸ *Land and Agricultural Bank of South Africa v. Parker and Others* 2005 (2) SA 77 (SCA), para. 37.3.

²²⁹ De Waal MJ, 'The Abuse of the Trust (or: "Going Behind the Trust Form")', 18.

trustees to always act jointly, can be added to this list.²³⁰ The importance of joint action as part of South African trust law was noted in the *Land and Agricultural Bank of South Africa v Parker and Others*²³¹ case, where it was said that actions made by the trustee without meetings or consultation of other co-trustees amounts to an abuse of the trust form.

However, an important distinction must be made here between claims where property is hidden in trusts, and when it is hidden in companies as will be discussed below. The *Land and Agricultural Bank of South Africa v Parker and Others* case referred to the trust form as a “vener to be pierced”.²³² This idea makes a trust look like a company in law, but as the SASCA clarified, in *Badenhorst v Badenhorst*: “strictly speaking it is incorrect to refer to a trust as a ‘separate legal entity’”.²³³ The SASCA in *Badenhorst* cited *Commissioner for Inland Revenue v MacNeillie’s Estate*²³⁴ where it was stated that “neither our authorities nor our Courts have regarded it as a persona or entity...It is trite law that the assets and liabilities in a trust vest in the trustee”. Therefore, where trusts are concerned, there is no veil between the trust, and the trustee, whose control permits the possibility of abuse, and the trust. Control of the property is vested in the trustee, although enjoyment of the property belongs to the beneficiary. An abuse of the trust form exists where the trustee attempts to have both enjoyment and control as if he fully owned the property. The court thus comes in to determine whether such abuse warrants considering the trust property as the trustee’s own property where an action is brought against the trustee.

The SASCA determined that unlike in companies where the first assumption must be that the company and the dishonest spouse are separate, “the mere fact that the assets vested in the trustees and did not form part of the respondent’s estate does not per se exclude them from consideration when determining what must be considered when making a redistribution order”.²³⁵

Moreover, the court held that abuse of the trust form is the key to the success of an innocent spouses claim. The court held that:

“ to succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that [the dishonest] party controlled the

²³⁰ Toit F, ‘South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa’, 666.

²³¹ 2005 (2) SA 77 (SCA), para 15.

²³² *Land and Agricultural Bank of South Africa v. Parker and Others* 2005 (2) SA 77 (SCA), para. 37.3.

²³³ [2006] 2 All SA 363 (SCA), para 8.

²³⁴ 1961 (3) SA 833 (A).

²³⁵ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 9.

trust and but for the trust would have acquired and owned the assets in his [or her] own name. Control must be de facto and not necessarily de jure...De jure control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. De facto the founder controls the trust".²³⁶

To decide on *de facto* and *de jure* control, the court looks through the trust deed and analyses the trust's administration in comparison for any discrepancies. In most cases, the discrepancies arise from violations of the key principles highlighted by De Waal and Du Toit. Such an analysis was taken on both the *Badenhorst* and *Jordaan* cases.

The Jubli trust deed in the *Badenhorst* case was set up as follows: the founder of the trust was the respondent's father, who appointed the respondent and his brother as the trustees.²³⁷ The capital beneficiaries of the trust were the issues of any marriage entered by the respondent.²³⁸ The respondent's former wife, the applicant, was an income beneficiary.²³⁹ The rights of the beneficiaries, both income and capital, vested on a date to be determined by the trustees.²⁴⁰ Moreover, the respondent had the right to discharge his co-trustee and appoint someone else in his place.²⁴¹ The trustees had unfettered discretion to do with the trust assets and income as they saw fit.²⁴² The court found that in practice, the respondent seldom paid attention to the difference between his own assets and trust assets. He listed trust assets as his own while applying for credit facilities, and later financed a property listed in his name using a trust.²⁴³ He also received a substantial monthly income of R50,000 from an Estate agency, which was wholly controlled by a company whose shareholding was split 50:50 between the trust and his former wife.²⁴⁴ The court found that in a majority of his decisions as trustee, the respondent rarely consulted his co-trustee giving him, *de facto*, total control of the trust.²⁴⁵

From the statement of facts given by the court, it can be seen that the respondent had violated the principles of a trust given by De Waal and Du Toit. Of the principles highlighted

²³⁶ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 9.

²³⁷ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²³⁸ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²³⁹ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²⁴⁰ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²⁴¹ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²⁴² *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 10.

²⁴³ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 11.

²⁴⁴ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 11.

²⁴⁵ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 11.

by De Waal, the respondent failed on all three fronts. By applying for credit using the trust's assets, he sought to indirectly profit from the trust. This interferes with his ability to exercise independence of judgement and discretion as it is likely to create a conflict of interest between his duties as trustee, and to his business regarding the credit facility. This is also true of the R50,000 monthly incomes which he was able to grant himself through the trust's control of the estate agency. By financing a property in his name using the trust, he failed to properly give effect to the trust deed. As neither a capital nor income beneficiary, he had no vested right to use the income or capital of the trust for personal means. By failing to appreciate his role as a trustee, separating his control from the enjoyment of trust property, the respondent did not act with care, diligence and skill in exercising his powers. The joint-action standard set by Du Toit was also violated by the respondent's unilateral decisions without sanction or consultation from his co-trustee.

Although the SASCA did not employ a specific analysis using the principles above, it still made a general finding that the actions of the respondent did not align with the purpose of the trust. It's critical finding was that but for the trust, ownership of the trust assets, in terms of both control and enjoyment, would have vested in the respondent. As such the Court held that the defendant would be liable to a court order for redistribution of the property in the trust²⁴⁶.

In the *Jordaan v Jordaan*²⁴⁷ case, the South African High Court found that the defendant, acting as trustee, similarly used the trusts as if the property within them was vested in himself. The defendant held a controlling position over the trust through clauses 4.3 and 5 of the trust deed. Through his powers of control, the defendant treated a farm and other rental income from the trust as personal property by all accounts except in name.²⁴⁸ Thus the court held that the farm, should be considered part of the defendant's personal property in divorce proceedings.

The discussions in the South African Courts about trust property offer some guidelines that may be applied by Kenyan courts regarding trust property and matrimonial property. They point to the fact that where there is a disregard for the correct legal form of companies and trusts, dishonest spouses should not be allowed to rely upon them to hide property.

²⁴⁶ *Badenhorst v Badenhorst* [2006] 2 All SA 363 (SCA) para 13.

²⁴⁷ 2001 (3) SA 288 (C).

²⁴⁸ *Jordaan v Jordaan* 2001 (3) SA 288 (C), para 44.

4.3. Piercing the Company Corporate Veil

Companies have also been used as tools to hide matrimonial property. However, the approach to handling claims by innocent spouse with respect to companies differs from the approach to trusts. As highlighted in the *Badenhorst* case, trusts have no “veil to be pierced”. The property sought is vested in the trustee, who the action is against. Companies however separate ownership of the property, from the dishonest spouse, thus keeping it safe from any action brought against the dishonest spouse.

This presents a challenge to courts since it cannot simply ignore the veil between the company and the dishonest spouse. Instead, the court must find whether the company business is being used for a fraudulent purpose, and if so, pierce the veil and distribute the company’s property as if it was held by the dishonest spouse.²⁴⁹ As noted in the previous chapter, the use of companies brings about two distinct issues to a court seeking to bring justice to the innocent spouse. First, the corporate veil makes it easier for a dishonest spouse to conceal their role in the ownership and control of the company concerned. Second, even where the ownership and control are determined, the court must consider whether it can make orders against the company to distribute the matrimonial property.

The leading case of *Prest v Petrodel Resources Limited and others*²⁵⁰ recently laid down the principles to be considered before piercing the corporate veil. Before the case reached the UKSC, the English Court of Appeal set two requirements that must be followed before company assets can be distributed as matrimonial property. First the corporate personality of the company was abused for some fraudulent purpose, and second on the particular facts of the case, it could be shown that an asset legally owned by the company was held in trust for the husband²⁵¹.

Rimer LJ who delivered the leading judgment for the majority in the Court of Appeal held that unless these requirements were met, such orders for distribution were beyond the jurisdiction of the court.

There is an interesting similarity of actions between spouses attempting to hide matrimonial property in companies, and in trusts. The Court of Appeal found that the husband in the *Prest* case:

²⁴⁹ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 34.

²⁵⁰ [2013] UKSC 34.

²⁵¹ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 7.

“ [had] personal expenditure substantially [that] exceeded his salary and bonuses as chief executive, and that the difference was funded entirely by the company. There was no formality involved. The husband simply treated the companies’ cash balances and property as his own and drew on them as he saw fit...the husband had ‘unrestricted access’ to...assets, unconfined by any board control or by any scruples about the legality of his drawings. He used PRL’s assets to fund his and his family’s personal expenditure, including the substantial legal costs incurred in these proceedings...effectively the husband’s money box which he uses at will” .²⁵²

This is reminiscent of the actions of the husbands in the *Badenhorst* and *Jordaan* cases who not only sought to hide matrimonial property once the marriage came to an end, but further treated the property in the trusts, and company in the *Prest* case, as their own.

The UKSC took a different approach from the Court of Appeal in determining whether the corporate veil should be pierced. It was of the view that a company’s veil may be pierced where its separate legal personality was being abused for some wrongdoing. This wrongdoing resulted in the company being either a “facade” or a “sham” – which the court termed as the concealment principle and the evasion principle respectively.²⁵³ Under the concealment principle, the court does not pierce the veil, but will only look behind it to identify the owner or controller of the company should their identification be legally relevant.²⁵⁴ In the latter, the court will pierce the veil where the incorporation of the company is being used to put up a veil between a right that is owed so as to defeat or frustrate the right.²⁵⁵

In the case before it, the UKSC looked behind the veil of PRL to determine not only that the husband was the controller of the company, with almost no accountability to a board,²⁵⁶ but to further find that the matrimonial home in dispute was held by the company in trust for the husband and not for any commercial purposes. The home was in fact acquired by the company before it began any operations.²⁵⁷ The court found that the husband was using the corporate veil of the company to frustrate the enforcement of his former wife’s right to a share in the matrimonial home.

²⁵² *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 15.

²⁵³ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 28.

²⁵⁴ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 28.

²⁵⁵ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 28.

²⁵⁶ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 15.

²⁵⁷ *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, para 48.

The UKSC in deciding whether the company or the spouses rights should prevail, cited *Adams v Cape Industries plc*²⁵⁸ which stated that in deciding whether to pierce the corporate veil, “the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires”.

The UKSC reasoned that due to the nature of company law, justice was not reason enough to pierce the veil. It held that there must be some specific impropriety that the dishonest spouse seeks to uphold by concealment under the company, or evasion by using the company’s veil as a defence. It thus concluded that hiding matrimonial property can be considered an impropriety which may justify piercing the corporate veil.

Under Kenyan case law, a similar conclusion would have been reached. In *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another*²⁵⁹ it was determined that:

“ [the] separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud”

4.4. Conclusion

The cases highlighted demonstrate that spouses can indeed have claims to matrimonial property hidden in trusts or companies. The legal position under Kenya’s Matrimonial Property Act will require amendment given the arguments of the SASCA. The nature of a trust can easily be abused by a trustee, and an inflexible statutory position will only aid his defence where the rights of the trustee’s spouse are being infringed upon.

²⁵⁸ [1990] Ch 433.

²⁵⁹ (2014) eKLR.

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