EXAMINING THE CONSTITUTIONALITY OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT

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COUNSELS

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DECLARATION

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

Signed……

Date……

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

Signed…….

Dr. Francis Kariuki.

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DEDICATION

I would like to dedicate this study to God for His grace and to my parents for their unwavering support, good will and prayers which have followed me all my life.

ACKNOWLEDGEMENTS

I sincerely would like to acknowledge the Almighty God for his favour and grace. Furthermore, I would like to thank Dr. Francis Kariuki for his intellectual guidance and support in this study for the past year. I am also eternally grateful for my family members for their unwavering support during this period.

ABSTRACT

The purpose of this study was to critically examine the current matrimonial property regime in Kenya along with the inconsistencies that have arisen over the provisions of the Constitution of Kenya 2010 and the Matrimonial Property Act. To conduct this study, rigorous desktop research was adopted to execute the main objectives of the study. That is; assessing the legal framework governing matrimonial property from colonialism to date, understanding the reasoning behind Article 45(3) of the Constitution of Kenya 2010, as well as make recommendations, if any, to the current matrimonial property regime in Kenya.

List of Cases

Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR

Dibble v Hutton, 1 Day, 221.

Pettit v Pettit [1970] AC 777.

Gissing v Gissing [1971] AC 886

Pettit v Pettit [1970] AC 777.

Kivuitu v Kivuitu [1991] KLR.

Kamore v Kamore [200] 1 EA 81.

Nderitu v Nderitu [1997].

Tabitha Wangechi Nderitu v Simon Nderitu Kariuki [1998] eKLR.

Peter Mburu Escharia v Priscilla Njeri Escharia [2007] eKLR.

MBO v JOO [2018] eKLR.

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

UMM v IMM [2014] eKLR.

TMW v FMC [2018] eKLR.

PNN v ZWN [2017] eKLR.

Karanja v Karanja [1976] KLR 307.

CMN v AWN [2013] eKLR.

Burns v Burns [1984] Ch 317.

UMM v IMM [2014] eKLR.

PWK v JKG [2015] eKLR.

White v White 200 UKHL.

Francis Njoroge v Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009

List of Statutes

Judicature Act, CAP 8 Laws of Kenya.

Married Women's Property Act, 1882.

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

Constitution of Kenya, (2010).

Divorce Act, South Africa.

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

Land Act (Act No. 6 of 2012).

Land Registration Act (Act No.3 of 2012).

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1. BACKGROUND

Property has always been a touchy subject within the confines of any African community or social structure that has been put in place. In the Pre-Colonial period, land holding was communally owned in most African communities.[1] No man had complete control over a specific piece of property. Individuals were able to access land based on their membership and what they were able to do for the growth of the community.[2] This could be accessed in activities such as grazing getting dowry from your daughters by marrying them off, participating in raids or being gifted a parcel of land.[3]

With the European powers coming to the continent and forcefully taking it as their own, there came a change to the way of life in African Communities. Colonialism impacted land ownership in Kenya by alienating land from Africans, imposing English Property law and transforming customary land law and tenure. The introduction of English Property Law in the 1900s was that of a gender-biased group of individuals who were of the opinion that human beings were not inherently equal.[4] In England, when a man and a woman were joined together in holy matrimony or by civil procedures, the doctrine of coverture would apply.[5] The doctrine implies that a wife and her husband were to be viewed as one under the law. The wife would lose her legal identity and with it her capacity to own property.[6] William Blackstone expounds on the doctrine by digressing that a husband could not even gift his wife any property as this would mean that she was a separate being. Thus gifting her would essentially be gifting himself.[7] Blackstone's digression can also be seen in the case of *Dibble v Hutton*[8] where the court invalidated a contract

[1] Okoth-Ogendo H, The tragic African Commons: A century of expropriation, suppression and subversion, University of Nairobi Law Journal (2003).
[2] Okoth-Ogendo H, The tragic African Commons: A century of expropriation, suppression and subversion, University of Nairobi Law Journal (2003).
[3] Mbiti J, *Introduction to African religion*, 2ed, Waveland Press Inc., Bern, 2015, 108.
[4] Sprankling, *Understanding property law*, 2ed, Matthew Bender, New Jersey, 2007, 146.
[5] Blackstone W, *Commentaries on the law of England*, Clarendon Press, Oxford, 1765.279
[6] Blackstone W, *Commentaries on the law of England*, 279.
[7] Blackstone W, *Commentaries on the law of England*, 279.
[8] *Dibble v Hutton*, 1 Day, 221 (1804).

between a husband and a wife for the sale of jointly owned land since in common law they were regarded as one.

Upon divorce, under the doctrine of coverture, the man was able to retain all the properties since they were all in his name whilst the wife was catered for through alimony. This is owing to the 'leniency' of the law as it did not want to leave her destitute.[9]

The introduction of the Married Women's Property Act of 1882 (MWPA), a statue of general application that applied in Kenya through Section 3(1)(c) of the Judicature Act,[10] altered the doctrine of coverture. It allowed married women the right to buy and sell property separate from their husbands.[11] Section 17 of the MWPA gave the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interests in a disputed property.[12] This was to mean that the court's jurisdiction was not to take away property from one person to another[13] but to merely determine where ownership lies.[14] The views presented by the judges in *Gissing v Gissing*[15] and *Pettit v Pettit*[16] were that monetary contribution directly or indirectly towards the acquisition of the contested property registered under the name of the other spouse is where one could be entitled to rights to the property.

Taking it back to our local court systems, the courts used the MWPA in determining cases such as *Kivuitu v Kivuitu*[17] where the court determined that non-monetary contribution is to be recognised. The Court of Appeal further went on to say that if there are no specifications as to who owned what portion of the property before hand, if said property is registered jointly, the intention was to have the family property owned in equal shares. These sentiments were echoed in *Kamore v Kamore*[18] where the court held that property that is acquired during the course of coverture and is registered in the joint names of both spouses, it is taken that the property is acquired in equal shares.

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[9] Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 265.
[10] Section 3(1), *Judicature Act*, CAP 8 Laws of Kenya.
[11] Blackstone W, *Commentaries on the law of England*, 475.
[12] Section 17, *Married Women's Property Act*, 1882.
[13] *National Provincial Bank v Ainsworth*
[14] *Pettit v Pettit* [1970] AC 777.
[15] *Gissing v Gissing* [1971] AC 886.
[16] *Pettit v Pettit* [1970] AC 777.
[17] *Kivuitu v Kivuitu* [1991] KLR.
[18] *Kamore v Kamore* [200] 1 EA 81.

In *Nderitu v Nderitu*[19], it was held that where property is registered under the name of one spouse, the disputing spouse must prove that he/she had directly or indirectly contribution towards the acquisition of the assets. Justice Kwach noted that the contesting spouse has to provide evidence that shows the contributions he/she made towards the property's acquisition. It is not enough for the spouse to simply show that he/she was the doting spouse.

In *Tabitha Wangechi Nderitu v Simon Nderitu*, the court held that the claimant must prove that he/she contributed directly or indirectly towards the acquisition of the assets by providing evidence on the same.[20] The same sentiments were echoed by the Court of Appeal in *Peter Mburu Escharia v Priscilla Njeri Escharia*.[21] Therefore, until the promulgation of the 2010 Constitution, judges in Kenya interpreted Section 17 of the MWPA to mean that contribution needs to be proved in order for property rights to vested.

The promulgation of the Constitution of Kenya, 2010 came with new laws which made previously existing laws obsolete. In the case of *MBO v JOO,*[22] a case which was filed before the promulgation of the new constitution, the court of appeal stated that;

> Although the suit was filed before the above law came into effect, the hearing and determination took place between 2015 and 2017 when the judgment was delivered.

As such the Court of Appeal did not use the MWPA, nor did they heavily rely on cases decided by the use of the MWPA, it instead relied on the current laws that governed matrimonial property. These new laws were primarily set out by Article 45 of the Constitution. Article 45(3) states 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.[23] Article 45(4) further goes on to state that Parliament shall enact legislation that recognises marriages concluded under any tradition, or system of religion, personal or family law and any systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.[24] This brought about the enactment of the Marriage Act[25] and the Matrimonial Property Act of Kenya.[26]

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[19] *Nderitu v Nderitu* [1997] eKLR.
[20] *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki* [1998] eKLR.
[21] *Peter Mburu Escharia v Priscilla Njeri Escharia* [2007] eKLR.
[22] *MBO v JOO* [2018] eKLR.
[23] Article 45(3), *Constitution of Kenya*, 2010.
[24] Article 45(4), *Constitution of Kenya*, 2010.
[25] *Marriage Act* (Act No.4 of 2014).

The courts pronounced themselves on Article 45(3) of the Constitution in the case of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*[27] the Court of Appeal interpreted the article to mean equality in the sense of dividing property on a 50:50 basis.

This interpretation of Article 45(3) was later rejected in *UMM v IMM*[28] when Tuiyott J interpreted it to mean that upon the dissolution of the marriage, each partner should walk away with what he/she deserves. This is determined by considering his/her respective contribution whether it be monetary or non-monetary.

The Married Women's Property Act (MWPA) has now been repealed by the Matrimonial Property Act in 2013. The Matrimonial Property Act gained its legitimacy through Article 45(4) and Article 60 of the Constitution of Kenya 2010. Section 7 of the Matrimonial Property Act states that

> Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.[29]

In the case of *TWM v FMC,*[30] Judge Nyakundi denoted that Section 7 introduces a new aspect as far as ownership of property by the spouses is concerned.

> In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus in case of divorce, courts would look at what each party brought to the table for the purposes of distribution of matrimonial property.

In the case of *PNN v ZWN*,[31] Court of Appeal Judge Kiage stated in regards to the interpretations of Article 45(3) of the Constitution and the Matrimonial Property Act that;

> I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage……Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty.

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[26] *Matrimonial Property Act* (Act No. 49 of 2015).
[27] *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* Civil Appeal No. 127 of 2011.
[28] *UMM v IMM* [2014] eKLR.
[29] Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).
[30] *TMW v FMC* [2018] eKLR.
[31] *PNN v ZWN* [2017] eKLR.

The interpretation of Article 45(3) has therefore not truly been decided with different legal scholars taking different stances.

1.2. STATEMENT OF PROBLEM

Article 45(3) of the Constitution has been interpreted to mean an equal division of matrimonial property whereas the Matrimonial Property Act states that contribution to the acquisition of the property needs to be assessed in dividing the property. With Article 2 stating that the Constitution is the supreme law of the land, this renders the provisions of Section 7 of the Matrimonial Property Act unconstitutional. Hence, this study seeks to explain the unconstitutionality of Section 7 of the Matrimonial Property Act.

1.3. RESEARCH OBJECTIVES

1. To assess the legal framework governing matrimonial property in Kenya.
2. To assess the constitutionality of Section 7 of the Matrimonial Property Act in relation to Article 45(3) of the Constitution.
3. To make recommendations where applicable to the matrimonial property regime in Kenya.

1.4. HYPOTHESIS

The provisions of Section 7 of the Matrimonial Property Act are unconstitutional.

1.5. JUSTIFICATION OF THIS STUDY

There is therefore a disparity as to the provisions of the Constitution and the act governing matrimonial property disputes with regards to the methodology to be used in determining such disputes. The general rule in applying these laws has been to assess the facts of the case and apply the relevant law whether it be the Constitution or the Matrimonial Property Act.

This paper seeks to clarify whether Section 7 of the Matrimonial Property Act is unconstitutional in accordance with Article 2(4) and Article 45(3) of the 2010 Constitution.

1.6. IMPORTANCE OF THE STUDY

It is important to research on this disparity as it gives clarification on whether the laws of Kenya need to be amended to bridge the gap of disparity and whether there is need to change Section 7

of the Matrimonial Property Act or whether the division of matrimonial property regime that has been put in place is sufficient enough to cover any instance relating to division of matrimonial property.

1.7. THEORETICAL FRAMEWORK

John Rawls depicts justice to be fair.[32] He denotes that this position of fairness comes from the original position of equality. The principles of justice are to be set out in a veil of ignorance.[33] This is to mean that those seeking justice or dispensing it are not to take into account do not know their place in society, class position or social status. This ensures that no one is advantaged or disadvantaged in the process and as such justice is served.

Moreover, Aristotle viewed equality to be of different kinds. These are numerical and proportional equality.[34] Numerical equality is when justice treats all persons as undistinguishable, thus treating them identically or treating them the same amenities and benefits as every other person. He notes that this type of equality is not always just. It can be viewed in the same light as a communistic type of governance that has been tried by some African leaders such as Julius Nyerere in his implementation of Ujamaa in Tanzania and Nyayoism by Daniel Arap Moi in Kenya. The hard working toil whilst the lazy earn the same rewards as the rest. Aristotle however notes that there are some instances where numerical equality is just such as, when persons are equal in the relevant respects so that the relevant proportions are equal.[35]

Proportional equality or distributive justice is the treatment of individuals and distribution of goods to persons according to merit. Proportional equality involves some variables such as two or more persons, two or more allocations of goods to persons. Aristotle believed that this form of justice is the most powerful law as it believes in proper and proportionate allocation of offices, goods and other needs that may be in contention.[36]

This study shall assume that justice is the main prerogative in determining matrimonial property disputes and as such, social status, gender differences or any other factors that do not make the parties to the suit equal are to be eliminated or overlooked in dispensing justice in the matter

[32] Rawls J, *A theory of Justice*, Harvard University Press, Cambridge, 1971, 52-55.
[33] Rawls J, *A theory of Justice*, 208.
[34] Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.
[35] Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.
[36] Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.

1.8. LITERATURE REVIEW

There is an ever growing occurrence of settlements within failed marriages in the outside world. The reasons for such are not known, however, suggestions have included a move away from relying on continued financial support between the ex-spouses obviating the need for an order by the courts to require financial support to be made.[37]This can be attributed to the continued surge of 'independence' that the current global population is experiencing. Whether it be from the burdens of day to day life or breaking from the shackles of an irreparable marriage, this study being the latter. With the rise of alternative dispute resolution mechanisms in the country, divorce settlements outside court seem like the go to method in resolving disputes of any kind. This is due to their cheaper, much more efficient means of resolving such disputes.[38]

However, there is need to appreciate that most of the Kenyan population is not blessed with such opportunities as those of the developed countries, more so Kenyan women. In Kenya, more that 60 percent of the population wholly or partially depend on agriculture for their livelihood. Women comprise 80 percent of the agricultural workforce. However, they only hold a meagre 1 percent of registered land in their names and 6 percent jointly with a spouse.[39] Therefore, one can agree with the interpretations of an equal division of property set out in Article 45(3) of the 2010 Constitution.

The Federation of Women Lawyers, FIDA-Kenya, instituted a suit to challenge the validity of Section 7 of the Matrimonial Property Act from a human rights perspective since Section 7 did not consider the plight of the Kenyan woman.[40] Their position was the Kenyan property landscape is different to that which the drafters of the Matrimonial Property Act had intended. However, the courts held that Section 7, along with subsequent provisions of the Act had taken care of all the issues raised by FIDA. Therefore, FIDA did not win the case.

Cases such as that of FIDA-Kenya and the worrying statistics of property ownership by women give legitimacy to this study. With the provisions set out in Article 45(3) of the 2010

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[37] Lowe N, Douglas G, *Bromley's Family Law*, Oxford University Press, New York, 2015, 827.
[38] Standley K, *Family law*, Palgrave Macmillan, 2010, 153.
[39] Kirui D, Still No Guarantee of an Equal Share in Divorce for Kenyan Women, <newsdeeply.com/womensadvancement/articles/2018/05/28/still-no-guarantee-of-an-equal-share-in-divorce-for-kenyan-women> accessed in 28 February 2020.
[40] *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] eKLR

Constitution that provide for equality of the parties to the marriage even after its dissolution as well as the different interpretations the Article has and the provisions of Section 7 of the Matrimonial Property act that state that contribution towards the matrimonial property need to be considered in determining such cases regarding matrimonial property, there is a major problem that needs to be addressed.

In the book, Property Law published by Strathmore Press[41], the authors weigh in on the matter by saying;

> It is very unfortunate that even with the progressive provisions of the Constitution, the issue of division of matrimonial property remains a quagmire without clear guidelines to guide the courts in determining such dispute. Inconsistency in court decisions continue as depicted by the decisions in *UMM V IMM*[42] and *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*.[43]

Therefore, because of the differences between the Constitution and the Matrimonial Property Act, the division of matrimonial property has always been murky waters to wade with different laws being used at different times. The inconsistencies of these decisions have been criticized by Katrina Juma and Charles Kanjama as they explain the history of matrimonial property in Kenya in their book.[44] The authors further go on to review these decisions in determining just division of property.

Maina Joseph Ndirangu further continues to explain the effects of Article 45(3) of the constitution with respect to matrimonial property.[45] He delves on to explain how the constitution came to render the MWPA obsolete and how its provisions have affected matrimonial disputes in the country.

1.9. RESEARCH DESIGN AND METHODOLOGY

The study will entail a desktop research. The data collected will be qualitative data. This is to be done by reading articles, books, journals, cases dealing with matrimonial property disputes in Kenya and dissertations of authors who have referred to the division of matrimonial property regime as well as referring to the Constitution of Kenya 2010.

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[41] Kariuki F *et al*, *Property Law,* 272.
[42] *UMM v IMM* [2014] eKLR.
[43] *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* Civil Appeal No. 127 of 2011.
[44] Juma K, Kanjama C, *Family Law Digest: Matrimonial Property*, Law Africa Publishing Ltd, Nairobi, 2009.
[45] Maina Joseph Ndirangu, *Reconciling Echaria v Echaria with Article 45(3) of the Constitution*, 2013.

The data will also be collected through hands on research by visiting the Strathmore University library as well as other libraries that have material regarding matrimonial property. Types of data collected will be that of primary nature, such as journals, archives, newspapers as well as secondary sources of data such as textbooks and government databases The information gathered will then be analysed by identifying basic observations or patterns in the collected data, revisiting the research objectives and identifying the questions that can be answered through the collected data and developing a framework that identifies broad ideas and assign codes to them. The importance of this analysis is to determine whether the veracity of the hypothesis.

Recommendations will then be assessed with a comparative study to the matrimonial property regime in South Africa. This is because the constitutions of both states have certain similarities between them.

1.10. CHAPTER BREAKDOWN

Chapter 1: Introduction to the study.

This chapter will seek to inform the history or how disputes of matrimonial property were handled before colonialism, during colonialism and after Kenya gained independence. This will be done by analysing cases decided by the laws governing matrimonial property during that period. It is important to discuss this history as it addresses the present events.

Chapter 2: Legal framework governing matrimonial property in Kenya.

This chapter seeks to understand how the matrimonial property regime in Kenya, as is, came into being. This will be done by analysing cases decided before as well as after the promulgation of the Constitution of Kenya 2010 as well as reading articles and journals on the matter. Owing to the fact that there have been differing interpretations of Article 45(3), this chapter will also seek to determine the true intentions of the committee when adding Article 45(3) to the Constitution.

Chapter 3: A comparative study to the matrimonial property regime in South Africa.

This chapter will analyse and compare the matrimonial property regime in our country to that of South Africa. This is because of the two countries' adoption of common law as their preferred

jurisdiction as well as the glaring similarity in the constitutions of both countries. It therefore seems accurate to have a side by side comparison in assessing and critiquing Kenya's matrimonial property regime. The importance of this comparative study is to assess whether Kenya is to adopt a more rigid system of handling disputes concerning matrimonial property.

Chapter 4: The South African Accrual System Vs The Fluidity of the Kenyan Matrimonial Property Regime

This chapter seeks to assess whether the South African Accrual System should be the guiding principle in determining matrimonial property disputes in Kenya. This chapter will also seek to address whether Section 7 of the Matrimonial Property Act of Kenya does indeed contradict the provisions of the 2010 Constitution. This will be done through analysis of its provisions with the findings of chapter two of this study so as to determine its veracity.

Chapter 5: Conclusions, findings and recommendations.

This chapter seeks to make recommendations, if any to the current matrimonial property regime in Kenya.

CHAPTER TWO

LEGAL FRAMEWORK GOVERNING MATRIMONIAL PROPERTY

2.1. INTRODUCTION

This chapter seeks to examine the matrimonial property regime within Kenya and the historical contexts behind the decisions of the provisions of the Matrimonial Property Act of Kenya.

2.2. DIVISION OF MATRIMONIAL PROPERTY BEFORE THE MATRIMONIAL PROPERTY ACT OF KENYA

Before delving into what governs matrimonial disputes in Kenya after the 2010 Constitution of Kenya and the Matrimonial Property Act of Kenya, we need to understand what the historical context behind the provisions of these statutes.

In England, before the realization of basic and fundamental human rights such as the right not to be discriminated based on any physical indifference, when a man and a woman were joined together in holy matrimony or by civil procedures, the doctrine of coverture would apply.[46] Under this doctrine, the husband and wife were viewed as one under the law. The wife lost her legal identity and with it her capacity to own property as they were incorporated into the husband under whose protection and care she would perform her duties.[47] This put the wife into a state that is commonly referred to as a 'femme covert'.[48]

In his commentary on English laws, William Blackstone digresses on the notion that as a result of this doctrine, a husband could not even gift his wife any property or even enter a covenant with her as it would assume that she was a separate being.[49] Thus, doing so would essentially be gifting himself.[50] This can also be seen in the decision in *Dibble v Hutton*[51] where a contract between a husband and a wife for the sale of jointly owned land was invalidated since in common law, they were regarded as one person.

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[46] Stretton T, Kesselring K, *Married women and the law: Coverture in England and the Common Law World*, McGill-Queen's University Press, 2013.
[47] Blackstone W, *Commentaries on the law of England*, 279
[48] Blackstone W, *Commentaries on the law of England*, 475
[49] Blackstone W, *Commentaries on the law of England*, 279
[50] Blackstone W, *Commentaries on the law of England*, 279.
[51] *Dibble v Hutton,* 1 Day 221(1804).

The English women raised their issues to the law makers and as a result introduced the Married Women's Property Act of 1882 (MWPA). The MWPA was a Statute of General Application that applied in Kenya through section 3(1)(c) of the Judicature Act.[52] The MWPA essentially altered the doctrine of coverture to allow married women the right to buy and sell property separate from her husband.[53] This was seen as a great step towards incorporating the women's need and rights to be treated equally as the man.[54]

However, section 17 of the Act, the most litigated provision of the Act, gave the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property.[55] Section 17 provided that if a question was to arise between a husband and wife over a title to or possession of property, either disputing parties may apply by summons or by any other summary to any High Court judge who may make orders with respect to the dispute as he deems fit.[56]

The introduction of the Act and its interpretations within the court system was different depending on the different judges. Lord Morris of Borth-y-Gest in *Pettit v Pettit*[57] says:

> 'The words of section 17 must be given the meaning which they had when the Act was passed……There was no provision which empowered a judge on the trial of an action between husband and wife concerning a question as to the title to property to give a decision which, however benevolently motivated, was in disregard of the law. There was no suggestion that the status of marriage was to result in any common ownership or the co-ownership of property. All this in my view, negates any idea that section 17 was signed for the purpose of enabling the court to pass property rights from one spouse to another'.

This therefore means that the court's jurisdiction was not to take away property from one person to another by following the MWPA, but to merely determine where ownership lies. It was therefore necessary for the spouse claiming property rights over the property in dispute to produce evidence over the claim. This was not to vary title to the property, but to determine the

[52] Section 3(1)(c), *Judicature Act*, CAP 8, Laws of Kenya.
[53] Blackstone W, *Commentaries on the law of England*, 475.
[54] Van Tassel E, *Women, property and politics in the nineteenth century law*, Cornell University Press, New York, 1982, 374-375.
[55] Kariuki F *et al*, *Property Law*, 265.
[56] Section 17, *Married Women's Property Act*, 1882.
[57] [1970] AC 777.

amount of compensation that should be given to the spouse based on their contribution to the property in question.[58] [59]

From the views presented by the judges in *Gissing v Gissing*[60] and the aforementioned *Pettit v Pettit*[61] case, monetary or financial contribution directly or indirectly towards the acquisition of the property in question that is registered under the name of the other spouse is where one could be entitled to getting property rights in the property. What did this then mean for our jurisdiction when judges were to determine matrimonial disputes concerning property?

In legal practice, each case is to be taken by its own merit. There are different facts that give rise to different situations. Where a property was registered in the name of one spouse, the party contesting his/her ownership had to produce evidence of contributing towards its acquisition. It is not enough for the spouse to show that she was merely present in the marriage.[62]

Moreover, the beneficial share of each spouse would also depend on their proven respective portions of financial contribution either directly or indirectly towards the acquisition of the property.[63] Where it is not known as to the amount contributed, it may be equitable to apply the maxim 'equality is equity.'[64]

Where property is registered jointly under the names of the spouses, it is deemed to have been acquired in equal shares and the court in normal circumstances must take it that such property is a family asset.[65]

2.3. WAS MONETARY CONSIDERATION THE ONLY FACTOR IN DETERMINING MATRIMONIAL PROPERTY DISPUTES?

Before the promulgation of the 2010 Constitution and the enactment of the Matrimonial Property Act, the general position with regard to matrimonial property disputes was that non-monetary

[58] *Karanja v Karanja* [1976] KLR 307.
[59] *National Provincial Bank vs Ainsworth* [1965] 3 WLR 1
[60] [1984] UKHL 3.
[61] [1970] AC 777.
[62] *Tabitha Wangechi Nderitu v Simon Nderitu Karuiki* [1998] eKLR.
[63] *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR.
[64] *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR.
[65] *CMN v AWN* [2013] eKLR.

contributions such as domestic housework and taking care of the matrimonial house did not entitle a spouse to beneficial interests over property registered in his/her spouse's name.

According to the English law of trust, a wife is only entitled to beneficial interests in the property through her financial contributions directly or indirectly towards its acquisition which is registered to her spouse's name.[66] In *Burns v Burns,*[67] it conveyed the different ways which a spouse can show contribution towards the acquisition of the property. These include:

a) By paying part of the purchase price.
b) Contributing regularly towards the mortgage installments.
c) Paying part of the mortgage.
d) Makes financial contributions to the family expenses that help the mortgage to be paid.

However, there came about a diversion from the norm in 1976 when Justice Simpson cut the ribbon for Kenyan women in their pursuit for equality within the marriage. In his decision in *Karanja v Karanja*[68] he states that;

> 'The fact that property acquired after marriage is put into the name of the husband alone and that the husband had evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust, nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both'.

This position was further re-emphasized in *Kivuitu v Kivuitu*[69] when Justice Omolo recognized that non-monetary contribution should be considered when determining a parties beneficial interest towards property in dispute.

2.4. DIVISION OF MATRIMONIAL PROPERTY IN THE CONSTITUTION OF KENYA, 2010 AND THE MATRIMONIAL PROPERTY ACT OF KENYA

2.4.1. The Constitution of Kenya 2010.

[66] *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR
[67][1984] Ch 317.
[68][1976] KLR 307.
[69][1991]2 KAR 241.

Article 45(1) of the Constitution of Kenya provides that the family is the basic fundamental unit in the society. It also provides that the family shall enjoy recognition and protection of the state.[70] Moreover, the Constitution provides that parties to a marriage are entitled to equal rights during and at the dissolution of marriage.[71]

There has been backlash as to what the Committee of Experts, when drafting the constitution, actually meant by adding Article 45(3) into the constitution. In the case of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*,[72] the Court of Appeal interpreted Article 45(3) to imply that the parties involved in a marriage have equitable rights during and after the dissolution of the marriage. Therefore, the property in contention should be divided equally between them. The maxim of equality was also used in the case of *CMN v AWN*[73] where the court ruled that the property in question is to be divided equally.

This position has however been questioned by numerous cases before and after the promulgation of the Constitution of Kenya, as well as the enactment of the Matrimonial Property Act in accordance with Article 45(4) of the Constitution which mandates parliament to enact legislation that protects the basic institution that is family.

In 1985, we see that the courts opted that contribution should be taken into account when deciding division of matrimonial property. In *Njoroge v Ngari*,[74] the court stated that:

> 'If a matrimonial property is being held in the name of one spouse, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interest'.

Contribution therefore, has been viewed as the guiding principle in determining division of matrimonial cases pre-promulgation of the 2010 Constitution with cases such as *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki*[75] and *Peter Mburu Escharia v Priscilla Njeri Escharia* [76]

[70] Article 45(1), *Constitution of Kenya*, 2010.
[71] Article 45(3), *Constitution of Kenya*, 2010.
[72]Civil Appeal No. 127 of 2011.
[73][2013] eKLR.
[74][1985] KLR, 480.
[75][1998] eKLR.
[76][2007] eKLR.

2.4.2. The Matrimonial Property Act of Kenya.

The Matrimonial Property Act, therefore sought to incorporate the guiding principle of contribution in its laws by stating that ownership of matrimonial property vests on the spouses based on their contribution towards its acquisition.[77]

Contribution however in itself is difficult to determine. For much of the decisions that have used contribution as the guiding principle, actual financial contribution has been used to gauge a spouse's property interests. This was a detriment to the stay at home spouses who took care of the house as well as the issues that arose from the union.

In *NWM v KNM*,[78] the court stated that courts must give effect to both monetary and non-monetary contribution in determining matrimonial property disputes. In *White v White*,[79] the court cited the greater awareness of the value of non-monetary contribution in the family. This position was also re-iterated in *Kivuitu v Kivuitu*[80] and *Karanja v Karanja*.[81] Non-monetary contribution was therefore included as contribution in the Matrimonial Property Act.[82]

This is the reason why we see decisions in the cases of *Agnes Nanjala Williams* as well being rejected and opposed vehemently in determining matrimonial cases. In *UMM v IMM*,[83] the court stated that:

> 'The outright split of matrimonial property without considering their contribution towards its or their acquisition(s) would encourage fortune seekers to distress this union that the constitution seeks to protect'.[84]

However, there are instances where the doctrine of equality is considered in determining such disputes. In the case of *PWK v JKG*,[85] the court stated that:

> 'Where the disputed property is not so registered in the joint names of the spouses but registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective portions of financial contribution directly or indirectly towards its acquisition. However, in cases where

[77] Section 7, *Matrimonial Property Act*, (Act No. 49 of 2013).
[78][2014], eKLR.
[79] *White v White* 200 UKHL.
[80][1991]2 KAR 241.
[81][1976] KLR 307.
[82] Section 2, *Matrimonial Property Act* (Act No.49 of 2013).
[83][2014] eKLR.
[84] Article 45(1), *Constitution of Kenya*, 2010.
[85][2015] eKLR.

each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim of 'Equality is equity'.

Therefore, there is no clear system of determining division of matrimonial property in Kenya. As such, there is no clear distinction to determine whether the provisions of the Matrimonial Property Act directly contravene those of Article 45(3) of the Constitution. This is because ideally, in Kenya, cases of this nature are to be taken by their merit. There is no rigid stance of determining matrimonial property in Kenya. This was emphasized in the case of *Francis Njoroge v Virginia Wanjiku Njoroge*[86] where the Justice Kiage stated that:

'A division of the property must be decided after weighing the peculiar circumstances of each case'.

2.4.3. Land Laws Dealing with Matrimonial Property.

Matrimonial property is governed by certain land laws that regulate the properties in question. The principle of joint tenancy, more specifically tenancy in entirety focuses on the possibility of a husband and wife holding property as a unity.[87] It flows from the doctrine of coverture where the husband and wife are to be regarded as one.[88] This form of co-ownership has not been expressly provided for by land law regimes of the country. [89]

The concept of it is however seen indirectly in our land laws such as the provisions of Section 28 of the Land Registration Act[90] that provides for spousal overriding interest and spousal consent before transferring title of property. The Act also contains provisions that state that any land obtained by a spouse for the purposes of co-ownership and is used by both or all spouses is presumed and registered as joint property unless otherwise expressed.[91] This is because a conveyance of common property, which is matrimonial property, is valid only if done by both spouses.[92]

[86]Nairobi Civil Appeal No. 179 of 2009.
[87] Kariuki F *et al*, *Property Law,* 265.
[88] Blackstone W, *Commentaries on the law of England*, 279
[89] Section 2, *Land Act* (Act No. 6 of 2012).
[90] Section 28, *Land Registration Act* (Act No.3 of 2012).
[91] Section 93(2), *Land Registration Act* (Act No.3 of 2012).
[92] Section 94(4), *Land Act* (Act No. 6 of 2012).

Moreover a matrimonial home may not be charged without the consent of the other spouse living there.[93] He/she is also entitled to receive a notice of sale by the lender in the event of default to repay the charge.[94] This was reiterated in the decision of *Kipsigis Farm Enterprises v Stephen Ngerechi & 2 others*[95] where the trial judge ruled against the validity of the charge put on the matrimonial property as the husband had not sought consent from his wife before taking a charge on their property.

[93] Section 79(3), *Land Act* (Act No. 6 of 2012).
[94] Section 96(3), *Land Act* (Act No. 6 of 2012).
[95] [2014] eKLR.

CHAPTER THREE

A COMPARATIVE STUDY TO THE MATRIMONIAL PROPERTY REGIME IN SOUTH AFRICA

3.1. INTRODUCTION

Contrary to the fluidity of matrimonial property laws in our country, South Africa has a rigid regime of determining property disputes in their jurisdiction. This is all based on the different types of marriages available to their citizens. According to the Matrimonial property act,[96] there are three matrimonial property systems available in South Africa. Matrimonial disputes are therefore resolved based on the type of system chosen by the couple upon the commencement of their union. This is crucial in determining the property rights a spouse has to the matrimonial properties in question. This chapter seeks to undertake an in-depth analysis of the South African matrimonial property regime.

3.2. MARRIAGE IN COMMUNITY OF PROPERTY

It is described as 'a universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions hold equal shares'.[97] This type of marriage implies that a husband and wife's assets and liabilities are merged into one as previously discussed in the doctrine of coverture.[98] This also includes all assets and debts accrued before the commencement of the union. Each spouse therefore has an undivided half share of the joint or communal estate. [99]

As previously mentioned, all the assets belonging to the spouses prior to the union and those they may accumulate during the union are lumped into one and fall under the joint estate. However, there are certain instances where certain assets may not be included in the joint estate[100] such as a

[96] Section 2, *Matrimonial Property Act*, (Act 88. of 1984) South Africa.
[97] Robinson J.A, '*Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution'*, 2007.
[98] Stretton T, Kesselring K, *Married women and the law: Coverture in England and the Common Law World*.
[99] Section 15, *Matrimonial Property Act*, (Act 88. Of 1984) South Africa.
[100] Preller B, The Matrimonial Property Systems.
<https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

will stipulating that an inheritance shall not form part of any joint estate. Such clauses may exclude such estates from this regime.

Liabilities are also shared or incurred by both parties during the union if the union falls under this regime. Debts, fines, cumbrances and any other forms of liability that have been incurred by any of the spouses are considered to form part of the communal estate. Each spouse also has the capacity manage the communal estate in any way they seem fit without the consent of the other. This is because, based on the rules of this regime, each spouse has equal management of the joint estate.[101] Consent therefore is not required from either of the parties when managing the communal estate.

However, there are instances when consent is required from the other spouse before binding the communal estate.[102] An example of such is for a instance, a spouse charges his/her separate estate, the creditor can lay claim over the private interest of that spouse. If the spouse's private interest does cannot cover the charge, it is only then that the creditor can law claim against the joint estate.[103]

This type of union comes about, by default, if the couple does not sign an antenuptual contract before the marriage.[104] This is the most popular of the 3 matrimonial property system as most citizens are not aware of the importance that the antenuptual contract has on their union.[105] As a result of their ignorance, South African law categorizes these marriages into this regime.

3.3. MARRIAGE OUT OF PROPERTY WITHOUT THE ACCRUAL SYSTEM

This regime of matrimonial law clearly divides the properties obtained by the parties before and during the union.[106] This is to mean that one spouse cannot claim property interests over the

[101] Section 14, *Matrimonial Property Act*, (Act 88. Of 1984) South Africa.
[102] Section 15(2), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[103]Preller B, The Matrimonial Property Systems.
<https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.
[104] Marriage in Community of Property.
<https://www.vandeventers.law/Services/Marriage-Matrimonial-Property/Community-Of-Property> accessed on 11 November 2019.
[105] *G v G*, 2016, High Court of South Africa.
[106]Preller B, The Matrimonial Property Systems.

others properties as they have no legal basis of doing so. This is to include assets and liabilities accrued before the union and during the union. They each fall within their separate estates.

The consequences of entering into this regime of matrimonial property prior to the introduction of the accrual system in 1984 was that, upon the dissolution of the union and in the absence of a divorce settlement, each party was to leave with their own assets and liabilities as had been previously agreed in their antenuptual contract.[107] This was unless the court granting the decree of divorce orders a redistribution of assets between the parties based on the Divorce Act provisions.[108]

For one to seek these orders, certain contributing factors had to be met. These include:

- The spouse seeking the order must have contributed directly or indirectly to the maintenance or the increase of the other spouse's estate during the marriage.[109]
- The court must be satisfied that by reason of such contribution, it would be equitable and just to make a redistribution order.[110]

These provisions were introduced to assist vulnerable class of women who are less likely to find employment upon divorce. Although mainly used by women in court, orders for redistribution of assets can be sought by any of the parties involved.[111]

After the enactment of the Matrimonial property act in November 1984, parties joined together through marriage out of community without the accrual system could not seek this relief. It was argued that after the enactment of the act, there were three different regimes that catered to the different facets of the law. As such, upon divorce each spouse was to stay with the assets and liabilities accrued in his/her individual estate. A spouse who contributed to the other's wealth or

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<https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

[107] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

[108] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

[109] Section 7(3), *Divorce Act*, South Africa.

[110] Section 7(3), *Divorce Act*, South Africa.

[111] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

assets will have a difficult time claiming proprietal interest of said property as contributions do not play any role if the parties are married through this regime.[112]

This is therefore, the most restrictive regime within the South African marriage laws as spouses who are left at home taking care of the children and improving the matrimonial home may find themselves distraught if the union comes to an end. This is because they will be left with nothing as they have no legal recourse to claim anything. A good example its restrictive nature is when spouses advance each other money. It is not uncommon for spouses to do so. Marriage without community regards this transaction as pure money lending with the result that the giving spouse can institute a claim against the receiving spouse for repayment of such a loan in the divorce proceedings.[113]

This regime is entered into by agreeing to an antenuptual agreement before the commencement of the marriage.

3.4. MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL SYSTEM

This regime is somewhat tandem to the previous one with a unique twist to it. It has been described as the most effective and ideal way of dealing with matrimonial property disputes.[114] In this regime, parties to the marriage have their own separate estates that store their own assets and liabilities prior to and during the union. Upon the dissolution of the union, the spouse whose estate shows no accrual or a smaller accrual that the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses.[115]

Accrual is seen as a way to ensure that both spouses in a marriage gain a fair share of the estate once the marriage domes to an end. The parties to the marriage opt into the system. Therefore,

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[112] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.
[113] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.
[114] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.
[115] Section 3, *Matrimonial Property Act*, (Act 88 of 1984) South Africa.

the parties know the parameters of the agreement. The 'sharing' of the assets is based on a calculation method provided for in the matrimonial property act. The assets that are to be included in calculating accrual of the parties is provided for in the Act.[116]

It is efficiency is in the sense that parties can choose to which assets they would like to include into the accrual system and those to be excluded. The Act, also includes assets that should not be included in the accrued estate of the spouse when calculating the assets to be shared. These assets include:

1. Any asset excluded from the accrual system under the antenuptual agreement as well as any other asset that the spouse has acquired by virtue of his/her possession of such asset.[117]
2. Any donations between the spouses other than a donation mortis causa, a gift in prospect of death.[118]
3. Any amount that accrued to the spouse by way of damages.[119]
4. Any inheritance, legacy, trust or donation which accrues to a spouse during the subsistence of his marriage as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation except when agreed to be included in the antenuptual agreement.[120]

When parties wish to enter marry through this regime, the must ensure that the commencement values of their respective estates have been verified and accepted by both parties. This is done through the antenuptual agreement that records these values and is signed by both parties for verification. These assets are based on those accrued before the commencement of the union and after its dissolution.[121]

3.5. CHANGING YOUR MATRIMONIAL PROPERTY REGIME

[116] Section 4(1) (b), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[117] Section 4(1)(b)(ii), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[118] Section 5(2), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[119] Section 4(1)(b)(i), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[120] Section 5(1), *Matrimonial Property Act*, (Act 88 of 1984) South Africa
[121] Preller B, The Matrimonial Property Systems.
<https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

Section 21 of the Matrimonial Property Act enables spouses to jointly apply to a court to change the matrimonial property system which applies to their marriage.[122] The court may grant this leave if it is satisfied that:

1. There are sound reasons for the proposed change.[123]
2. Sufficient notice of the proposed change has been given to all the creditors of the spouses.[124]
3. No other person will be prejudiced by the proposed change.[125] This is with regard to the parties to the marriage, the issues that came as a result of the marriage and all relevant stakeholders to the union.

3.6. CONCLUSION

There are numerous advantages of having a rigid matrimonial property system in place as seen in South Africa. For instance, there are few cases concerning matrimonial property disputes in the country. This is due to the rigidity of the systems that have been put in place. There are few issues for court determination as most of them have been addressed. As a consequence, there is more time and resources allocated to more serious matters.

However, with this rigidity comes issues that arise. Most spouses concentrate on the wedding ceremony itself instead of deciding which regime they opt into. As a consequence, most are not particularly happy when they have to share their assets equally when their union comes to an end. Section 21 of the Act does provide spouses the opportunity to change which regime they want their marriage to be governed by, however there are certain thresholds that have to be met which may not be agreed upon by the other spouse. As a consequence, most married couples find themselves filled with discontent when it comes to the division of their matrimonial property.

[122] Section 21(1), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[123] Section 21(1)(a), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[124] Section 21(1)(b), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.
[125] Section 21(1)(c), *Matrimonial Property Act*, (Act 88 of 1984) South Africa.

CHAPTER FOUR

THE SOUTH AFRICAN ACCRUAL SYSTEM VS THE FLUIDITY OF THE KENYAN MATRIMONIAL PROPERTY REGIME.

4.1. INTRODUCTION

This chapter seeks to weigh the impact of the Kenyan matrimonial property regime vis-a-vis the South African system of determining matrimonial property disputes. This chapter also seeks to determine whether Section 7 of the Matrimonial Property Act of Kenya is indeed unconstitutional.

4.2. THE ACCRUAL SYSTEM VS THE FLUID MATRIMONIAL PROPERTY SYSTEM

As mentioned in the previous chapter, the accrual system adopted by South Africa has brought about impeccable efficiency in determining matrimonial disputes within the country. So much so that as I conducted my research, it was difficult to find any case law regarding matrimonial disputes within its jurisdiction. This is due to the rigidity of the accrual system. Each marriage is governed by a certain matrimonial regime. Upon its dissolution, there is little to no legal recourse to the aggrieved parties due to the strict nature of the regime that the marriage has subscribed to. This has brought with it its advantages and disadvantages.

The financially weaker spouse benefits immensely if the marriage subscribes to the marriage in community regulations whilst the financially stronger spouse might feel somewhat aggrieved by the decision to bear jointly, the liabilities of his/her spouse as well as equally sharing his/her assets with their spouses.[126] In marriage out if community without the accrual system, each spouse gets to control and deal with their own assets and liabilities however they deem fit. If one spouse becomes insolvent, creditors cannot touch the assets of the other spouse. As with everything in life, there are pros and cons to any decision taken. However, the question that

[126] Preller B, The Matrimonial Property Systems. <https://www.divorcelaws.co.za/uploads/1/2/1/6/12166127/matrimonial_property_regimes.pdf> accessed on 11 November 2019.

arises is, do the benefits outweigh the disadvantages with regard to the Kenyan matrimonial property regime?

The Kenyan system is a more fluid based system. Fluid in the sense that each case is taken by its own merit[127] with more inclination towards the provisions of the Matrimonial Property Act.[128] As discussed in chapter two, we see Kenyan judges take different stances when it comes to deciding property interests in matrimonial property. But one thing is clear, there is no outright split or sharing of assets/interests as seen in South African law.

The Kenyan jurisdiction prides itself in dispensing justice to all parties involved based on what each party brought to the table. Contribution, whether it be financial or non-monetary is therefore critical in proving ones property interest over the matrimonial property in contention.[129] It is not enough just to exist in the marriage and reap the seeds of the other. Doing so would bring disrepute to the essence of marriage and with it tarnish the family to which the constitution has sworn to protect.[130] Where there is substantial contribution towards the acquisition of the property, but the exact estimation of said contribution cannot be ascertained, then the doctrine of equity is used to dispense justice to all parties involved.[131]

Therefore, I am of the opinion that the Kenyan Matrimonial regime need not change its fluid nature to that of South Africa's. The South African regime has brought about efficiency in dealing with such matters, but with it comes tremendous discontent and aggravations to the parties on the short end of the stick. With the lack of public awareness in deciding which regime the spouse want the marriage to be governed under, many spouses end up bearing liabilities and sharing assets with their spouses. The result of which cripple them financially. The antenuptual agreement is therefore the key determinant of matrimonial property disputes in South Africa. This is not the case back home. Moreover, the grounds upon which spouses can seek to change their regime are impossible to satisfy as more often than not, one spouse may not want to change the regime since the change may prejudice them.

[127] *Francis Njoroge v Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009.
[128] Section 7, *Matrimonial Property Act*, (Act No. 49 of 2013).
[129] Section 7, *Matrimonial Property Act*, (Act No. 49 of 2013).
[130] Article 45(1), *Constitution of Kenya*, 2010.
[131] *PWK v JKG* [2015] eKLR.

The Kenyan courts do not condone free loaders and joy riders to tarnish the union of marriage. In accordance with the theoretical framework governing this study, justice, that is proportional justice, is to treat individuals according to their merit. This is to mean that justice should be proportioned to the individuals based on what they deserve. In accordance with Section 7 of the Matrimonial Property Act, each party to the marriage is accorded with their merit, in terms of matrimonial property, upon the dissolution of marriage. This form of justice is what Aristotle himself deemed as fair.[132]

4.3. THE CONSTITUTIONALITY OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT OF KENYA

In the first chapter of this paper, the hypothesis of this study was to determine whether the provisions of Section 7 of the Matrimonial Property Act are indeed unconstitutional. In Chapter 2, vigorous research and meticulous reading of case law sought to answer the ambiguity left by the Committee of Experts when drafting Article 45(3) of the Constitution.

Before the promulgation of the 2010 Constitution, the matrimonial property regime was based of contribution. This was seen in the decisions rendered in cases such as *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki*, [133]*Peter Mburu Echaria v Priscilla Njeri Echaria*[134] along with numerous cases cited in chapter 2 of this research paper. All that was need to be proven was physical evidence of the contribution the contesting spouse had put towards the acquisition of the contested property.

That which was lacking, that is, provisions of non-monetary contributions to be included as contributions, were rectified in the decision of *Karanja v Karanja.*[135] Further emphasis was seen in in *Kivuitu v Kivuitu*[136]. The system put in place was therefore satisfactory as it did not prejudice any party involved in the union. It was a just system that gave each party its dues all whilst upholding the sanctity of the institution of marriage.

[132] Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.
[133][1998] eKLR.
[134][2007] eKLR.
[135][1976] KLR 307.
[136][1991]2 KAR 241.

Article 45(1) of the Constitution of Kenya provides that the family shall enjoy the protection of the state since it is a natural and fundamental unit of the society necessary for social order.[137] The collapse of this sacred institution would lead to pandemonium within the country. As such parliament was to enact legislation to curtail such events from taking place.[138] The Matrimonial Property Act is one of the aforementioned legislations that were to be enacted by parliament to ensure the security of the family. Its provisions, more so, Section 7 were not enacted with a view of contradicting Article 45(3) of the Constitution.

Considering case law, the highest case with regard to matrimonial property at the time was that of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*[139] where the Court of Appeal interpreted article 45(3) of the Constitution to mean that the property in question should be divided equally between the parties involved. There has also been compelling reasons as to why the maxim of equity should apply in resolving such disputes which have been discussed in Chapter 2 of this paper.

Adopting this position however ruins the basic principles of marriage. As stated by the Judge Kiage, adopting a position as that of the *Agnes Nanjala* case[140] would invite vagabonds and opportunists into the institution of marriage, tainting the very unit that is necessary for social order. In *PNN v ZWN*[141] he stated that;

> 'I think it would be surreal to suppose that the constitution somehow converts the state of coverture into some sort of liassez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. Our new constitutional dispensation is no safe haven for those spouses who will not pull their own weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty'.

Moreover, adding a religious view to the matter, God intended marriage to be a partnership.[142] In the book of Genesis, God created Eve as a partner for Adam. This shows that the institution of marriage was not to profit from the other, but to build one another, it was intended for support and companionship.

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[137] Article 45(1), *Constitution of Kenya*, 2010.
[138] Article 45(4), *Constitution of Kenya*, 2010.
[139] Civil Appeal No. 127 of 2011.
[140] *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* Civil Appeal No. 127 of 2011.
[141] [2017] eKLR.
[142] Heffernan C, *God's Design for Marriage* <https://www.focusonthefamily.com/marriage/gods-design-for-marriage/> accessed on 12 November 2019.

Adopting the maxim of equality goes against the very premise Article 45 which ensures the protection of the family. As such, courts have sided with the principle of contribution, which is provided for in the Matrimonial Property Act,[143] in deciding issues relating to matrimonial property. There are special circumstances when the maxim of equity is needed in resolving such disputes,[144][145] however, it should not be used as the guiding principle.

Therefore, it seems as though the Kenyan courts have accepted that Article 45(3) of the 2010 Constitution does not mean an outright split of matrimonial property upon the dissolution of the marriage. Recent Court of Appeal cases such as *PNN v ZWN,*[146] have frowned upon this idea of equity when it comes to matrimonial property. This position has been sided by judges in cases such as *TWN v FMC*[147], *GWN v FGW*[148], *JWC v LKM*[149] as well as numerous others in determining cases that concern the division of matrimonial property.

Therefore, from the Judiciary's point of view, the equality envisioned in Article 45(3) of the Constitution, was not to extend to property rights or in-rem rights within the marriage. The intentions of the Committee of Experts when they included such provisions were only to be limited to the personal rights enjoyed by the parties to the marriage. The doctrine of equity is only to be confined with such realms.

4.4. CONCLUSION

In order to determine the true intentions of the Committee of Experts when drafting Article 45(3) of the Constitution, we have to examine case law on the matter. This is done by examining the most recent decision from the highest court with jurisdiction to hear such matters. The Court of Appeal is the highest court in Kenya that has dealt with matters dealing with matrimonial property. Recent decisions such as PNN v ZWN[150] has toppled previous positions held be the

[143] Section 7, *Matrimonial Property Act,* (Act No. 49 of 2013).
[144] *PWK v JKG* [2015] eKLR.
[145] *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR.
[146] [2017] eKLR.
[147] [2018] eKLR.
[148] [2019] eKLR.
[149] [2019] eKLR.
[150] [2017] eKLR.

esteemed court when it was of the position of the outright split upon the dissolution of the marriage[151] in accordance with Article 45(3) of the Constitution of Kenya.

Therefore, the provisions of Section 7 of the Matrimonial Property Act do not contravene those of Section 7 of the Act. Moreover, as of the recent and dated cases that have resolved disputes regarding matrimonial property, contribution is seen to be the guiding principle in such disputes. This is crucial in securing the sanctity of the institution of marriage.

Furthermore, the fluid nature of the Kenyan matrimonial property regime ensures the proper dispensation of justice since the principle of contribution is not the de facto rule in deciding such cases. As previously discussed, the matrimonial property regime in Kenya decides each case in its own merit.[152] As such, there are instances where the principle of equality takes precedent over that of contribution, which is when contributions of a substantial amount cannot be ascertained. Therefore, Section 7 of the Matrimonial Property Act is constitutional.

[151] *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* Civil Appeal No. 127 of 2011.
[152] *Francis Njoroge v Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009.

CHAPTER FIVE

CONCLUSION, FINDINGS AND RECOMMENDATIONS.

5.1. INTRODUCTION

This chapter seeks to give conclude the study as well as give recommendations to the current matrimonial property landscape in the country.

5.2. FINDINGS

This study sought to find out whether the ambiguity of the current matrimonial property regime within the country could lead to a disproportionate way of dispensing justice with regard to matrimonial property. With two differing sides/laws stating two different things, the Matrimonial Property Act and the Constitution of Kenya 2010, there was need for an examination of the true intentions of the Committee of Experts when drafting the provisions of Article 45(3) of the Constitution of Kenya.

Upon examining the historical background of Kenya with regards to matrimonial property, it is clear that before the promulgation of the 2010 Constitution, contribution was seen as the guiding principle in determining such disputes. Moreover, in accordance with Article 45(4) of the Constitution of Kenya and with the intention to protect and preserve the family,[153] parliament enacted the Matrimonial Property Act with Section 7 of the Act to serve as the continuation of Kenya's previous position with regards to division of matrimonial property. The provisions of Article 45(3) of the Constitution therefore do not constitute to an equal division of matrimonial property as once previously thought.[154] The equality of the parties to a marriage envisioned in Article 45(3) of the Constitution by the Committee of Experts were only to be of personal rights and not in-rem rights.

In doing so, the research objectives of this study, that is; assessing the legal framework governing matrimonial property, assessing the constitutionality of Section 7 of the Matrimonial Property Act of Kenya and making recommendations where applicable were met. Therefore, the provisions of Section 7 of the Matrimonial Property Act are not unconstitutional. Thus testing

[153] Article 45(1), *Constitution of Kenya*, 2010.
[154] *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* Civil Appeal No. 127 of 2011.

and disproving the hypothesis of this study that the provisions of Section 7 of the Matrimonial Property Act of Kenya are unconstitutional.

5.3. RECOMMENDATIONS

As mentioned in chapter 3, the rigidity of the South African matrimonial property regime leaves a bitter taste in the mouths of those involved, more so spouses defaulted into marriage in community. With the systems put in place, there is a tremendous amount of efficiency in dealing with such cases, however one cannot help but feel used as a piggy bank to fortune as the other spouse profits from his/her sweat.

Contrary to South Africa, the fluidity of the Matrimonial property regime ensures for proper dispensation of justice equal to the views of Aristotle with regard to proportional justice,[155] distribution of goods according to merit. As depicted by Aristotle, this type of justice ensures proper and proportionate allocation of needs that may be in contention. The merit system adopted by the Kenyan system negates any resentment towards the judicial system or the laws of the land as each party is given what is rightfully his/hers based on their contribution all whilst weighing the facts of the case.

Therefore, the Kenyan matrimonial system does not need any reforms to its current provisions as it ensures a proper dispensation of justice.

[155] Aristotle, *Nichomachean Ethics*, 1130b-1132b; cf Plato, Laws, VI.757b-c.

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