

**AN ANALYSIS OF DENIAL OF WOMEN'S RIGHTS, WITH REGARD TO
ACCESS OF MATRIMONIAL PROPERTY IN KENYA**

MILDRED AOKO OKELLO


078741

Submitted in Partial Fulfilment of the Requirements of the Bachelor of Laws Degree,
Strathmore University Law School.

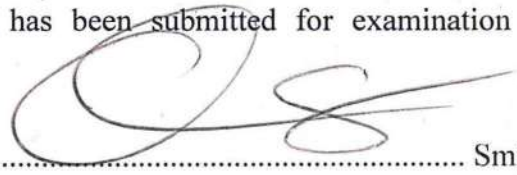
JANUARY 2018

Declaration

I, MILDRED AOKO OKELLO, 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 29/5/2018

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

Signed:  Smith Ouma 29th MAY 2018

Acknowledgements

I acknowledge the astounding input of my supervisor, Mr. Smith Ouma. His criticism, counsel and guidance were highly valuable. I would also like to acknowledge my sister, Valerie Okello, a remarkable woman dedicated to female empowerment, and her support through the course of writing this paper.

Abbreviations

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

List of Statutes

Kenyan Legislations

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 Matrimonial Causes Act, Cap 152, Laws of Kenya (repealed).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

International Instruments

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

List of Cases

1. Echaria v Echaria, Civil Appeal 75 of 2001
2. Gissing v Gissing, [1970] 2 All ER
3. I v I [1971] EA
4. Karanja v Karanja [1975] KLR
5. Kivuitu v Kivuitu, [1991] KLR
6. Nderitu v Nderitu, Civil Appeal No. 203 of 1977
7. Pettitt v Pettitt, [1970] AC

Table of Contents

Declaration.....	2
Acknowledgements	3
Abbreviations	4
List of Statutes	4
List of Cases	4
ABSTRACT	8
Chapter One: INTRODUCTION TO THE STUDY	11
1.2. Introduction.....	11
1.2. Statement of Problem.....	12
1.3. Research Objectives	12
1.4. Research Questions	12
1.5. Hypothesis.....	13
1.6. Literature Review.....	13
1.7. Theoretical Framework.....	15
1.8. Research Methodology.....	16
1.9. Chapter Break-down.....	15
1.10. Timeline of Study.....	15
Chapter Two: ACCESS TO MATRIMONIAL PROPERTY BY WOMEN: THE HISTORY	16
2.1. Introduction.....	16
2.2. History of Matrimonial Property ownership by women in Kenya.....	16
2.3. Provisional Highlights of the MWPA 1882.....	19
2.4. Highlights of the MPA 2013	20
2.5 Conclusion.....	22
Chapter Three: THE LEGAL RESPONSE TO DENIAL OF ACCESS TO MATRIMONIAL PROPERTY WITH REFERENCE TO STATUTE AND THE EFFECT ON SOCIETY.....	23
3.1. Introduction	23
3.2. Legal response to denial of Matrimonial Property.....	23

3.2.1 The Constitution of Kenya.....	23
3.2.2. MPA No. 49 of 2013.....	24
3.3. Jurisprudence from Courts.....	28
3.4 Effects of the MPA on Kenyan society.....	28
3.4.1. Concept of indirect contribution.....	28
3.4.2. Pre-nuptial agreements.....	29
3.4.3. The MPA and Islam.....	29
3.5. International Instruments.....	29
3.6 Conclusion.....	31
 Chapter Four: A COMPARATIVE ANALYSIS OF TRANSFORMATION IN MATRIMONIAL ASSET DIVISION WITH REGARD TO SPECIFIC CASE LAW, CRITIQUING THE IMPLICATION ON WOMEN’S RIGHTS IN RECENT CASES	
4.1. Introduction.....	32
4.2. Influential Common Law and precedent.....	32
4.2.1. Influence on Kenyan Interpretation of MWPA today.....	33
4.2.2. Confusion in the Kenyan interpretation of MWPA.....	35
4.3 Lack of clarity in Kenyan Legislation.....	36
4.4. Conclusion.....	37
 Chapter Five: FINDINGS, RECOMMENDATIONS AND CONCLUSION	
5.1. Introduction.....	38
5.2. Findings.....	38
5.3. Recommendations.....	39
5.4. Conclusion.....	39
BIBLIOGRAPHY AND SELECTED READINGS.....	40

Abstract

Since time immemorial, there has been an imbalance in women's and men's rights with regard to division of matrimonial property in Kenya. This study delves into the protection of women's rights to matrimonial property upon the dissolution of a marriage. The starting point of the study is the history, and what property rights were enabled to each back then, versus now. As the study is relevant to Kenya, Kenyan law and common law will be evaluated. By way of case law, the study examines how women's rights to matrimonial property are protected by the statutory provisions in Kenya, and how adequate these are.

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

Matrimonial property is that which is owned by one or two individuals who are unified by marriage which, upon the application of one of the spouses to a court, is subject to division between them.¹ Matrimonial property” means the matrimonial home, household goods and effects in the matrimonial home, or any movable or immovable property jointly owned and acquired during the marriage.² Trust property, including property held in trust under customary law, does not form part of matrimonial property.³ For centuries, inequality has prevailed amongst women accessing matrimonial assets, especially after marriage ends. Be it from 1872, with the onset of the Married Women’s Property Act, or currently, the Matrimonial Property Act of 2013 in Kenya, there have been positive developments that enable women to now access matrimonial property if a union is to come to an end. Before the adoption of Kenya’s Constitution in 2010, case law held that at separation or divorce, property was to be distributed in proportion to a spouse’s monetary contribution to that property.⁴

The Constitution gives every person the right, either individually or in association with others, to acquire and own property.⁵ The Constitution also protects equality within a marriage stating that parties to a marriage are entitled to equal rights as at the time of the marriage, during the marriage and at the dissolution of the marriage.⁶ Further, the Constitution requires Parliament to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.

¹Kanabbiran K, *Women and Law: Critical Feminist Perspectives*, SAGE Publications India, 2013, 37

²Matrimonial Property Act S2(1)

³ Matrimonial Property Act S2(1)

⁴Matrimonial Property Act S7

⁵Constitution of Kenya Ch 4. Part 2(40)(1)

⁶Constitution of Kenya Ch 4. Part 2(40)(1)

Ownership of matrimonial property vests in the spouses according to the contribution of either party towards the acquisition of that property, for instance if one purchased a car, they are technically entitled to that car upon divorce. This line of reasoning severely discriminated against women, who generally did not provide monetary contributions to the property, but provided labour and child care and typically were not involved in investments made during the marriage⁷. However, despite this evolution, there are still many cases in Kenya where women are denied the right to access matrimonial property if the union ends, or where a husband is deceased. Multiple cases display a judicial philosophy that may still hinder access to matrimonial property for women in Kenya.⁸

1.2 Statement of problem

In Kenya, women still have great difficulty accessing matrimonial property upon divorce. This is despite judicial reform and advancement in judicial philosophy that currently facilitates equality of women and men in the event of a concluded marriage. Evidence of this can be seen in past and more recent case law such as *Peter Mburu Echaria vs Priscillah Njeri Echaria*⁹ *inter alia*.

1.3 Research objective

This paper aims to achieve the following:-

1. To highlight the flaws of the legal systems in Kenya which are to blame for the discrepancy with regard to women's rights to matrimonial property in Kenya.
2. To examine customary law's provisions regarding division of matrimonial property so as to illustrate the root of the problem where women are denied the right to access of matrimonial property.

⁷IMPOWR.org: Current Legal Framework: Marital assets and property in Kenya 2014, 5

⁸*KAS v MMK* [2015] Mombasa Divorce Case No. 45

⁹*Peter Mburu Echaria vs Priscillah Njeri Echaria* [2007] eKLR

3. This paper will also seek to elucidate improvements that have been made, and more that still need to the relevant provisions of the law in order to tackle the problem of women being denied the access to matrimonial assets in Kenya.
4. This paper also seeks to outline the evolution of women's rights to access to matrimonial property according to Common Law, and provide a comparative analysis of other places that have put the provisions into effect, vis a vis the situation in Kenya currently.

1.4 Research questions

This research attempts to answer the following questions:-

- a) How has customary law hindered women's rights to matrimonial property in Kenya?
- b) How has the judiciary attempted to bridge the gap of gender inequality in cases of division of matrimonial property?
- c) Are there any other mechanisms to address the issue of sharing of matrimonial property upon divorce if the existing laws are deemed inadequate?
- d) What is the impact of the Matrimonial Property Act, 2013 on the current situation in Kenya, with regard to denial of access to matrimonial property for women?
- e) What remedies have been provided in cases where customary law has hindered women's rights to matrimonial property?

1.5 Hypothesis

In answering the above enumerated questions, this research relies on the following assumptions:-

- i) There are numerous laws dealing with sharing of matrimonial property but it is clear that there is inequality in the sharing of property upon divorce.

- ii) Women's rights are overlooked when it comes to sharing of matrimonial property and there definitely is a need to amend the laws or enact other laws that deal with sharing of matrimonial property upon divorce.
- iii) Customary law has a huge role to play in the hindrance of women's access to matrimonial property in Kenya, despite the fact that the Constitution of Kenya, 2010 guarantees the equal protection of property rights for men and women.

1.6 Literature review

This research does not present itself as a pioneer in the issues involving the subject of gender disparity in the access of matrimonial assets in Kenya, nor does it seek to be the first to extensively study the concept of denial of access to marital property in Kenya. Indeed, there are numerous distinguished scholars and researchers who have undertaken and written extensively on this subject. Similarly, there are various local and international instruments that elucidate the issue at hand¹⁰.

J.D. Ochieng' states that women are mostly the victims when it comes to the sharing of matrimonial property upon divorce.¹¹ The inequality in the sharing of such property is attributed to several factors ranging from social, cultural, religious, political and constitutional factors¹².

In order to give a background to the issue, customary law will also be discussed, not only will the provisions of customary law be explored but literature such as *Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems*¹³ will also be used. This literature will introduce the concept of customary law in Kenya, how it is still in

¹⁰Ochieng,J.D. *The Legal Framework Governing the division of Matrimonial Property in Kenya*,2013, 15

¹¹Ochieng,J.D. *The Legal Framework Governing the division of Matrimonial Property in Kenya*,2013, 7

¹²Ochieng,J.D. *The Legal Framework Governing the division of Matrimonial Property in Kenya*,2013, 7

¹³Kartuki, F., '*Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems*'. Workingpaper, StrathmoreUniversity (2015), 3

use and the contribution it makes towards the aforementioned issue regarding women's rights to property in matrimony.

International law also highlights this. Kenya is party to six of the seven core UN human rights treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁴ Consequently this research paper strictly focuses on specific treaties that give provision against discrimination of women. These are the International Covenant on Economic, Social and Cultural Rights¹⁵ and Convention on the Elimination of all forms of Discrimination Against Women.¹⁶

Under international human rights law, women have a right to own and administer property without discrimination.¹⁷ There are numerous cases where the disparities between men and women's rights to matrimonial property are highlighted. Such landmark cases in Common Law of *Gissing v Gissing*¹⁸, more locally *Karanja vs. Karanja*¹⁹ and *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge*²⁰ will be used in illustrating the background of this paper. There are more recent cases, such as *Peter Mburu Echaria vs Priscillah Njeri Echaria*²¹ and the case of *Milcah Municah Munoko v Lawrence Ochokolo Oduma*²² which shall also be used in order to demonstrate whether the problem still persists today, or whether the law and judicial attitude towards the problem have progressed. The implications of these cases are that they act as precedents that shape the past, present and future of the fate of women seeking rights to matrimonial property in Kenya.

¹⁴Ochieng, J.D. *The Legal Framework Governing the division of Matrimonial Property in Kenya*, 2013, 16

¹⁵ ICESR 1996

¹⁶ CEDAW 1979

¹⁷ Universal Declaration of Human Rights 1948

¹⁸ *Gissing v Gissing* (1971) AC 886

¹⁹ *Karanja vs. Karanja* [1976] KLR 307)

²⁰ *Wanjiru Kimani v Evanson Kimani Njoroge* [1998] civil appeal 79 of 97

²¹ *Peter Mburu Echaria vs Priscillah Njeri Echaria* [2007] eKLR

²² *Milcah Municah Munoko v Lawrence Ochokolo Oduma* [2016] eKLR

Statutes and case law are not the only sources of law with respect to women's marital property interests. Kenya has a large and diverse array of ethnic groups, many of which follow their own customary law. According to the Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women, not all but many, customary laws are disadvantageous to women in respect of property rights and inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage²³

1.7 Theoretical framework

Few concepts are frequently invoked in contemporary political discussions as human rights. This human rights theory posits that every person has rights inherent to all human beings regardless of their nationality, sex, national or ethnic origin, colour, religion, or any other status.²⁴ Every human being is equally entitled to their human rights without discrimination. These rights are interdependent and indivisible. The human rights theory draws heavily from natural law and natural law thinkers. This theory was developed by classical Greek philosophers, such as Aristotle.

One of the approaches to human rights theory holds that human rights exist in order to protect the basic dignity of human life and invokes the notion of striving for the dignity that makes human life worth living. This is affirmed in the United Nations Declaration on Human Rights and the writings of Jack Donnelly.²⁵ However, the inherent weakness of this approach lies in trying to identify the nature of this dignity. Dignity is a very elastic concept and if human rights are meant to be universal standards then the inherent dignity that is supposed to be

²³ Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women (39th Sess., 2007), para. 10, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), <http://www.un.org/womenwatch/daw/cedaw/39sess.ht>

²⁴ Accessed from <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed on 17/1/2017

²⁵ Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, 17.

protected should be common. Without this commonality, dignity cannot suffice as the ultimate goal of human rights.²⁶ Respecting dignity entails respecting the rights of women to access what they rightfully should, which, in this paper, is matrimonial property.

The freedom from discrimination is widely accepted as a human right. This is envisaged in the Constitution of Kenya which stipulates that everyone is equal before the law and has the right to equal protection and equal benefit of the law.²⁷ This embodies the theory of equality.

The Constitution further states that the state shall not discriminate directly or indirectly against another person on ground of races, gender, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.²⁸ In this context, emphasis is placed on gender as it is often women who face discrimination when it comes to the right being discussed.

In the Kenyan context, positive laws have been put in recognizing this freedom. It is further backed by international law which provides for human rights.²⁹ However, where natural law and human rights thinkers see this right as unalienable, positive law does not consider this freedom absolute and provides for its limitation in as far as it is reasonable and justifiable in a democratic society.³⁰ Various principles such as human dignity and freedom should be considered when limiting these freedoms. Furthermore, relevant factors must also be taken into account such as the purpose, nature and extent of the limitation.³¹ In this context, the limitation is on the right to access of matrimonial property for women.

Thus, this paper will look at the law on the denial of women to the access of matrimonial property, the international context and the legal responses that are necessary to curb it. Not only will this work seek to answer the research questions, it will elucidate the theories of

²⁶ Accessed from <<http://www.aphrc.org/insidepage/?articleid=574>> accessed on 17/1/2017

²⁷ Article 27(1), Constitution of Kenya (2010)

²⁸ Article 27(3), Constitution of Kenya(2010)

²⁹ Article 18, Universal Declaration of Human Rights (1998)

³⁰ Article 24(1), Constitution of Kenya(2010)

³¹ Article 24(1) (b) and (c), Constitution of Kenya (2010)

human rights, equality and of dignity as these are theories that can be linked to the manner in which women are treated in the event of matrimony or its end.

1.8 Research methodology

This paper is based on the collection of qualitative data obtained from secondary and tertiary resources. These include but are not limited to, analysis of information from online resources, journals and articles, reports from relevant organizations, text books, case law, news articles, and statute. Further, works by scholars, professionals and commentaries by those with vast knowledge in the appropriate fields applicable will be used and cited.

The choice of research methodology which, as mentioned, will entail utilizing the Married Women's Property Act, Matrimonial Property Acts of 1882, 1984 and 2013, defines the scope and will provide a comparative analysis that will serve to display how drastically times have changed, and how Kenya can ensure that flaws in this area of law can be avoided when women seek to exercise their rights to matrimonial property.

There are numerous cases that will be analysed, such as landmark cases in Common Law of *Gissing v Gissing*.³² more locally *Karanja vs. Karanja*³³ and *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge*.³⁴ There are more recent cases, such as *Peter Mburu Echaria vs Priscillah Njeri Echaria*³⁵ and the case of *Milcah Munich Munoko v Lawrence Ochokolo Oduma*³⁶ which shall also be analysed. In order to demonstrate whether the problem still persists today, or whether the law and judicial attitude towards the problem have progressed.

1.9 Chapter break- down

³² *Gissing v Gissing* (1971) AC 886

³³ *Karanja vs. Karanja* [1976] KLR 307)

³⁴ *Wanjiru Kimani v Evanson Kimani Njoroge* [1998] civ app 79 of 97

³⁵ *Peter Mburu Echaria vs Priscillah Njeri Echaria* [2007] eKLR

³⁶ *Milcah Munich Munoko v Lawrence Ochokolo Oduma* [2016] eKLR

The research will be broken down into five chapters. Chapter one is the introduction which comprises the background of the research laying out the research objectives, methodology as well as literature review. Chapter two seeks to handle the history regarding the subject of women's access to matrimonial property in a customary law setting, and in common law.. Chapter three will explore the legal responses to denial of access to matrimonial assets with reference to statute, legal instruments and case law, and their implications in society. Chapter four tackles the comparative case study, jurisprudence and findings/evidence of different cases Chapter five concludes the entire work and provides recommendations whilst trying to include ameliorations that ought to be made in order to curb flaws in the legal system that hinder this important right to access of matrimonial property.

1.10 Timeline of the study

Chapter	Research Period	Due date
Chapter 1	5/ 2017	6/2017
Chapter 2	8/ 2017	9/ 2017
Chapter 3	9/ 2017	10/2017
Chapter 4	11/2017	11/2017
Chapter 5	12/2017	1/2018

CHAPTER TWO

ACCESS TO MATRIMONIAL PROPERTY BY WOMEN: THE HISTORY

2.1 Introduction

Women's access to land and housing are an important development issue. Secure property rights for women can have an impact on intra-household decision making, income pooling, and women's overall role and position in the community.³⁷ Moreover, land is a particularly critical resource for a woman when the household breaks down; for example, in the event of migration, war, abandonment, divorce, polygamous relationships, illness, or death.³⁸ As a cornerstone of development, secure land ownership confers direct economic benefits as a key input into agricultural production, income from rental or sale, and as collateral. However, women may not fully participate in these benefits as members of a household if they do not share formal, or customarily recognized property rights over the land and/or housing.³⁹

This chapter looks at the history behind access to matrimonial property by women and the law thereof in a customary and in common law settings.

2.2 The History of Matrimonial Property Ownership by Women in Kenya

The law on matrimonial property hitherto was governed by the English Married Women's Property Act of 1882. This statute was passed with the intention of reducing the legal inequalities that had existed between men and women.⁴⁰ Under the provisions of the Act, married women had the same rights over their property as unmarried women. The Act therefore allowed a married woman to retain ownership of ante-nuptial property and to keep

³⁷US Agency for International Development, *Study on Women and Property Rights: Project Best Practices*, October 2006 at 1.

³⁸ US Agency for International Development, *Study on Women and Property Rights: Project Best Practices*, at 1.

³⁹ US Agency for International Development, *Study on Women and Property Rights: Project Best Practices* at 1.

⁴⁰ US Agency for International Development, *Study on Women and Property Rights: Project Best Practices* at 1

separate ownership of property acquired during the marriage.⁴¹ Previously, this property would automatically have become the property of the husband. The Act provides that “in any question between husband and wife as to the title or possession of property, either of them may apply to the High Court or a county court and the judge may make such order with respect to property in dispute As he thinks fit.”⁴² It was at one time thought that power given to a judge in this section to make such orders as he thinks fit provided statutory justification for doing what was thought to be just between the parties without having regard to the technicalities of property law.⁴³

However this changed in 1965. Previously, courts would rely on section 17 to vary property rights in matrimonial property but after 1965 in the *National Provincial Bank v. Ainsworth*⁴⁴ the House of Lords was of the opinion that section 17 only provides a method or a summary procedure for determining proprietary rights between spouses but the courts cannot vary those rights using section 17. Courts cannot confer rights which were previously not there. In this case the husband had deserted the wife and it was conceded that she had a right to be provided with housing by her husband under what was known as the deserted wife’s equity. It was also conceded that she could have obtained an injunction from the court to stop the husband from interfering with her rights to housing. However, the husband had mortgaged the house without her knowledge and he subsequently became insolvent. The House of Lords held that her right to housing was not a proprietary right within the meaning of section 17 and therefore was incapable of binding the bank to which the house had been mortgaged. In other words, the wife was relying on section 17 to fight the bank interest in the house but it was held that her rights could not qualify.

⁴¹ Section 1, *The Married Women’s Property Act* (1882)

⁴² Section 17, *Married Women’s Property Act*, (1882)

⁴³ Onyango E.J, *The Development Of Married Women’s Rights In Property In Kenya: The Matrimonial Property Act of 2013 (No. 49 Of 2013)* 2014, 6.

⁴⁴ *National Provincial Bank v. Ainsworth* [1965] AC 1175.

As a result of this, the law in England was changed in 1970 under the Matrimonial Property and Proceedings Act of 1970. Under Section 37 it is provided that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which either or both of them have a beneficial interest, the husband or wife so contributing shall if the contribution is of a substantial nature be treated as having then acquired by virtue of his/her contribution a share or an enlarged share as the case may be in that beneficial interest. The important thing is that this section recognizes indirect contributions to the property.

Trevelyan J in the authority of *I v I*⁴⁵ declared that the MWPA was applicable in Kenya by virtue of it being a statute of general application in England on 12 August 1897. This therefore was adopted into Kenya the common law of property between spouses that had been developed in England over decades.

In as much as the decision in *I v I*⁴⁶ settled the application of the MWPA in Kenya, it is the decisions in *Petit v Pettit*⁴⁷ and *Gissing v Gissing*⁴⁸ that effectively settled the principles to be applied in an application of the MWPA.

In *Petit*, it was decided that Section 17 of the MWPA was merely a procedural provision and did not entitle the Courts to vary the existing rights of parties.⁴⁹ *Gissing*, then developed the ratio in *Petit*, and opened the way to pleading resulting, implied or constructive trusts in a MWPA application. This Act applied to all Kenyan marriages regardless of the regime under which the marriage was conducted in. This included the marriages that were conducted under the Customary or Muslim law.⁵⁰

⁴⁵ *I v I* [1971] EA 276.

⁴⁶ *I v I* [1971] EA 276.

⁴⁷ *Pettit v Pettitt* [1969] All ER 2.

⁴⁸ *Gissing v Gissing* [1970] 2 All ER 780.

⁴⁹ This was after Lords made a survey of numerous decisions of the English Court of Appeal of the previous two decades in which the beneficial interests of spouses in a former matrimonial home had been the subject of consideration not only in MWPA applications but in other types of proceedings.

⁵⁰ Customary law marriages as in the case of *Karanja v. Karanja* (1976) 1 KLR 389 and in Muslim marriages as in the case of *Amina O. Abdulkadir v Ravindra N. Shah Alias Raveen Mohamed Nashri* (2006) eKLR

In Kenya under this law, there existed intricate and contradictory court decisions relating to the rights of women in customary law marriages, joint properties, and land solely registered in the husband's name when even the wife has contributed.

Even as such, there existed various family laws that were scattered in different statutes depending on the race and religion of a Kenyan. The Matrimonial Causes Act,⁵¹ The Marriage Act,⁵² The Mohammedan Marriage Divorce and Succession Act,⁵³ The Hindu Marriage and Divorce Act,⁵⁴ The African Christian Marriage and Divorce Act,⁵⁵ were still on the statute book, alive and kicking and in the process creating havoc in the matter of personal laws until the Marriage Act 2014 which is preamble as an Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes was enacted. This Act repealed The Marriage Act Cap 150; The African Christian Marriage And Divorce Act Cap 151; The Matrimonial Causes Act Cap 152; The Subordinate Court (Separation and Maintenance) Act Cap 153; The Man Marriage And Divorce Registration Act Cap 155; The Mohammedan Marriage Divorce and Succession Act Cap 156; and The Hindu Marriage and Divorce Act Cap 157.

The courts have from time to time in determining issues of this nature urged the legislature to enact a law to govern this critical subject. This has been the case in the *Kivuitu vs. Kivuitu*⁵⁶ and *Echaria vs. Echaria*⁵⁷ cases.

As envisaged under the Matrimonial Property and Proceedings Act of 1970 under its Section 37, in determining how matrimonial property is to be divided, the courts have always considered the contributions made by the claiming spouse and fairness. These contributions

⁵¹ *The Matrimonial Causes Act* (1931)

⁵² *The Marriage Act* (1902)

⁵³ *The Mohammedan Marriage Divorce and Succession Act* (1920)

⁵⁴ *The Hindu Marriage and Divorce Act* (1960).

⁵⁵ *The African Christian Marriage and Divorce Act* (1977)

⁵⁶ *Kivuitu vs. Kivuitu* [1991] Kenya Appeal Reports 241.

⁵⁷ *Echaria v Echaria* [2007] eKLR Nairobi Civil Appeal No. 75 of 2001.

can either be direct or indirect. Direct contributions are actual monetary contributions towards the acquisition of these family assets.

Indirect contributions range from one being a good spouse to taking care of household expenses as the other spouse accumulates or saves money to buy the family assets. The court in *Echaria vs. Echaria*⁵⁸ opined that one has to prove contribution in order to get a share of the matrimonial property to enable the court to determine the level of contribution of the alleging party, so as to be able to divide the property equitably. It is very difficult for one to prove indirect contribution, and the extent to which one contributed to the acquisition and the improvement or development of matrimonial property.⁵⁹

It is important and imperative to note that Kenya was still relying on section 17 of the Married Women Property Act before the enactment of the Matrimonial Property Act of 2013 as upheld in the decision of *National Provincial Bank v Ainsworth*⁶⁰ that it does not confer jurisdiction on the court to vary title but only to determine rights in matrimonial property.

2.3 Provisional Highlights of the Married Women's Property Act of 1882

The MWPA allowed women to hold property separately from their husbands.⁶¹ This included any wages, earnings, money, and property so gained or acquired by her as aforesaid.⁶² This basically means that any property acquired after the Act by a woman married before the Act will be held by her as *feme sole*.⁶³

A married woman shall also be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her

⁵⁸ *Echaria v Echaria* [2007] eKLR Nairobi Civil Appeal No. 75 of 2001

⁵⁹ Onyango E.J, *The Development Of Married Women's Rights In Property In Kenya: The Matrimonial Property Act of 2013 (No. 49 Of 2013)* 2014, 6.

⁶⁰ [1965] AC 1175.

⁶¹ Section 1(1), *The Married Women's Property Act (1882)*

⁶² Section 5, *The Married Women's Property Act (1882)*

⁶³ Section 5, *The Married Women's Property Act (1882)*

husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.⁶⁴ Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.⁶⁵

Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.⁶⁶

A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories.⁶⁷

Under section 18, married women can be an executrix or a trustee of an estate and she can perform the duties of a trustee or an executrix as provided for by the law of succession.⁶⁸

The legal personal representative of any married woman in respect of the Married Women's Property Act shall in respect of her separate estate have the same rights and liabilities and be

⁶⁴ Arika Oyuga A, 'An appraisal of the Matrimonial Property Act, 2013' Unpublished Research submitted in partial fulfilment of the requirement for the award of the Bachelor of Laws (LL.B) Degree of Moi University 2015.

⁶⁵ Section 1(2) *The Married Women's Property Act* (1882)

⁶⁶ Arika Oyuga A, 'An appraisal of the Matrimonial Property Act, 2013' Unpublished Research submitted in partial fulfilment of the requirement for the award of the Bachelor of Laws (LL.B) Degree of Moi University 2015. The author provides the meaning of '*feme sole*' as a single woman, taken to include unmarried women, widows, divorcees, and married women living independently and separately from their husbands.

⁶⁷ Section 13, *The Married Women's Property Act* (1882)

⁶⁸ Section 18 *The Married Women's Property Act* (1882)

subject to the same jurisdiction as she would be if she were living.⁶⁹ The lacunae in law and the ambiguities in the existing law saw the need to enact a better legislation- the Matrimonial Property Act, 2013.

2.4 Highlights of the Matrimonial Property Act, 2013⁷⁰

The Matrimonial Property Act is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. The Act extinguishes the provisions and the operations of the MWPA.⁷¹

This Act exempts persons who profess the Islamic faith from its provisions. Such persons are to be governed by the Islamic law.⁷²

Of keen interest is the distinction of what constitutes matrimonial property. The interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.⁷³ Matrimonial property includes:- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.⁷⁴

The Act further exempts trust property, including property held in trust under customary law, as not being part of matrimonial property.⁷⁵ Equally, parties to an intended marriage may enter into an agreement before their marriage to determine their property rights⁷⁶ and a party to such an agreement may apply to the Court to set aside the agreement and the Court may set

⁶⁹ Section 23, *The Married Women's Property Act* (1882)

⁷⁰ *Matrimonial Property Act*, (2013) (No. 49 of 2013)

⁷¹ Section 19, *Matrimonial Property Act* (2013)

⁷² Section 3, *Matrimonial Property Act* (2013)

⁷³ Section 5, *Matrimonial Property Act* (2013)

⁷⁴ Section 6, *Matrimonial Property Act* (2013)

⁷⁵ Section 6(2), *Matrimonial Property Act* (2013)

⁷⁶ Section 6(3), *Matrimonial Property Act* (2013)

aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.⁷⁷

Acquisition of interest in property by contribution is now statutorily provided for. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.⁷⁸

Consideration of customary law principles is also evident in this Act. The following principles of customary law shall apply in the division of matrimonial property- The customary law relating to divorce or dissolution of marriage; the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.⁷⁹

Lastly, the position regarding gifts in a marriage is now settled in the following terms:-“ there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.”⁸⁰

2.5 Conclusion

The enactment of the MPA 2013 was a response to a long-standing issue. This came after many years of a struggle to have a new matrimonial property legislation that was awake to the societal developments that have taken place. It was prudent that we have a good law that would promote the principle of equality, and help bring consistency in the courts decisions as regards the issues of distribution of matrimonial property.⁸¹

⁷⁷ Section 6(4), *Matrimonial Property Act* (2013)

⁷⁸ Section 9, *Matrimonial Property Act* (2013)

⁷⁹ Section 11, *Matrimonial Property Act* (2013)

⁸⁰ Section 15, *Matrimonial Property Act* (2013)

⁸¹ For example, the courts have given out conflicting jurisprudence with regard to contribution of a spouse in the determination of proprietary rights in matrimonial property. In the case of *Kivuitu v Kivuitu* [1991] 2 KAR 241,

There had been a need to have legislation addressing legal gaps and to set guidelines for the division of property. New legislation needs to include clear rules for the division of matrimonial property at separation or divorce; and, a framework requiring spousal consent for particular transactions involving matrimonial property.⁸²

Gaps in divorce law would limit women from equally sharing property at the dissolution of marriage. At separation or divorce, Kenyan women rarely take away their equal share. Further, the tradition of registering property, including matrimonial property, solely in the name of the husband becomes a serious obstacle when women sought to lay claim in the matrimonial property accrued during the subsistence of their union. Clearly, the law lacked guidance on the division of matrimonial property.⁸³

the court held that indirect contribution of women should be taken into account when dividing matrimonial property. Yet, in the case of *Echaria v Echaria* [2007] eKLR, the court stepped away from the decision in *Kivuitu v Kivuitu* and held that indirect contributions didn't suffice.

⁸² Arika Oyuga A, 'An appraisal of the Matrimonial Property Act, 2013' Unpublished Research submitted in partial fulfillment of the requirement for the award of the Bachelor of Laws (LL.B) Degree of Moi University 2015, 10.

⁸³ Arika Oyuga A, 'An appraisal of the Matrimonial Property Act, 2013' Unpublished Research submitted in partial fulfillment of the requirement for the award of the Bachelor of Laws (LL.B) Degree of Moi University 2015, 10.

CHAPTER THREE

THE LEGAL RESPONSE TO DENIAL OF ACCESS TO MATRIMONIAL PROPERTY WITH REFERENCE TO STATUTE, LEGAL PROVISIONS, AND THEIR EFFECTS ON SOCIETY

3.1 Introduction

The conversation around the drafting and eventual promulgation of the Constitution of Kenya 2010 has breathed a wind of legal transformation from the old order to a new era where human rights are firmly enshrined in the Bill of Rights.

The Constitution of Kenya 2010, the Matrimonial Property Act No 49 of 2013 and various international instruments attempt to comprehensively codify the rights and responsibilities of spouses in relation to matrimonial property during and at the time of dissolution of a marriage.⁸⁴ This chapter explores the responses to denial of access to matrimonial property with reference to legal instruments, and its effects in the society.

3.2 The Legal Responses to Denial of Matrimonial Property

3.2.1 The Constitution of Kenya 2010

The Constitution is the *grundnorm* in the hierarchy of laws in Kenya.⁸⁵ Any law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.⁸⁶

Article 10 of the Constitution of Kenya 2010 is the lens through which the Constitution is interpreted and appreciated. In particular, the article provides: *The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.*

⁸⁴ Onyango E.J, *The Development Of Married Women's Rights In Property In Kenya: The Matrimonial Property Act of 2013 (No. 49 Of 2013)* 2014, 6

⁸⁵ Article 2(1), *Constitution of Kenya 2010*.

⁸⁶ Article 2(4) *Constitution of Kenya, 2010*

The national values and principles of governance include; patriotism, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, protection of the marginalized; and sustainable development. The right to equal matrimonial property enhances human dignity of the parties to a marriage⁸⁷.

The right to equality of parties to a marriage from the time of, during and at the dissolution thereof is inviolable.⁸⁸ Its limitation is subject to the provisions of article 24 of the Constitution.⁸⁹

The equality of parties before the law and the in the temple of justice is guaranteed under article 27(1) of the Constitution. Equality before the law includes the full and equal enjoyment of all rights and fundamental freedoms.⁹⁰

Most importantly is the right under article 27(3) to the effect that women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres⁹¹. The right to equal share of matrimonial property is categorized under economic, cultural and social spheres. It is economic in the sense that upon the dissolution of a marriage, the parties need financial stability to continue with their daily lives without it affecting them adversely be it socially or economically⁹². Equally, despite the dissolution of the marriage, issues to the marriage will in most occasions be in dire need of financial support hence the need for access to the matrimonial property.

⁸⁷ A Feminist Critique of the new Family laws in Kenya, https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya, accessed on 20th October 2017

⁸⁸ A Feminist Critique of the new Family laws in Kenya, https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya, accessed on 20th October 2017

⁸⁹ Article 24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law

⁹⁰ Article 27(2), *Constitution of Kenya*.

⁹¹ Article 27 (3), *Constitution of Kenya* 2010

⁹² A Feminist Critique of the new Family laws in Kenya, https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya, accessed on 20th October 2017

Further, the right to matrimonial property finds another backing in the constitution,⁹³ every person has the right to acquire and own property in any part of Kenya.

Equally, the Constitution provides that the State shall not discriminate against any person on any ground, including gender, marital status, health status, ethnic origin, age, religion or gender.

3.2.2 *The Matrimonial Property Act No 49 of 2013*

The MPA attempts to comprehensively codify the rights and responsibilities of spouses in relation to matrimonial property. Before, the MWPA1882⁹⁴ provided for the rights and responsibilities of spouses in relation to matrimonial property.

The Matrimonial Property Act is meant to provide for the rights and responsibilities of spouses. This Act bridged the gaps that were in the previous legislation; the MWPA.⁹⁵

The new statute has a host of concepts that borrow heavily from the spirit of the Constitution. For example, the Constitution of Kenya provides that parties to a marriage are entitled to equal rights at the time of, during and after marriage.⁹⁶ The Act further states that the ownership of matrimonial property vests in the spouse' equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if their union is dissolved.⁹⁷ This contradicts the earlier provision.

The Act⁹⁸ defines "contribution" to mean monetary and non-monetary contribution and includes domestic management of the matrimonial home; child care; companionship; and management of family business or property.⁹⁹

⁹³ Article 40, *Constitution of Kenya* 2010

⁹⁴ A United Kingdom Statute of General Application Applied in Kenya by virtue of Section 3(1) (c) of the Judicature Act Cap. 8.

⁹⁵ Section 19, *The Matrimonial Property Act*, 2013.

⁹⁶ Article 45(3), *Constitution of Kenya* 2010.

⁹⁷ Section 7, *The Matrimonial Property Act*, 2013.

⁹⁸ *The Matrimonial Property Act*, 2013

⁹⁹ Section 2, *The Matrimonial Property Act*, 2013.

A matrimonial home is defined as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home, and includes any other attached property¹⁰⁰. This extends to any property attached to the matrimonial home.¹⁰¹

For the purposes of the Act, matrimonial property entails the matrimonial home or homes; household goods and effects in the home or homes; any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.¹⁰²

With regard to ownership of matrimonial property, property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided (not equally) between the spouses if they divorce or their marriage is otherwise dissolved as seen in the *Echaria*¹⁰³ case,¹⁰⁴ especially where there is no Prenuptial Agreement.¹⁰⁵

Furthermore, the Act introduces Property rights in polygamous marriages¹⁰⁶. It states that where a polygamous marriage is dissolved, the matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives considering any contributions made by the man and each of the wives¹⁰⁷. However, where there's agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then that wife shall own the respective property equally with the husband without the participation of the other wives.¹⁰⁸

¹⁰⁰ Section 6, *The Matrimonial Property Act, 2013*

¹⁰¹ Section 2, *The Matrimonial Property Act, 2013*.

¹⁰² Section 6(1), *The Matrimonial Property Act, 2013*.

¹⁰³ *Echaria v Echaria* [2007] eKLR Nairobi Civil Appeal No. 75 of 2001

¹⁰⁴ Section 7, *The Matrimonial Property Act, 2013*.

¹⁰⁵ A prenuptial Agreement or sometimes referred to as an ante-nuptial agree is defined as a written contract between two people who are about to marry, setting out the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is later dissolved. Definition available at <<http://legal.dictionaty.thefreedictionary.com/Prenup>> accessed on 30 September, 2016.

¹⁰⁶ Section 8 (1), *The Matrimonial Property Act, 2013*

¹⁰⁷ Section 8 (1)(b), *The Matrimonial Property Act, 2013*

¹⁰⁸ Section 8, *The Matrimonial Property Act, 2013*.

Customary law principles form an integral part of Kenyan cultural practices and traditions. Upon division of property between spouses, the Act provides that the customary law of the communities in question shall, in accordance with the Constitution,¹⁰⁹ be taken into account including the customary law relating to dissolution of marriage; the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and the principles relating to access and utilization of ancestral land by a wife or wives or former wife or wives.¹¹⁰

The Act protects both spouses in situations where one spouse sells the matrimonial property without the knowledge of their spouse. It provides that, an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by sale, gift, lease, or mortgage.¹¹¹ This means that a sale agreement of matrimonial property by one spouse unilaterally is voidable. Further, a spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution/ or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.¹¹²

Situations whereby one spouse evicted their spouse from the matrimonial home have come to a statutory end as this has been made illegal by the Act¹¹³, except by court order.¹¹⁴ However, the only instances when a spouse shall be evicted from the matrimonial home by any person is on the sale of any estate or interest in the matrimonial home in execution of a decree; by a trustee in bankruptcy; or by a mortgagee or chargee in exercise of power of sale or other

¹⁰⁹ Article 2(4), *The Constitution of Kenya*, 2010; Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

¹¹⁰ Section 11, *The Matrimonial Property Act*, 2013.

¹¹¹ Section 12(1), *The Matrimonial Property Act*, 2013.

¹¹² Section 12(2), *The Matrimonial Property Act*, 2013

¹¹³ Section 12(3), *The Matrimonial Property Act*, 2013

¹¹⁴ Section 12(3), *The Matrimonial Property Act*, 2013

remedy given under any law.¹¹⁵ Also, the matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.¹¹⁶

A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person. This application shall be made in accordance with such procedure as may be prescribed; may be made as part of a petition in a matrimonial cause; and may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.¹¹⁷

With regard to spousal liabilities, any liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it. However, any liability that was reasonably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree.¹¹⁸

Parties to a marriage shall share equally any liability incurred during the subsistence of the marriage for the benefit of the marriage; or reasonable and justifiable expense incurred for the benefit of the marriage.¹¹⁹

Marriage does not affect the right of either spouse to own, or dispose of any property other than matrimonial property. This Act provides that any agreement between the spouses before the marriage, marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.¹²⁰

The Act equally addresses presumptions regarding property acquired during marriage to the effect that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse;

¹¹⁵ Section 12(4), *The Matrimonial Property Act*, 2013.

¹¹⁶ Section 12(5), *The Matrimonial Property Act*, 2013.

¹¹⁷ Section 17, *The Matrimonial Property Act*, 2013.

¹¹⁸ Section 10(1) and (2), *The Matrimonial Property Act*, 2013.

¹¹⁹ Section 10(3), *The Matrimonial Property Act*, 2013.

¹²⁰ Section 13, *The Matrimonial Property Act*, 2013.

and in the names of the spouses jointly, there shall be rebuttable presumption that their interests in the matrimonial property are equal.¹²¹

The Act attaches no liability for antecedent debts of a spouse. A spouse is not liable, solely by reason of marriage, for any personal debt contracted by the other spouse prior to their marriage.¹²² What does this mean for banks? It means that the banks have to pay attention to the rights of the spouse of the borrower. They have an indirect obligation and/or duty to ensure that they protect the spousal rights.¹²³

3.3 Jurisprudence from Courts in addressing denial of Access to Matrimonial Property

Courts have begun to interpret and give effect to the Matrimonial Property Act 2013, which is a transformative step in the right direction for Kenya. After the new Constitution was adopted, case law on marital property and property rights upon the dissolution of marriage began to evolve.¹²⁴ On May 10, 2013, Lady Justice Mary M. Gitumbi ruled in favor of a women's equal right to marital property. In that case the husband had made 100% of the monetary contributions to the family home and sought 100% ownership of that home, but the Judge ruled that "[t]he legal provisions in force now [under the new Constitution] require this court to apply the principles of equality instead. This Court is duty bound to share the Suit Property equally between the Plaintiff and the Defendant."¹²⁵

3.4 Effects of the Matrimonial Property Act in the Society

3.4.1 The Concept of Indirect Contribution

The Act¹²⁶ has introduced the concept of acquisition of interest in property by contribution, whereby one spouse acquires property before or during the marriage. The property acquired

¹²¹ Section 14, *The Matrimonial Property Act*, 2013.

¹²² Section 63, *The Matrimonial Property Act*, 2013.

¹²³ Chigiti J, 'Kenya: New Law Guides Distribution of Matrimonial Property' (19 February, 2014) available at <<http://allafrica.com/stories/201402190710.html>> accessed on 30 June 2015.

¹²⁴ MWE Team, 'Current Legal Framework: Marital assets and Property in Kenya', (8 April 2017) available at <http://www.impowr.org/content/current-legal-framework-marital-assets-and-property-kenya#footnoteref23_ea6hg4p> accessed on 30 June, 2015.

¹²⁵ *C.M.N v A.W.M* [2013] eKLR.

¹²⁶ The Matrimonial Property Act 2013

during the marriage does not become matrimonial property. However, if the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.¹²⁷ In as much as this concept had already been developed in case law,¹²⁸ it is advancement in the sense that the drafters of this legislation saw it fit to have it clearly stipulated in statute.

3.4.2 Prenuptial Agreements

Pre-nuptial agreements were not legal in Kenya prior to the Matrimonial Property Act 2013. It is now possible for spouses to enter into pre-nuptial agreements to determine their property rights before marriage-thanks to the Act. The introduction of pre-nuptial agreements is a way of safeguarding properties from the possibility of being embroiled in any future divorce proceedings of a family member.

Parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.¹²⁹ A party to a prenuptial agreement may appeal to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is unjust.¹³⁰

3.4.3 The Matrimonial Property Act and Islam

The application of Islamic law to persons who profess the faith in matters relating to personal status, marriage, divorce and inheritance is recognized under the Constitution.¹³¹ Here, the MPA provides that Muslims can opt to either, be bound by the MPA;¹³² or have matrimonial property governed by Muslim law. There are exceptions to the general application of Islamic

¹²⁷ Section 9, *The Matrimonial Property Act*, 2013.

¹²⁸ *Kivuitu v Kivuitu*. (1991) eKLR 241

¹²⁹ Section 6(3), *The Matrimonial Properties Act* 2013.

¹³⁰ Section 6(4), *The Matrimonial Properties Act* 2013

¹³¹ Article 170 (5), *The Constitution of Kenya*, 2010; The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

¹³² Section 3, *The Matrimonial Properties Act* 2013.

law¹³³. The Matrimonial Property Act provides that notwithstanding Muslim law, customary law or any other law to the contrary, a married woman has the same rights as a married man: to acquire, administer, hold, control, use, and dispose of movable or immovable property; to enter into a contract; and to sue and be sued in her own name¹³⁴.

3.5 International Instruments

Kenya has ratified many international and regional human rights instruments. To this end, it is a party to six of the seven core UN human rights treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹³⁵ Consequently this research paper deliberately focuses on specific treaties that give provision against discrimination of women.

These are the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) and Convention on the Elimination of all forms of Discrimination against Women (1979) (CEDAW).¹³⁶

Under international human rights law, women have a right to own and administer property without discrimination (UDHR).¹³⁷

Everyone is entitled to rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹³⁸. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to

¹³³ Section 6, *The Matrimonial Properties Act 2013*

¹³⁴ Section 6, *The Matrimonial Properties Act 2013*

¹³⁵ See Kenya Human Rights Commission, 'Towards equality and anti-discrimination, *An Overview of International and Domestic Law on Anti-Discrimination in Kenya.*' (2010) at 2.

¹³⁶ *Convention on the Elimination of All Forms of Discrimination Against women*, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), entered into force 3 Sept. 1981, G.A. Supp. (No. 46), (hereinafter **CEDAW**)

¹³⁷ *Universal Declaration of Human Rights* is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

¹³⁸ *Universal Declaration of Human Rights* is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.¹³⁹ The implication of such provisions is that women are free from discrimination as access to the rights and freedoms in the Declaration is for all, regardless even of gender.

Further article 17 (1) states that 'Everyone has the right to own property alone as well as in association with others.' whereas article 17(2) No one shall be arbitrarily deprived of his property.

Further article 17 (1) states that 'Everyone has the right to own property alone as well as in association with others.' while article 17(2) provides that No one shall be arbitrarily deprived of his property.

CEDAW Convention is a landmark international agreement that affirms principles of fundamental human rights and equality for women around the world. It is a blueprint for each country to achieve progress for women and girls. Article 13 gives provision for economic and social life. It affirms that women have equal rights to family benefits, financial credit, and participation in recreational activities. Article 14(2) (g) gives effect to outlawing discrimination of rural women by affirming "equal treatment in land and agrarian reform." Article 15 also provides for equality before the law. Women and men are equal before the law. Women now have the legal right to enter contracts, own property, and choose their place of residence. Article 16 stipulates that within the family, both spouses have equal rights in the "ownership, acquisition, management, administration, enjoyment and disposition of property." Soft-law instruments have also been adopted by the United Nations. For instance, Resolution 15(1998) of the Sub-Commission on the Promotion and Protection of Human Rights stated that discrimination against women with respect to acquiring and securing land constitutes a violation of human rights law, and urged governments to amend and/or repeal

¹³⁹ *Universal Declaration of Human Rights* is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

discriminatory laws and policies and to encourage the transformation of discriminatory customs and traditions.¹⁴⁰

3.6 Conclusion

Spouses to a matrimonial union are now protected under Kenyan law. The promulgation of the Constitution 2010, the enactment of the Matrimonial Property Act 2013 and the ratification of various instruments has ushered in transformation in the area of matrimonial property. This chapter has explored the presupposition that the Matrimonial Property Act is an Act sufficiently providing for the rights and responsibilities of spouses in relation to matrimonial property especially the division or allocation of matrimonial property upon dissolution of such unions.

The effect of these laws is that spouses in a dissolved union, especially women, are the biggest beneficiaries of the Act in a predominantly patriarchal society.

¹⁴⁰ UN Resolution 15 (1998) of the Sub-Commission on the Promotion and Protection of Human Rights, 'Women and the Right to Land, Property and Adequate Housing' (1998), at paragraphs (1 and 3).

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF TRANSFORMATION IN MATRIMONIAL ASSET DIVISION WITH REGARD TO SPECIFIC CASE LAW, AND A CRITIQUE ON THE IMPLICATIONS ON WOMEN'S RIGHTS IN MORE RECENT KENYAN CASES

4.1 Introduction

For the duration of the period of colonialism, and in subsequent years after independence, Kenyan courts were heavily reliant on precedent set out by British courts, owing to common law¹⁴¹. These decisions have played a key role in development of jurisprudence on the division of matrimonial property¹⁴². This chapter seeks to analyse, on a case by case basis, the way in which matrimonial property has been handled over the years. It is a look into the evidence of transformation by way of precedents or case law that paved a way for favourable conditions with regard to women's rights to access matrimonial property, both in Kenya and the English courts that Kenya has derived much of its common law influence from. Furthermore, an evaluation of recent cases will reveal whether or not the law and precedent has grown favourable to women in Kenya.

4.2 Influential Common Law Provisions and Precedent

There are cases which set the precedent for the use of the English Married Women Property Act of 1882 in Kenya. For instance, in the case of *I v J*¹⁴³, discussed in chapter two of this dissertation, the court held that the Married Women's Property Act was applicable in Kenya as a statute of general application, as ordained by section 3 of the Judicature Act.¹⁴⁴ The Act also affirmed that a married woman had the capacity to own property separately from

¹⁴¹ Onyango E.J, *The Development Of Married Women's Rights In Property In Kenya: The Matrimonial Property Act of 2013 (No. 49 Of 2013)* 2014, 6

¹⁴² K. Freyda, *The Division of Matrimonial Property in Kenya: A Feminist Approach* (1)2017 available at <https://su-plus.strathmore.edu/bitstream/handle/11071/5226/> accessed on 28 November 2017

¹⁴³ *I v J* (1971) EA 27

¹⁴⁴ Section 3, Judicature Act, Cap 8 Laws of Kenya

her husband.¹⁴⁵ It also granted power to the court to consider the respective shares of the parties to the property in the event of dissolution of marriage.¹⁴⁶

In terms of precedent, the landmark case of *Gissing v Gissing*¹⁴⁷ aforementioned in chapter two of this dissertation, plays an influential role. In the ruling, the court held that where there was no agreement between the spouses regarding the matrimonial home, as to the beneficial interest of the other spouse, the question of whether that spouse had a beneficial interest would be dependent on the law of trust¹⁴⁸. It was also held that there was no distinction to be drawn in law between the position where a spouse makes direct contribution to the purchase of the property and where either the husband or the wife makes indirect contribution¹⁴⁹. In this context, the share of the contributing spouse would be proportionate to the contributions, either of the direct payments for the property or a fair estimate of their indirect contribution determined by the courts¹⁵⁰.

The English Courts' Interpretation of Section 17 of the Married Women's Property Act of 1882 was also reflected in the *Pettitt* case discussed prior,¹⁵¹ as it was evidence of a transformation in the legislation which favoured women.¹⁵² Upon dissolution of the marriage, there was an issue presented by the former spouses; the question arose, of whether the decorations would entitle the husband to a beneficial interest in the property¹⁵³. It was held that a husband was not entitled to an interest in his wife's property merely because he had

¹⁴⁵ Section 3, Judicature Act, Cap 8 Laws of Kenya

¹⁴⁶ K. Freyda, *The Division of Matrimonial Property in Kenya: A Feminist Approach* (1)2017 available at <https://su-plus.strathmore.edu/bitstream/handle/11071/5226/> accessed on 28 November 2017

¹⁴⁷ *Gissing v Gissing* (1971) AC 886

¹⁴⁸ *Gissing v Gissing* (1971) AC 886

¹⁴⁹ V. J. Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 2014.

¹⁵⁰ *Gissing v Gissing* (1971) AC 886

¹⁵¹ *Pettit v Pettit* (1969) 2 All ER 385.

¹⁵² K. Freyda, *The Division of Matrimonial Property in Kenya: A Feminist Approach* (1)2017 available at <https://su-plus.strathmore.edu/bitstream/handle/11071/5226/> accessed on 6 January 2018

¹⁵³ K. Freyda, *The Division of Matrimonial Property in Kenya: A Feminist Approach* (1)2017 available at <https://su-plus.strathmore.edu/bitstream/handle/11071/5226/> accessed on 6 January 2018

done in his free time jobs which husbands are usually expected to do¹⁵⁴. The House of Lords also stated that section 17 of the Married Women's Property Act was a purely procedural provision which did not entitle the court to vary the existing proprietary rights of the parties. Further, the status of the marriage did not result in any common ownership or co-ownership of the property and usage of the term, family property, was devoid of any legal meaning unless it referred to assets separately owned by one of the spouses¹⁵⁵.

4.2.1 Kenyan interpretation of the Married Women's Property Act today

There are numerous cases in Kenya whereby access to matrimonial property, for both men and women has been put in question. However the scope of this chapter is limited to a few key cases within Kenyan jurisdiction, and over the years, there have been ameliorations in both legislature and case law that sometimes provide a safety net for women upon dissolution of marriage. Whereas customary traditions would be highly unfavourable for women in Kenya, evidenced in cases such as *Hortensiah Wanjiku Yawe v Public Trustee*¹⁵⁶, where it was established that the status of a married woman may enable her to qualify for maintenance or share in the estate of the deceased husband¹⁵⁷, common law has contributed to more favorable conditions for women in Kenya upon dissolution of a marriage in circumstances such as death or divorce.¹⁵⁸

In *Peter Mburu Echaria vs Priscillah Njeri Echaria*¹⁵⁹ the decision was that one has to prove contribution in order to get a share of the matrimonial property to enable the court to determine the level of contribution of the alleging party, so as to be able to divide the property equitably. It is very difficult for one to prove indirect contribution, and the extent to which

¹⁵⁴ *Pettit v Pettit* (1969) 2 All ER 385.

¹⁵⁵ *Pettit v Pettit* (1969) 2 All ER 385.

¹⁵⁶ *Hortensiah Wanjiku Yawe v Public Trustee Civil Appeal No. 13 of 1976*

¹⁵⁷ *Hortensiah Wanjiku Yawe v Public Trustee Civil Appeal No. 13 of 1976*

¹⁵⁸ *Hortensiah Wanjiku Yawe v Public Trustee Civil Appeal No. 13 of 1976*

¹⁵⁹ *Echaria v Echaria* [2007] eKLR Nairobi Civil Appeal No. 75 of 2001

one contributed to the acquisition and the improvement or development of matrimonial property.¹⁶⁰ At that time, Kenya was still relying on section 17 of the Married Women Property Act before the enactment of the Matrimonial Property Act of 2013 as upheld in the decision of *National Provincial Bank v Ainsworth*¹⁶¹ that it does not confer jurisdiction on the court to vary title but only to determine rights in matrimonial property.¹⁶²

Using an example of an older case, the Kenyan case of *Karanja v Karanja*¹⁶³ is one that applied the principles which the aforementioned case of *Gissing* set out. As per the facts of this case, Mr. and Mrs. Karanja acquired several properties during the marriage that were registered in the name of the husband. One property was acquired using Mrs. Karanja's money, while the others with her direct and indirect contribution. The issue that was brought before court was whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in a salaried employment.¹⁶⁴

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

In the subsequent case of *Kivuitu v Kivuitu*,¹⁶⁵ the question arose of whether the non-monetary contribution of a housewife would equate to indirect financial contribution of a wife in salaried employment.¹⁶⁶ This case involved a husband who went abroad and left his wife in charge of obtaining an alternative matrimonial home. Mrs. Kivuitu paid a deposit for the new

¹⁶⁰ Onyango E.J, *The Development Of Married Women's Rights In Property In Kenya: The Matrimonial Property Act of 2013 (No. 49 Of 2013)* 2014, 6.

¹⁶¹ *National Provincial Bank v Ainsworth* [1965] AC 1175.

¹⁶² V. Sirma, *Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent*, LL.M Thesis, University of Nairobi, 201

¹⁶³ *Karanja v Karanja* [1976] KLR 307)

¹⁶⁴ Maina, W.M., *Marriage and Succession: A Conflict Precipitated by the Inclusion of Section 3(5) Into the Law of Succession Act Cap. 160. Laws of Kenya*. LLB. Dissertation University of Nairobi, 1992

¹⁶⁵ *Kivuitu v Kivuitu* Civil Appeal 26 of 1985, (1991) eKLR

¹⁶⁶ *Kivuitu v Kivuitu* Civil Appeal 26 of 1985, (1991) eKLR

property using moneys obtained from a business owned Mr. Kivuitu. The husband paid the balance from his salary and the property was registered in their joint names.¹⁶⁷

When divorce proceedings begun between the two, the wife applied for the matrimonial home to be sold and the proceeds to be shared between them. The court of Appeal held that the fact that the property was registered in the joint names of the husband and wife meant that each party owned undivided equal shares therein.¹⁶⁸ Further, section 17 of the Act did not give the right of a sale but a determination and declaration of the wife's share in the property.¹⁶⁹

4.2.2 Confusion in the Kenyan interpretation of the Married Women's Property Act

Despite promulgation of change from customary laws that would often render it difficult for a woman to own or inherit her husband's property upon death or divorce, there have been disadvantageous instances due to a lack of clarity. In the much more recent case of *Milcah Munica Munoko v Lawrence Ochokolo Oduma*¹⁷⁰, Mrs. Munoko, under Certificate of Urgency, filed a Notice of Motion Application together with an Originating Summons Application both dated 26th February, 2016, seeking to cease sale of property that had been acquired during her marriage to Mr. Oduma. This property entailed a motor vehicle, four apartments and a parcel of land.¹⁷¹

It was the respondent's contention that although Section 17 of the MPA states that an Applicant is to make such Applications to Court in accordance with the procedures as prescribed,¹⁷² the Act has not expressly given any procedure to that effect. Judge M.W. Muigai noted that indeed, the Matrimonial Property Act does not give the procedure or the mode of institution of any such proceedings under the Act and the same has thus been left to

¹⁶⁷ *Kivuitu v Kivuitu* Civil Appeal 26 of 1985, (1991) eKLR

¹⁶⁸ K. Freyda, *The Division of Matrimonial Property in Kenya: A Feminist Approach* (1)2017 available at <https://su-plus.strathmore.edu/bitstream/handle/11071/5226/> accessed on 6 January 2018

¹⁶⁹ *Kivuitu v Kivuitu* Civil Appeal 26 of 1985, (1991) eKLR

¹⁷⁰ *MilcahMunicaMunoko v Lawrence OchokoloOduma*[2016] eKLR

¹⁷¹ *MilcahMunicaMunoko v Lawrence OchokoloOduma*[2016] eKLR

¹⁷² *MilcahMunicaMunoko v Lawrence OchokoloOduma*[2016] eKLR

the parties and the Courts. It followed therefore that there was no explicitly outlined procedure to be followed in instituting proceedings under the Act and hence, the Court could not dismiss a litigant on the basis that he or she ought to have instituted such proceedings using a particular mode as opposed to another.¹⁷³ This case illustrates the lack of clarity in a year as recent as 2016, when one ought to assume that interpretation of the Act would be clear and favorable to not just women, but both parties by determining each party's contribution.

Furthermore, interpretation of this piece of common law legislation has been questioned in the Kenyan context. In the case of *PNN v ZWN*,¹⁷⁴ Justice Patrick Kiage contended that although equal sharing of property would be unfair to the spouse who is deemed to have contributed more, there are also parties who do not fulfill their obligations when it comes to non-monetary contributions.¹⁷⁵ It was stated that the dispensation is no safe haven for spouses who will not pull their weight. Also, the judge stated that legislation regarding division of matrimonial property should not be "an avenue to early riches by men who would rather reap from rich women, or women who see in wealthy men an adieu to poverty"¹⁷⁶. This presents the issue of women taking advantage of the aforementioned legislation, as it is no secret that certain spouses may claim to have made non-monetary contributions in order to claim a larger share upon dissolution.¹⁷⁷

4.3 Lack of clarity in Kenyan legislation

Although the Married Women's Property Act has been applied many times in Kenyan case law, there is still a lack of clarity in terms of a way to establish each spouse's contribution in a marriage, which can be detrimental to not just women but both parties. Under *Article 45*

¹⁷³ *MilcahMunicahMunoko v Lawrence OchokoloOduma*[2016] eKLR

¹⁷⁴ *PNN v ZWN* [2014] eKLR

¹⁷⁵ *PNN v ZWN* [2014] eKLR

¹⁷⁶ *PNN v ZWN* [2014] eKLR

¹⁷⁷ *PNN v ZWN* [2014] eKLR

(3)¹⁷⁸ of the Constitution of Kenya, 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. In the case of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*,¹⁷⁹ the court 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.¹⁸⁰ It 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.¹⁸¹ However pursuant to Article 68¹⁸²¹⁸³ Parliament is obliged to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, there is hope that in time Parliament will rise to the occasion and enact such a law.¹⁸⁴

4.4 Conclusion

It is quite clear that the current situation in Kenya has changed over time, as customary law was tweaked by common law in the onset of colonialism. Over the years, as evidenced by the cases above, one can see that the approach towards division of matrimonial property has shifted from one that was disadvantageous to women, who were dependants, to an equal division according to the contribution of the respective parties. One can credit this with the onset of shifting roles over time, as women have become contributors in the household due to female employment rates increasing in Kenya over time. Whereas many women still face uncertainties, and rulings often make it hard for those with non-monetary contributions to benefit highly, the fact still remains that Kenya is getting to a point where both genders are being evaluated and allocated matrimonial property in equally, not one gender over another.

¹⁷⁸ Constitution of Kenya, 2010

¹⁷⁹ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] eKLR

¹⁸⁰ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] eKLR

¹⁸¹ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] eKLR

¹⁸² Constitution of Kenya, 2010

¹⁸³ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] eKLR

¹⁸⁴ *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* [2011] eKLR

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Introduction

The main purpose of this study was to discuss the sharing of matrimonial property upon dissolution of marriage, and to establish whether or not there has been transformation in this realm. Previously, women in Kenya were widely known to have their rights infringed when it came to their rights to access matrimonial property. Various chapters of the study explore the background and transformation in legislation regarding this subject.

5.2. Findings

The case for this study was that women often have unequal rights to access of matrimonial property in Kenya. Since time immemorial, it has been common knowledge that men are the breadwinners, and women often make non-monetary contributions to the matrimony.

The first objective of the study was to identify the history of the legal framework on the division of matrimonial property. As such, Chapter One was a background and introduction to the issue to be explored.

Chapter Two was a look historical development of the laws on division of matrimonial property from the colonial period to the promulgation of the 2010 Constitution. The provisions that laid the foundation for the study were Article 45(3) of the Constitution and Section 7 of the Matrimonial Property Act.

The third objective was to compare the laws and precedent in Kenya with common law that Kenya has derived a lot of influence from. Chapter three examined the matrimonial property reforms over time and all the relevant legal instruments that Kenya utilizes in establishing that both parties in a marriage have access to.

Not only was the aim of this study to explore the journey towards a system that favours women, it was also to recommend reform in the law relating to sharing of matrimonial property upon divorce and as such, the study points out that the courts should construe the provisions of the Constitution and the Matrimonial Property Act in a manner that achieves substantive equality.

5.3. Recommendations

By way of the legal theories explored, it would be fair to recommend that courts should take into consideration the enormous input of women in terms of child birth, child care, taking care of the home, cooking and other roles in the house. Women should be left in position which enables them to support themselves and lead a normal life in the event of a divorce.

Parliament needs to amend the Matrimonial Property Act to state how the forms of nonmonetary contributions listed in the Act should be quantified in order to determine the share of the matrimonial property that a party can claim when the marriage is terminated. Section 7 of the Matrimonial Property Act, which states that ownership of matrimonial property vests in the spouses according to their contribution, should be amended to recognize other forms of contribution towards maintenance of property. Parliament should also develop a standard system of division of matrimonial property instead of leaving a wide discretion to the courts in determining parties' shares to matrimonial property.

5.4. Conclusion

The country has come a long way in protecting women from discrimination in the acquisition, ownership and management of property in general and not just matrimonial property. However, some ambiguities within the current legal framework still leave women, as the

weaker financial parties in marriage, vulnerable. The hypothesis of the study, which was that women are inadequately protected when it comes to the division of matrimonial property, has been demonstrated.

BIBLIOGRAPHY

BOOKS

1. Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, (London: Blackwell, 1989).
2. Clark B (ed) *Family Law Service* (2012).
3. Cotran E, *Restatement of African Customary Law: Laws of Marriage and Divorce*, (1968) Sweet and Maxwell, London.
4. Gray & Symes, *Real Property and Real People: Principles of Land Law*, Butterworths, London, 1981.
5. Heaton J *South African Family Law* 3 ed (2010).
6. Joubert WA (ed) *The Law of South Africa* (2006).
7. Kanjama Charles and Juma Katarina, *Family Law Digest on Matrimonial Property*, (Law Africa, 2013).
8. Kelly Weisburg, *Feminist Legal Theory: Foundations*, (Temple University Press, 1993).
9. Lumumba P.L.O, Mbondeyi Morris and Odero Steve, *The Constitution of Kenya: Contemporary Readings*, Law Africa, Nairobi, 2013.
10. MacKinnon Catherine, *Consciousness Rising in: Towards a Feminist Theory of the State*, Cambridge: Harvard University Press (1989).
11. Martha Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen Law and Business, 1999).
12. Murray C. (ed) *Gender and the New South African Legal Order* (1994).

13. Robinson JA, Human S and Boshoff A, Introduction to South African Family Law.
14. Tom Ojienda, Conveyancing Law and Practice, (2009).
15. Trevor May, An Economic and Social History of Britain (New York: Longman, 1987).
16. William Blackstone, Commentaries on the Laws of England, 1756.

JOURNAL ARTICLES

1. Bonthuys E, "Family Contracts" 2004, South African Law Journal, 881.
2. Claudia Zaher, "When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture" Law Library Journal Vol 94.
3. E.A Archampong, Matrimonial Property Division at Marriage Breakdown: The way forward, KNUST Journal, Vol. 4.
4. Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, Georgetown Journal of International Law.
5. P. Kameri-Mbote and M.Nzomo, The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya 2002: Have the Hens finally come home to roost for Kenyan women? University of Nairobi Law Journal (1) 2004, available at <http://www.ielrc.org/content/a0408.pdf>.
6. Patricia Kameri-Mbote, "Gender Considerations in Constitution-Making: Engendering women's rights in the legal process" University of Nairobi Law Journal (2003) Available at <http://www.ielrc.org/content/a0303.pdf>.

REPORTS, DISCUSSION PAPERS AND OTHER WRITING

1. A Feminist Critique of the new Family Laws in Kenya,

https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya.

2. A Feminist Critique of the new Family laws in Kenya,

https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya.

3. Akinyi Nzioki, Gender Aspects of Land Reform; Constitutional Principles, Kenya Land Alliance, (2002) Published at www.kenyalandalliance.or.ke

4. Customary Law and Women's Rights in Kenya, available at

<http://theequalityeffect.org/wpcontent/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>.

5. Diana Lee-Smith, "My House is my Husband – A Kenyan Study of Women's Access to Land and Housing", Lund University Press (2010).

6. Double Standards; Women's Property Violations in Kenya. Available at

https://www.hrw.org/reports/2003/kenya0303/kenya0303-02.htm#P184_25151

7. Family Law Reform in Kenya; a feminist critique,

https://www.academia.edu/8462856/A_Feminist_Critique_of_the_New_Family_Law_Regime_in_Kenya.

8. Federation of Women Lawyers Training Handbook.

9. FIDA-Kenya available at http://fidakenya.org/?page_id=39.

10. Gillian Lowndes, 'The Need for a Flexible and Discretionary System of Marital Property Distribution in the South Africa Law of Divorce'.
11. Hiam Brinjikji, "Property Rights of Women in Nineteenth-Century England" available at <http://www.umd.umich.edu/casl/hum/eng/classes/434/geweb/PROPERTY.html>.
12. Kenya Human Rights Commission, 'Towards equality and anti-discrimination, An Overview of International and Domestic Law on Anti-Discrimination in Kenya.' (2010) Available at <http://www.khrc.or.ke/publications/64-an-overview-of-international-anddomestic-law-on-discrimination-in-kenya-1/file.html>.
13. Lilian Adawo, "History of Feminism in Kenya", 2010.
14. Mogammad Shamiel Jassiem, Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes, LLM Dissertation, 2010 University of Western Cape.
15. Nancy Baraza, "The Philosophy and Historical Development of Family Law in Kenya" .
16. Nancy Baraza, Family law reforms in Kenya: an overview, presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30 April 2009
17. Patricia Kameri-Mbote, 'The land has its owners! Gender issues in land tenure under customary law in Kenya' IELRC working paper International Environmental Law Research Centre (2005 – 9) at 1. Available at <http://www.ielrc.org/content/w0509.pdf>
18. Perpetua Karanja, "Women's Land Ownership Rights in Kenya" Available at <http://scholar.valpo.edu/twls/vol10/iss1/6>

19. Rachel Ablow, "One Flesh, One Person and the 1870 Married Women's Property Act"
Available at http://www.branchcollective.org/?ps_articles=rachel-ablow-one-flesh-oneperson-and-the-1870-married-womens-property-act.
20. Reg Graycar, "Matrimonial Property Law Reform and Equality for Women: Discourses in Discord?" Sydney Law School Legal Studies Research Paper No. 07/38. 2007.
21. Stanford Encyclopedia of Philosophy, available at
<http://plato.stanford.edu/entries/equality/#DefCon>.
22. Vayonda Jepchumba Sirma, Lending on the Security of Matrimonial Property in Kenya: The Issue of Spousal Consent, LL.M Thesis, University of Nairobi, 2014.
23. Winifred Kamau, "Customary Law and Women's Rights in Kenya: Moving Forward into an Era of Equality", 2014.
24. Women's Land and Property Rights in Kenya - Moving forward into an era of equality: A Human Rights Report and Proposed Legislation available at
<http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Women-propertyrights.pdf>.