

of equals.² When a partnership—in this case, a marriage—ends, there should typically be a fair and equal division of marital assets.³ Theoretically, allocating property according to each party's contribution seems like a simple task. Comparing contributions that are fundamentally different from each other in practice, however, poses a number of difficulties.⁴ The process of assigning a monetary value to non-monetary contributions presents similar challenges.⁵ The courts were tasked with establishing some kind of guidelines on how matrimonial property was divided between couples upon divorce because there was no statute specifying applicable principles in Kenya's colonial and postcolonial periods regarding the distribution of matrimonial property.⁶ This paper traces the legal evolution of matrimonial property division in Kenya and the current jurisprudence on the subject.

2.0 History of Matrimonial Property Division in Kenya

In the legal evolution of Kenya, significant changes have occurred concerning matrimonial property and the rights of spouses.⁷ Prior to the colonial era, customary law governed the distribution of marital assets, denying wives legal entitlement to their husbands' property.⁸ The formal regulation of marital asset distribution after divorce only took shape during colonization with the enactment of the Married Women's Property Act (MWPA) on August 18, 1882.⁹ Originating in the United Kingdom and subsequently implemented in Kenya, this legislation aimed to empower married women, granting them autonomy over their assets, fostering independence from their husbands, and acknowledging their contributions to the community and economy.¹⁰ The MWPA bestowed married women with the authority to possess and manage property, including the ability to acquire, transfer, and

2 Leong Wai Kum, 'The Just and Equitable Division of Gains Between Equal Former Partners in Marriage' (2000) *Singapore Journal of Legal Studies* 208.

3 *Ibid.*

4 Patrick Parkinson, 'Reforming the Law of Family Property' (1999) 13 *Australian Journal of Family Law* 117.

5 Peter Juma, "Division Of Matrimonial Property In Kenya: Joo V Mbo Revisited" Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315886#:~:text=Juma-,Peter,Juma&text=An%20equal%20distribution%20of%20marital,a%20wide%20range%20of%20issues.<Accessed on 29th October 2023>.

6 Ruth A. Odhiambo and Maurice Oduor, 'Gender Equality' in Lumumba P.L.O, Mbondeyi Morris and Odero Steve, *The Constitution of Kenya: Contemporary Readings* (2013) pg.113.

7 *Ager P & N Blenda*, "Splitting the Difference: Supreme Court Hands Down a Landmark Decision on Matrimonial Property Rights in Kenya" Oraro & Company Advocates 2023, available at <<https://www.oraro.co.ke/splitting-the-difference-supreme-court-hands-down-a-landmark-decision-on-matrimonial-property-rights-in-kenya/>> (accessed on 2 July 2023).

8 *Ibid.*

9 Married Women Property Act [1882].

10 *Ibid.*

inherit assets.¹¹ Additionally, it conferred the right to contract, initiate legal proceedings, and be parties to legal actions.¹²

In the post-colonial era, various inherited rules governing marriage and divorce, such as the Marriage Act, the African Christian Marriage and Divorce Act,¹³ the African Christian Marriage and Divorce Act,¹⁴ the Hindu Marriage and Divorce Act,¹⁵ the Mohammedan Marriage, Divorce and Succession Act,¹⁶ and the Matrimonial Causes Act. Women in Kenya often struggled to claim their rightful share of the marital estate upon the dissolution of marriages, frequently facing eviction and being able to take only the clothes on their backs.

Efforts to address this situation were initiated by the government, including the consolidation of family law rules and the establishment of two commissions in 1967 to study laws governing marriage, divorce, and succession.¹⁷ These commissions aimed to ensure equal access to property for both men and women during and after marriage.¹⁸ However, the proposed Marriage Bill of 1985, which sought to grant spouses equal rights in matters such as child custody, divorce, and the division of marital property, faced rejection in Parliament. Reasons for the rejection included opposition to interference with a man's right to correct his wife, objections to adultery becoming a punishable civil wrong, resistance to independent divorce proceedings, and opposition to a wife's right to object to her husband taking a second wife.¹⁹ The Matrimonial Causes Act outlined grounds for divorce but lacked specificity on the rights each spouse had to marital property that needed to be shared. Consequently, women had to rely on extensive court discretion, often resulting in unfavorable rulings regarding the contribution of women to marital property.²⁰

11 Ibid.

12 Ibid.

13 The Marriage Act, 150 Laws of Kenya (repealed).

14 The African Christian Marriage and Divorce Act, (1931) Cap 151, (repealed).

15 Hindu Marriage and Divorce Act, (1960) Cap 157, (repealed).

16 Cap 156, Laws of Kenya.

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

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

19 *Kameri-Mbote P & Nzomo M*, "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*, 2004.

20 The Matrimonial Causes Act, (1941) Cap 152(Kenya).

3.0 Current Legal Framework

3.1 International Law on Matrimonial Property Rights

The 2010 Constitution of Kenya stipulates that international treaties and conventions, once signed and ratified by Kenya, are integral components of Kenyan law.²¹ The case of *JAO v NA* underscored the importance of Articles 2(5) and (6) in addressing gaps and playing a complementary role in matrimonial property rights law.²² Kenya, having signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 9 March 1984, is bound by its provisions. CEDAW mandates state parties to ensure, on the basis of equality, identical rights for both spouses concerning property ownership, acquisition, management, administration, enjoyment, and disposal, whether acquired freely or for valuable consideration.²³

Furthermore, Kenya, a signatory to the Universal Declaration of Human Rights (UDHR) on 31 July 1990, commits to upholding the right of women of full age, without limitations based on race, nationality, or religion, to marry and establish a family. Women are entitled to equal rights in marriage, during its duration, and at its dissolution according to the UDHR.²⁴ In addition, Kenya signed the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) on 17 December 2003. Article 7(d) of the Maputo Protocol explicitly asserts that, "In cases of separation, divorce, or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage."²⁵

3.2 Constitution of Kenya

The Constitution's preamble underscores equality as one of the six fundamental values that should underpin governance.²⁶ This declaration is not merely aspirational but carries legal weight within the text, explicitly designating human dignity, equity, social justice, inclusiveness, equality, non-discrimination, and protection of the marginalized as national values and principles of governance.²⁷ These principles are integral in applying and interpreting the Constitution, other laws, and in formulating or executing policy decisions.²⁸ The Constitution renders customary laws invalid if they contradict its provisions.

21 Constitution of Kenya 2010, art 2(5) & (6).

22 *JAO vs NA* [2013] eKLR.

23 Convention on the Elimination of All Forms of Discrimination Against Women, art 6(1) (h).

24 Universal Declaration of Human Rights, art 16 (1).

25 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, art 7(1) (d).

26 Constitution of Kenya, 2010, Preamble.

27 *Id*, art 10.

28 *Id*, art 2(4).

Article 40 serves as the starting point for matters concerning matrimonial property, affirming the right of every person to acquire and own property.²⁹ The promotion of values such as equality and equity is emphasized in interpreting the Bill of Rights.³⁰ The Constitution further declares that every individual is equal before the law, possessing the right to equal protection and benefit under the law.³¹ Equality encompasses the full and equal enjoyment of all rights and fundamental freedoms.³² Article 45(3) of the Kenyan Constitution explicitly states, "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and at the dissolution of the marriage." This provision reinforces the commitment to equality within the institution of marriage, spanning its inception, duration, and termination.³³

3.3 *Marriage Act, 2014*

Enacted in 2014, this statute was brought into effect to amend and consolidate diverse laws pertaining to marriage and divorce, as well as related matters.³⁴ It specifically defines marriage as the voluntary union of a man, whether in a polygamous or monogamous arrangement, and registered in compliance with the Act.³⁵ In alignment with Article 45(3) of the Constitution, the Act reaffirms that parties to a marriage possess equal rights and obligations at the commencement, throughout the duration, and at the dissolution of the marriage.

3.4 *Matrimonial Property Act 2013*

In response to widespread public concerns regarding uncertainties in the distribution of matrimonial properties, the Matrimonial Property Act of 2013 (MPA) was introduced to standardize the criteria for dividing such assets. The Act reinforces the constitutional principle of equal rights for both spouses when they co-own properties and introduces new rights for women landowners. Matrimonial property, as defined by the MPA, encompasses the matrimonial home, household goods within it, and any jointly owned movable or immovable property acquired during the marriage.³⁶ It excludes property that is held in trust or subject to pre-nuptial agreements by the spouses.

The MPA delineates the rights and responsibilities of spouses concerning matrimonial property, extending to their rights during the dissolution of the marriage. It asserts that

29 *Id.*, art 40.

30 *Id.*, art 20 (4) (a).

31 *Id.*, art 27(1).

32 *Id.*, art 27(2).

33 *Id.*, art 45(3).

34 *Marriage Act, 2014.*

35 *Id.*, section 2.

36 *Matrimonial Property Act, section 2.*

spouses share equal rights in the acquisition, administration, usage, disposal, and other entitlements pertaining to property ownership.³⁷ Additionally, the MPA specifies that property acquired or inherited before marriage does not fall under the category of matrimonial property.³⁸ The Act accommodates contributions as a factor in the division of matrimonial property.³⁹ Exclusions from this definition include property held in trust or subject to pre-nuptial agreements.

Section 7 of the MPA stipulates that ownership of matrimonial property is vested in the spouses based on their respective contributions toward its acquisition. In the event of divorce or dissolution, the property is divided accordingly. This necessitates a woman to substantiate her contribution to the property's acquisition to establish a legal claim. The MPA emphasizes that non-monetary contributions are also considered in determining beneficial interests in matrimonial property, as outlined in Section 14.⁴⁰ S. 14 of the MPA provides that, where matrimonial property is acquired in the currency of a marriage in the name of one spouse, a general presumption follows that the property is held in trust for the other. Section 14 of the MPA further outlines that if matrimonial property is acquired during the marriage in the name of one spouse, a presumption arises that the property is held in trust for the other. Similarly, when matrimonial property is jointly acquired and owned in both spouses' names, the legal presumption is that beneficial interests and subsequent rights to matrimonial property are equal.

4.0 Judicial Development of Matrimonial Property Distribution

The MWPA vested the court with the authority to evaluate the respective shares of parties in matrimonial property during divorce proceedings.⁴¹ In interpreting this provision, courts required parties to demonstrate their contributions to the acquisition of matrimonial property. If a party directly contributed money to the purchase of marital property, this contribution was classified as direct, with courts assessing only the percentage of such a contribution.⁴² Courts in this situation would only assess the percentage of such contribution.⁴³ In cases where one party invested money in additional expenses that the property acquirer would otherwise have incurred, it was considered an indirect contribution.⁴⁴ This

37 Id, section 4.

38 Id, section 5.

39 Id, section 7.

40 Matrimonial Property Act, section 9.

41 Ibid, section 17.

42 *Odhiambo R & Oduor M*, "Gender Equality" in Lumumba P, Mbondeyi M & Odero S, *The Constitution of Kenya: Contemporary Readings*, Law Africa, Nairobi, 2013, p.114.

43 Ibid.

44 Ibid.

in the names of both spouses and one spouse makes a significant indirect contribution to its purchase, each spouse is entitled to an equal share.

However, the Court of Appeal overturned the *Kivuitu v. Kivuitu* decision in the 2007 case of *Echaria v. Echaria*. The court asserted that contributions had to be strictly proven, and the performance of domestic duties would not be considered a contribution for matrimonial property purposes. In this case, the husband acquired the property through a loan and a monetary deposit during the marriage. Following the divorce, the wife filed a section 17 MWPA application to recover half of the property. The trial court ruled for equal shares, prompting an appeal by the husband.

The Court of Appeal rejected the notion that the *Kivuitu* case had established a universal rule of equality for all property disputes. It emphasized that legislation allowing for non-monetary contributions would need parliamentary approval for the courts to consider it. After examining the case specifics, the court determined the wife's beneficial interest in the property to be 25 % and the husband's to be 75 %. The restricted definition of "contribution" significantly limits Kenyan women's access to marital property.

4.3 Decisions Post Constitution of Kenya 2010 and Matrimonial Property Act 2013

In 2018, the Federation of Women Lawyers (FIDA-K), a non-governmental, non-profit, and nonpartisan organization, initiated a petition against the Attorney-General on behalf of the women of Kenya.⁵⁰ The petitioners argued that section 7 of the Matrimonial Property Act (MPA) is unconstitutional, posing a threat to the fundamental freedoms and rights of women, including their rights to property, equality, and nondiscrimination. Section 7 of the MPA determines ownership of marital property based on each spouse's contribution to its acquisition, to be shared in the event of divorce or marital dissolution.

The petition contended that the division of marital property based on contributions disproportionately disadvantaged women, as their indirect contributions were undervalued. Despite the provision's apparent neutrality, the *amicus curiae* supported the petitioner's claims, asserting that its implementation negatively impacts women's rights to marital property. However, the court rejected the petitioner's case, determining that section 7 of the MPA did not violate women's property rights. The court emphasized that the legal and constitutional framework ensures equal opportunities for men and women, both generally and specifically at the time of marriage, during the marriage, and upon its dissolution. The court argued that advocating for a 50/50 split of marital assets upon divorce would potentially incentivize individuals who failed to contribute to the marriage or sought quick financial gains through marriage.

Subsequently, the Supreme Court addressed a similar case initiated by a respondent claiming a share of marital assets registered in the applicant's name. This case progressed from the High Court to the Court of Appeal and ultimately the Supreme Court. Although

50 Federation of Women Lawyers Kenya (FIDA) v Attorney General & another (2018) eKLR.

the High Court acknowledged that the respondent had not demonstrated a direct contribution to the property's purchase, it recognized her "indirect non-monetary contribution towards the family's welfare in the form of upkeep and welfare." The High Court granted the respondent a 30 % portion of the marital house and a 20 % share of rental units on the land. Dissatisfied with this ruling, the respondent successfully challenged it, leading the Court of Appeal to overturn the decision and order a 50/50 split of the property.

The Supreme Court considered the Matrimonial Property Act of 2013 and sections 45(1) and (3) of the Constitution, enacted after the respondent's initial summons. While the court clarified that the MPA cannot be applied retrospectively, it affirmed that a constitution does not always adhere to the same non-retroactivity requirement. The Supreme Court determined that the Court of Appeal was correct in applying the 2010 Kenyan Constitution retrospectively.

The court also addressed whether the equality of parties during and after marriage, as stipulated in article 45(3) of the Constitution, mandated an equal division of property upon divorce, regardless of the partners' contribution levels. The court ruled that the distribution of property rights during the dissolution of marriage does not inherently indicate equality of interest in the assets. It emphasized that a court lacks the authority to modify existing property rights, taking from one spouse to give half to another without contributions. Furthermore, the division of marital property should not rely on a predetermined legal formula but should consider individual contributions to ensure fair outcomes for all parties involved.

5.0 Are We There Yet?

There should be an equitable and consistent procedure for the division of marital assets, including the husband's ancestral property, that safeguards the rights of all parties in the event of a divorce. The current law prohibits the inclusion of ancestral property and possessions acquired before marriage, which is a significant oversight. In instances where spouses reside in ancestral property, this exclusion could potentially leave the woman without a home and without any entitlement in case of divorce or the husband's demise. Additionally, there is ambiguity regarding what qualifies as a "contribution" under Section 7 of the Matrimonial Property Act (MPA), how it should be substantiated, and its impact on the division of marital assets. This raises concerns for women whose contributions, particularly non-financial ones, may be challenging to verify. For marriages lasting over 50 years, it becomes impractical to retain documentation of contributions.

6.0 Conclusion

Kenya has taken substantial strides to promote women's equality in the division of matrimonial property. Enactment of progressive laws, aligned with the values of the Constitution, signifies a commitment to this cause. The Courts have actively engaged with and

provided rulings on this matter, contributing to the evolution and continuity of our legal principles. While acknowledging the progress, there remains room for improvement, urging legislative bodies to address existing loopholes in current laws for enhanced protection.

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