

The Use of Marital Property Agreements for the Division of Matrimonial Property upon Divorce in Kenya

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Declaration

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

Signed:

Date:

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

Signed:.....

MR. FRANCIS KARIUKI

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DEDICATION

To the Almighty God for His grace and to my family for their continuous support and prayers.

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Civil Union Act, (Act No 17 of 2006) (South Africa).

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Land Act, (Act No. 6 of 2012).

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ABSTRACT

Marital agreements have been used for the division of matrimonial property upon divorce by couples for several years. However, their enforcement has been challenging. In Kenya the Matrimonial Property Act allows spouses to make antenuptial/pre-nuptial agreements for the division of matrimonial property upon divorce. It however does not recognize post-nuptial and settlement agreements. This may pose a challenge to the realization of equality as per Article 45(3) of the Constitution. This research has looked into the importance of recognizing post-nuptial and settlement agreements and how they contribute towards promoting equality between spouses in the ownership of matrimonial property.

The study was conducted through a review of existing literature on the subject of marital property agreements. It has also included a comparative analysis of the South African and English law on marital property agreements. The aim of the comparative analysis was to identify best practices from these jurisdictions that can be applied to the Kenyan system. Additionally, a historical analysis of the Kenyan matrimonial property laws has been done so as to understand the importance of ensuring equality between spouses in the ownership of matrimonial property.

In order to ensure that marital property agreements promote equality between spouses, the study recommends that there should be principles or guidelines that direct the court in dividing matrimonial property upon divorce as well as in the implementation and enforcement of marital agreements and finally that the law should give explicit recognition to post-nuptial and settlement agreements

Chapter One

Introduction to the Study

1.1.Introduction.

This is a study on the use of marital property agreements in the division of matrimonial property upon divorce. It will begin by giving a brief background of the division of matrimonial property in Kenya until the enactment of the Matrimonial Property Act of 2013. The background will also include how marital agreements are used by South Africa and England. The background will contextualize the statement of the problem.

The objectives, statement of the problem and hypothesis will also form part of this chapter. The research will be guided by the following questions: are marital agreements just and equitable in the division of matrimonial property and do they promote gender equality in ownership of matrimonial property.

A review of the literature on the subject of marital agreements, the theoretical framework that will support this study, methodology section and a chapter breakdown will also be discussed herein.

1.2. Background

Marriage is the corner stone of the family which is in turn the foundation of the society.¹ When two consenting adults of the opposite sex come together in matrimonial union, they do so with the belief that their union will last until death separates them. However, this is not always the case. Couples may find themselves in situations where they may need to separate. One of the ways this happens is through divorce.

Divorce can be defined as the legal separation of man and wife, brought about by the judgment of a court, and either totally dissolving the marriage relation or suspending its effects so as concerns cohabitation of the parties.² The grounds for divorce vary from jurisdiction to jurisdiction, however, in Kenya, the common grounds for divorce in civil³, Christian⁴, customary⁵ and Hindu⁶ marriages stipulated in the Marriage Act include: cruelty, adultery, desertion,

¹ Baraza N 'Philosophical and Historical Development of families' *Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi, 30 April 2009.*

² The Black's Law Dictionary, 2nd edition.

³ Section 65, *Marriage Act* (No. 4 of 2014).

⁴ Section 66(2), *Marriage Act* (No. 4 of 2014).

⁵ Section 69(1), *Marriage Act* (No. 4 of 2014).

⁶ Section 70, *Marriage Act* (No. 4 of 2014).

irretrievable breakdown of marriage and exceptional depravity by the other spouse.⁷ As the couple goes through the divorce process, division of matrimonial property is one of the aspects the courts look into.

Division of matrimonial property in Kenya was mainly governed by the Matrimonial Causes Act⁸ and the Married Women's Property Act of 1882⁹ until 2013 when the Matrimonial Property Act¹⁰ was enacted in Kenya subsequently repealing the former legislation. The Married Women's Property Act recognised a married woman's legal capacity to hold property separately from her husband.¹¹ Prior to the enactment of this law, division of matrimonial property was governed by the doctrine of coverture. Once married, the man and woman assumed one identity, that of the man.¹² Property would therefore be held in the man's name. This would allow him to enjoy benefits amassed from his wife's property.¹³ Consequently, women lost their legal existence and capacity to own property in their name or to enter into contracts.

The Married Women's Property Act of 1882 abolished the doctrine of coverture and ushered in the new rule on separate property ownership between a husband and wife. Of interest in this act was section 17 which stated as follows:

“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.”

The aforementioned Act applied in Kenya as a result of the Judicature Act.¹⁴ Section 17 stated above, provided the basis of various spousal disputes over matrimonial property after a divorce. Notable cases include; *Kivuitu v Kivuitu*¹⁵ where the court recognised non-financial contribution to the acquisition of matrimonial property. This was a significant decision due to the fact that prior to this, monetary contributions was the only type of contribution acknowledged by

⁷ Section 66(2), *Marriage Act* (No. 4 of 2014).

⁸ Act No.33 of 1939(Repealed).

⁹ This Act applied to Kenya by virtue of section 3 of the Judicature Act which states that any English laws enacted before 12th August 1897 are applicable in Kenya. This is known as the reception date.

¹⁰ Act No. 49 of 2013.

¹¹ Baraza N 'Family Law Reforms in Kenya: An Overview,' Presentation at Heinrich Böll Foundation's Gender Forum, Nairobi, 30 April 2009 , 5.

¹² William Blackstone Commentaries on the Laws of England. Vol., 1 (1765), 442-445.

¹³ Baraza N'Family Law Reforms in Kenya: An Overview', 5.

¹⁴ Section 3 of the Judicature Act states that statutes of general application in force in England before the 12 August 1897 are applicable in Kenya.

¹⁵ [1991] eKLR.

courts in the division of matrimonial property upon divorce. *Nderitu v Nderitu*¹⁶ also recognised non-monetary contribution.

The Kenyan law first recognised the use of marital agreements through the repealed Matrimonial Causes Act which allowed courts to consider any antenuptial or post-nuptial agreements signed by spouses with respect to the division of matrimonial property upon divorce.¹⁷

In Kenya today, matrimonial property is governed by the Matrimonial Property Act which defines, matrimonial property as any property jointly owned by parties to a marriage or any property acquired by both spouses during the subsistence of the marriage.¹⁸ It includes the matrimonial home as well as all household items found within the home.¹⁹ Despite the existence of this Act, the Constitution of Kenya 2010, which is the supreme law, states that parties to a marriage have equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.²⁰

The Matrimonial Property Act contains various provisions that govern the division of matrimonial property. These include, pre-nuptial agreements between spouses²¹, the recognition of both monetary and non-monetary contributions²² the definition of what constitutes matrimonial property,²³ the recognition of separate property ownership and ownership of matrimonial property in polygamous marriages²⁴ among other provisions.

The Matrimonial Property Act of Kenya does not provide a definition for pre-marital agreements however, it establishes that parties can enter into such an agreement before getting married.²⁵ Oxford's Advanced Learner's Dictionary defines marital/prenuptial agreements as agreements entered into by a couple before they marry concerning the ownership of their respective assets should the marriage fail. It is also defined as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.²⁶ There are two other main types of marital agreements; postnuptial and settlement agreements. Post-nuptial agreements are

¹⁶ [1998] eKLR.

¹⁷ Section 28, *Matrimonial Causes Act, (Act No 33 of 1939) (Repealed)*.

¹⁸ Section 6(1), the *Matrimonial Property Act* (No 49 of 2013).

¹⁹ Section 6(1) the *Matrimonial Property Act* (No 49 of 2013).

²⁰ Article 45(3) Constitution of Kenya (2010).

²¹ Section 6(3), *Matrimonial Property Act* (No 49 of 2013).

²² Section 2, *Matrimonial Property Act* (No 49 of 2013).

²³ Section 6(1), *Matrimonial Property Act* (No 49 of 2013).

²⁴ Section 13, *Matrimonial Property Act* (No 49 of 2013).

²⁵ Section 6 (3) *Matrimonial Property Act* (No 49 of 2013). .

²⁶ Section 1 (1), *Unified Premarital Agreement Act* (United States of America 1983).

those entered into by spouses after they get married outlining the manner in which matrimonial property will be divided upon divorce as well as the maintenance to be received by either spouse after divorce.²⁷ They can be made at any moment during the marriage. Settlement agreements are those that spell out the way spouses have agreed to divide the matrimonial property upon divorce.²⁸ They are made at the very end of the marriage when spouses are finalizing their divorce.

Signing of marital agreements has long been frowned upon because of the belief that when one makes or signs a marital agreement they are foreseeing or encouraging divorce.²⁹ In addition, marital agreements are thought to be instruments used by the rich to ensure that any wealth they acquired prior to the marriage is protected from the jurisdiction of courts in division of matrimonial property.³⁰ These beliefs about marital agreements have inhibited their enforcement by courts. In some jurisdictions, for example in England, courts have been quite reluctant to endorse marital agreements made by spouses because of the long standing belief that such agreements were contrary to public policy.³¹ A change in this perception has been seen over time and is reflected in rulings made by courts in cases such as *Edgar v Edgar*³² and the most recent case of *Radmacher v Granatino*.³³

In Kenya, The Matrimonial Property Act states that in the absence of a pre-marital agreement defining matrimonial property rights among spouses, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the property's acquisition, and shall be divided between the spouses on this basis.³⁴ There is no further mention of pre-nuptial agreements in the Act. Additionally, it does not provide for post-nuptial or settlement agreements. This omission can be detrimental to the realization of the right to equality between spouses as stipulated in Article 45(3) of the Constitution of Kenya because pre-nuptials may be used to unfairly prevent one spouse from acquiring interest in matrimonial property.

The research will look into the reasons as to why pre-nuptial agreements alone would not

²⁷ Halsbury's Laws of England, Contract, Volume 22.

²⁸ Halsbury's Laws of England, Contract, Volume 22.

²⁹ Mweresa E.S 'Prenuptial Agreements Blessing or Curse?' <http://salclaw.co.ke/prenuptial-agreements-blessing-or-curse/> on 25 November 2015.

³⁰ Glass R, 'Trading up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California,' 92(1) *California Law Review*, 2004,218.

³¹ Sanders A 'Private Autonomy and Marital Property Agreements' *The International and Comparative Law Quarterly*, Vol. 59, No. 3 (JULY 2010)571.

³² (1980) The United Kingdom Court of Appeal.

³³ (2010) The United Kingdom Court of Appeal.

³⁴ Section 7, *Matrimonial Property Act* (Act No 49 of 2013).

suffice in achieving the equality envisaged by the Constitution. Through an analysis of the legal background of division of matrimonial property in Kenya as well as a comparative study with the use of marital agreements in South Africa and England and finally giving recommendations as to the way forward for the use of marital property agreements in Kenya, this research will attempt to ensure the use of marital property agreements conforms to Article 45(3).

This study is limited to the context of marriages that are recognised by the Marriage Act of Kenya. They include civil marriages, Christian marriages, African Customary marriages, Hindu marriages and Islamic marriages³⁵. Therefore, it will not cover polygamous marriages or presumption of marriage by cohabitation.

1.3.Statement of the Problem

The Matrimonial Property Act allows spouses to enter into pre-nuptial agreements which outline spousal interests in matrimonial property. However, pre-nuptial agreements may not adequately protect the rights of spouses to equal rights in matrimonial property as envisioned in Article 45(3). Therefore, all forms of marital property agreements (pre-nuptial, pots-nuptial and settlement agreements) should be recognized by law in order to ensure equality of rights for spouses.

1.4. Research Objectives

This research will be guided by the following objectives:

1. To assess the viability of the use of marital property agreements in division of matrimonial property.
2. To find out whether marital property agreements are a just and efficient way of division of matrimonial property.
3. To draw out lessons from how marital agreements work in other jurisdictions.

1.5.Research Hypothesis

This research will be guided by the following hypothesis: Pre-nuptial, post-nuptial and settlement agreements are a practical method of division of matrimonial property when drafted and implemented appropriately and can aid the court in distribution of matrimonial property upon divorce in a just and equitable manner.

³⁵ Section 6, *Marriage Act* (No. 4 of 2014).

1.6.Theoretical Framework

1.6.1. Feminism

It is often said that behind every successful man, there is a woman. However, some wives face difficulties when it comes to securing interests to what they contributed towards the success of their husbands. At the heart of the feminist theory, is the equality of rights between men and women.³⁶ The current matrimonial property laws in Kenya provide for the distribution of matrimonial property on the basis of each spouse's contribution³⁷ whereas the Constitution provides for equal rights to ownership of matrimonial property.³⁸ Marital agreements can assist women to have control over their separate property. Such agreements can help women ensure that their husbands do not acquire a stake in the ownership of property they have worked hard to acquire. Such agreements can also protect the interests of women with regard to ownership of matrimonial property, where they might stand to be disadvantaged by the matrimonial property laws.³⁹

1.6.2 Contractarian Theory

Traditionally, contracts made between individuals, as long as they were not contrary to public policy or made as a result of fraud or coercion, were enforced by courts based on the terms of the contract. In this case, marital agreements are a type of contract because they are between more than one individual, contain an offer and acceptance, consideration and the intention to create legal obligations.⁴⁰ In this case then, such contracts should be enforced. The principle of autonomy should be applied by the courts in enforcement of marital agreements as will be discussed in the literature review. In as much as parties should be bound by the terms of their mutually agreed upon contract, it has been argued that their needs to be some sort of overarching legal protection extended by legislation or by the courts in order to ensure fairness. In addition to the fact that contracts signed under duress or mistake can be set aside, external intervention to promote good faith in contractual dealings is advocated for.⁴¹ This paper will show that fairness as per the

³⁶ Nzomo M, 'The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities,' 22(2) *The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities*, 1994, 17.

³⁷ Section 7, *Matrimonial Property Act*, (Act No 49 of 2013).

³⁸ Article 45(3) Constitution of Kenya, 2010.

³⁹ Glass R, 'Trading up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California,' 2004, 224.

⁴⁰ Probert R and Harding M *Creteney and Probert's Family Law* Sweet and Maxwell, London 2015, 165.

⁴¹ Dorfman R, 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment,' <http://newjurist.com/fairness-in-english-contract-law.html#sthash.R7UC0yvQ.dpuf>, on 14 March 2017.

contractarian theory can be achieved when party autonomy is respected but the intervention of the legislature and the courts is encouraged to promote good faith in private contracts.

1.6.3. Theories of Equality.

These theories were first discussed by Aristotle in *Nicomachean Ethics*. According to Aristotle the concept of equality and justice are synonymous.⁴² He defines justice as the habit of giving each what is due to them.⁴³ The principle of equality involves two things; distributing something between two or more persons and then modifying these matters to their proper ratios which is referred to as distributive justice⁴⁴ and where individuals are of an equal status, then it is just for them to receive equal shares of something.⁴⁵ Injustice arises when people of unequal status receive equal shares or people of equal status receive unequal shares. This is referred to as proportional equality. Today, equality is at the centre of the argument on matrimonial property.⁴⁶ This theory is relevant to the research because marital agreements affect the rights of spouses to matrimonial property. Such agreements can either promote distributive or proportional equality based on the terms of the contract.

1.7. Literature Review

Two common themes that have emerged from this field of research include the enforcement of marital agreements, fairness and equitability of marital agreements in division of matrimonial property. This section will give an overview of what various authors have written with regard to this two themes.

1.7.1. Enforcement of Marital Agreements and Party Autonomy

Various authors in their work have addressed the issue of the enforcement of marital agreements as well as party autonomy. This is because the contentious nature of marital agreements has made it difficult for these agreements to be enforced. Authors like Robert T Rose⁴⁷ and Allison A Martson⁴⁸ in their work address this in the context of the American Legal System. They state that prior to 1970, marital agreements in America were not easily enforced by courts

⁴² Chroust A H, 'Aristotle's Conception of Equity (Epieikeia),' 18(2) *Notre Dame Law Review*, 1942,120.

⁴³ Aristotle, *Nicomachean Ethics*, Hackett Publishing Company, Book V, 2000, 1.

⁴⁴ Aristotle, *Nicomachean Ethics*, Book V, 3.

⁴⁵ Aristotle, *Nicomachean Ethics*, Book V, 3.

⁴⁶The International Women's Human Rights Clinic, *Women's Land and Property Rights in Kenya-Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation*, 2009,37.

⁴⁷ Rose T R. 'Asset protection Through the Use of Premarital Agreements,' Unpublished, Claremont McKenna College, 2012, 20.

⁴⁸ Marston A 'Planning for Love: The Politics of Prenuptial Agreements,' 49(4) *Stanford Law Review*, 1997,890.

because of the belief that they were contrary to public policy. This is because of the belief that such agreements were made in contemplation of divorce.⁴⁹ However, a change of judicial attitude was observed when the traditional fault based system of divorce was abandoned. These authors also look into prerequisites of a valid marital agreement.⁵⁰ Such grounds include: voluntariness, capacity of parties to enter into a marriage as well as a contract and finally that the document must be in written form⁵¹ and are established in the Uniform Marital Agreement Act of the United States of America.

In Europe, the practice of signing marital agreements is widely accepted and has not experienced as much resistance as in the American and the English Courts.⁵² The broad understanding of the contract does not stop at commercial contracts but often includes marriage itself. Since the enlightenment period, marriage has often been described by legal scholars as a contract governed by special rules and formalities.⁵³

In continental Europe, the principle of party autonomy is used when it comes to private international law. This principle was first developed by a French Jurist known as Charles Dumoulin in 1525. Party autonomy as used in private international law advocates for the right of parties transacting in cross border private law matters to decide how their interactions will be governed and in the event of a dispute occurring, how such a dispute will be settled.⁵⁴ Dumoulin argued that parties should be allowed to decide among themselves how to divide rights and duties in contracts concerning personal relationships. In relation to marital agreements, this principle is used to argue that the effects of marriage upon property should be determined primarily by the intention of the parties. This intention is embodied in the marital agreements.

In England, marital agreements have long been frowned upon by the courts. The jurisprudence emerging from cases before 2012 showed the courts' hostility towards marital agreements. In Anne Sanders article she states that

⁴⁹ Rose T R. 'Asset protection Through the Use of Premarital Agreements,'22.

⁵⁰ Marston A 'Planning for Love: The Politics of Prenuptial Agreements,' 898.

⁵¹ Section 6, Unified Premarital Agreement Act (*United States of America*).

⁵²Sanders A 'Private Autonomy and Marital Property Agreements' 59(3) *The International and Comparative Law Quarterly*, 2010, 575.

⁵³ Sanders A 'Private Autonomy and Marital Property Agreements' 575.

⁵⁴ Sanders A 'Private Autonomy and Marital Property Agreements,'577.

'The long-established English understanding of marriage as creating a status and of the contract as a tool for commercial transactions has thus far impeded the introduction of enforceable marital property agreements'.⁵⁵

The position of the English Courts has slowly changed and the landmark case of *Radmacher v Granatino* shows this change of attitude with the courts upholding the marital agreements entered into by the parties.

This research will advocate for the right of spouses to enter into marital agreements in Kenya and have their agreements upheld by the courts.

1.7.2. Fairness and Equitable distribution of Matrimonial Property.

This issue has been addressed by Gail F Brod.⁵⁶In his paper, he argues that marital agreements are a tool used by the economically superior spouses to prevent economically inferior spouse from staking a claim to their wealth. He also argues that the signing of marital agreements requires the spouses to waive their legal claim to the property provided for by the matrimonial property laws.⁵⁷His argument culminates in the conclusion that marital agreements are detrimental to women because they are considered the economically inferior spouse.

In contrast, in her paper⁵⁸ Martha M. Ertman refers to the parties in a marriage as either primary homemakers or primary wage-earners. Primary homemakers refers to spouses who contribute to the upkeep of the family through domestic housework and general family welfare whereas the primary wage-earners are those who contribute to the upkeep of the family financially. Ms. Ertman proposes that marital agreements are an efficient way of remunerating the primary homemakers for their contribution to the family as well as securing their rights to matrimonial property after a divorce. This is because, the primary homemakers stand to experience a greater loss upon divorce due to the fact that they no longer have secure financial support.

This research will argue that marital property agreements can be used to promote fairness and equality based on the intentions of the parties.

⁵⁵ Sanders A 'Private Autonomy and Marital Property Agreements,' 1.

⁵⁶ Brod F G 'Premarital agreements and Gender Justice' 6(2) *Yale Journal of Law and Economics*, 1993.

⁵⁷ Brod F G 'Premarital agreements and Gender Justice,' 235.

⁵⁸ Ertamn M M 'Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements' 77 *Texas Law Review*, 1998, 18.

1.8. Research Methodology

This research is a qualitative research because it will rely on information that is mostly in the form of words. A qualitative research is one where by the data that is collected for the research is not in numerals but in words.⁵⁹ This research design allows for an in depth analysis of what marital agreements are, what they do and what benefits they have in relation to division of matrimonial property in Kenya. This is because the data required to address the problem and objectives of this research will be in words rather than numerals. The marital agreements are not available to the public since they are private contracts which do not require registration by the government. It will also be exploratory in nature because very few researches have been conducted on the use of marital agreements in Kenya since their inception in 2013. To get a better understanding of the phenomenon under research, this research will incorporate case studies of the state of laws regarding marital agreements in the England and South Africa.

Sources of information for this research are: primary sources and secondary sources of legal information. Primary sources include the constitution of Kenya, the Matrimonial Property Act of Kenya, the Land Registration Act of Kenya, statutes from other countries used as case studies and case law. This sources of information are relevant to this research because they are the basis on which marital agreements draw their validity. This sources of information will be accessed through the Kenya Law Reports website which provides a database for all laws of Kenya as well as cases decided by Kenyan courts. The internet will also be used to find relevant matrimonial property statutes used by other countries for the case studies.

Secondary sources will include journal articles and books published by various authors regarding the topic of marital agreements. These sources will be relevant to the study because they contain information collected and analysed by previous researchers in this topic. They will assist in a deeper understanding of the use of marital agreements in the distribution of matrimonial property. The journal articles will be accessed from online journal databases available through the Strathmore University Library. The books will also be sourced from the Strathmore University Library.

Data from this sources will be collected through document analysis of the various sources. This will be guided by the topic of the research, the research problem, the research objectives and the hypotheses. After collection of data, information will be synthesised into themes and patterns

⁵⁹ Mugenda O, Mugenda A, *Research Methods Quantitative and Qualitative Approaches* African Centre for Technology Studies, 1999,197.

for a clear understanding of the information collected. A comparative analysis will be done for the case studies so as to relate them to the Kenyan jurisdiction.

1.9.Chapter Breakdown

Chapter One: Introduction-The Research Proposal. The research proposal will constitute the introductory part of the dissertation

Chapter Two: Historical and Legal Background of Distribution of Matrimonial Property and Marital. This chapter will constitute the historical and legal background that will help to contextualize, the state of division of matrimonial property in Kenya. This will help in understanding the role marital agreements play in division of matrimonial property.

Chapter Three: Case Studies. This chapter contains the case studies of and how marital agreements work in England and South Africa.

Chapter Four: Lessons Learnt. This chapter will compare the Kenyan system to the systems discussed in the case study and draw lessons on the best practices on the use of marital agreements.

Chapter Five: Conclusion .This Chapter will conclude by stating whether or not the objectives of the study have been met, the problem set out in the statement of the problem is resolved and whether the hypotheses has been proved or disproved.

Chapter Two

Historical Background of Distribution of Matrimonial Property upon Divorce in Kenya

2.1. Introduction

This chapter will look into the history of the division of matrimonial property upon divorce in Kenya in three key eras: the pre-colonial, colonial and post-colonial. The pre-colonial era was the period before Kenya became a British protectorate. The *lex loci* was that of the various ethnic groups in Kenya. During the colonial era, common law was introduced as the formal legal system. Finally, during the post-colonial era, a hybrid of statutory common law and African customs were incorporated into the legal system.¹

Historical jurisprudence is credited as one of the main paradigms that inform legal reforms.² This theory will be used to assess the viability of marital agreements, as stipulated in the research objectives in chapter one, by understanding the legal and policy problems faced in the division of matrimonial property in Kenya upon.

2.2. Matrimonial Property in the Pre-Colonial Era

Before Kenya was declared a British protectorate in 1895, it was a geographical entity divided into various native tribes. Each tribe had its own local laws that governed marriage, divorce and ownership of property. A common feature for all these native tribes was that land was predominantly owned by the community for the benefit of all its members.³ In the case of pastoral communities, elders would be in charge of the distribution of the property while in other non-pastoralist communities, the family patriarch would have authority to distribute land or other resources according to the needs of each member.⁴

Marriage in traditional African communities was predominantly polygamous.⁵ One of the most important aspects of customary marriages was the payment of dowry by the husband.⁶ Dowry would be in the form of cattle, land or crop produce and would be paid before the marriage was

¹ Cotran E, 'The Development and Reform of the Law in Kenya, 27(1), *Journal of African Law*, (1983), 42.

² Vinogradoff P, *Introduction to Historical Jurisprudence*, Oxford University Press, London, (1920), 98.

³ Njoh A, *Tradition, Culture and Development in Africa: Historical Lessons for Modern Development Planning* 1st ed, Ashgate Publishing Ltd, Farnham United Kingdom,(2006),77.

⁴Ojienda T.O, *Principles of Conveyancing in Kenya a Practical Approach*, LawAfrica Pub, Nairobi, (2008), 35.

⁵ Ekane D, 'Contemporary Family patterns in Sub Saharan Africa', *Digitala Vetenskapliga Arkivet*, (2012), <http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A602444&dswid=5498>, on 23 November 2016.

⁶ Anderson S, 'The Economics of Dowry and Bride price', 21(4), *Journal of Economic Perspective*, 2007, 155.

solemnized or over a certain period of time after. Under Islamic law, the dowry (mahr) would be strictly payable to the bride or upon agreement, would be paid to her parents.⁷ A man was allowed to marry as many wives as he could as long as he was able to support each of them.⁸

In certain circumstances, wives would be allowed to pay dowry for other wives in the customary woman-to-woman marriages.⁹ One of the instances when woman-to-woman marriages took place was when a wife was unable to bear sons. The 'barren' woman would pay dowry for another girl who would engage in sexual intercourse with the woman's husband or a man of similar age and the child born as a result of this relation would be considered the 'barren' woman's child.¹⁰

Divorce was permitted in customary marriages on the following grounds: refusal of intercourse, witchcraft, theft, desertion, cruelty, adultery among others and would be granted by the elders in the community.¹¹ These grounds varied from community to community. Upon divorce, the woman would return to her home of origin and the dowry that was paid by the husband would be refunded in part or in full depending on the number of children.¹²

Women had little to no proprietary rights in their matrimonial home and could therefore not claim a share of the land they occupied while they were married.¹³ However, some communities allowed women to keep property such as household utensils and personal effects which she had acquired during the marriage.¹⁴ The husband was not under a duty to maintain his former wife.¹⁵

⁷ Cotran E, *Casebook on Kenyan Customary Law*, University of Nairobi Press, Nairobi, 1987, 36.

⁸ Kenyatta J, *Facing Mt. Kenya*, Martin Secker and Warbug Ltd, London, 1965,167.

⁹ Kjerland A.K, 'When African Women Take Wives: A Historical Overview', The Nordic Africa Institute, Poverty and Prosperity in Africa Occasional Paper Number 6, 1997, 5, <http://nai.diva-portal.org/smash/record.jsf?pid=diva2%3A460914&dsid=3880>, on 23 November 2016.

¹⁰ Justice Ruth Sitati, 'Customary Law; Woman to Woman Marriage and Constitutionality of Return of Dowry', Annual Judges Conference held at the Sarova Whitesands on 21st-27th August 2016.

¹¹ Kenyatta J, *Facing Mt. Kenya*, 1965,177.

¹² Cotran E, *Casebook on Kenyan Customary Law*, 38. In some traditional communities such as the Agikuyu, Akamba and the Nandi, children would remain with the husband while the wife returned to her parent's home. In such a case, the wife's family would not refund the dowry but if the husband allowed the wife to leave with the children, the wife's family would have to refund the dowry.

¹³ Ndulo M, 'African Customary Law Customs and Women's Rights', Cornell Law Faculty Publication, 2011,106.

¹⁴ Kenyatta J, *Facing Mount. Kenya*, 178.

¹⁵ Moore E and Himonga C, 'Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa: A View from Inside and Outside the Courts', Centre for Social Science Research Working Paper350,2015,4.

2.2. Colonial history

2.2.1. Common Law Position on Matrimonial Property

Common law principles and other laws of England have played an important role in the history of Kenya's legal framework. The former was introduced to Kenya when the British colonialists arrived. It is, therefore, important to understand how common law governed the ownership and division of matrimonial property.

2.2.1.1. Principle of Coverture

A key concept in the history of matrimonial property in England is the doctrine of coverture. As mentioned in Chapter One, coverture referred to the common law principle where the wife's legal identity was absorbed into her husband's making her incapable of entering into contracts or owning property in her own name for the duration of the marriage. She was referred to a *femme covert*.¹⁶ Under this principle, once a woman got married, the property she had prior to the marriage and the property she acquired during the subsistence of the marriage would legally belong to her husband.¹⁷ The rationale behind this doctrine is the biblical principle that a wife is required to submit to her husband, who is the head of the home.¹⁸

Under this doctrine, the husband had power to manage her property as well as receive rent from it but was not allowed to dispose of the property without the wife's consent.¹⁹ In contrast, an unmarried woman or a widow was referred to as a *femme sole* and enjoyed an independent legal identity. She could therefore own property.²⁰ Despite this strict principle, the wife had a legitimate expectation to be provided with all her necessities by her husband.²¹ A wife was not allowed to petition for a divorce. She was, however, allowed to defend herself against any accusations brought against her by her husband.²² The husband could sue his wife for any property that she may have eloped with from their matrimonial home. This was because he had legal ownership over them.

¹⁶ Women and the Law, http://www.library.hbs.edu/hc/wes/collections/women_law/, on 26 November 2016.

¹⁷ Hammon P, 'Rethinking Women and Property in 16th and 17th Century England, Literature Compass, 2006, 1389, <http://onlinelibrary.wiley.com.ezproxy.library.strathmore.edu/doi/10.1111/j.1741-4113.2006.00385.x/pdf>, on 28 November 2016.

¹⁸ Ephesian 5:22-23.

¹⁹ Bailey J, 'Favoured or oppressed? Married Women, Property and 'coverture' in England, 1660–1800', 17(3), *Community and Change*, 2002, 352.

²⁰ Women and the Law, http://www.library.hbs.edu/hc/wes/collections/women_law/, on 26 November 2016.

²¹ Dolan E.F, Battered Women, Petty Traitors, and the Legacy of Coverture, 29(2), *Feminist Studies*, 2003, 257.

²² Brabcová A, 'Marriage in Seventeenth-Century England: The Woman's Story', http://www.phil.muni.cz/angl/thepe/thepe_02_02.pdf, on 28 November 2012.

The wife would lose her legal right to matrimonial property upon divorce as well as lose custody over her children who would remain with the husband.²³ During periods of separation or instances of desertion by the husband, the wife was allowed to petition the courts for maintenance.²⁴

Because of the rigidity of common law, wives sought relief from the courts of equity which would regard the husband as a trustee for the benefit of his wife and children.²⁵ The courts of equity disregarded the principle of coverture and upheld the fact that the husband and wife were two separate individuals.²⁶ In addition to the recognition given by the courts of equity, women with the help of their male relatives or with the consent of their husbands, employed the use of instruments such as jointures, separate estate deeds, pre and ante-nuptial agreements to mitigate the harsh effects of the doctrine of coverture.²⁷ However, these avenues were costly and were thus only available to the rich.²⁸

2.2.1.2. Matrimonial Property Acts of 1870 and 1882.

The industrial revolution led to an increase in the number of women working in the economy. This increase in economic power led to reforms in the laws of property.²⁹ Moreover, women wanted to safeguard their families' welfare from husbands who were becoming reckless and irresponsible with family funds and property.³⁰ The Married Women's Property Act of 1870 was enacted to try and resolve these issues.³¹ This law allowed married women to manage and control their earnings without having to give it to their husbands. They still did not have legal ownership over other forms of matrimonial.

The Married Women's Property Act of 1870 was replaced by the Married Women's

²³ Churches C, 'Women and Property in Early Modern England: A Case-Study', 23(2), *Social History*, 1998, 166.

²⁴ Bailey J, 'Favoured or oppressed? Married women, property and 'coverture' in England, 1660–1800', 2002, 366.

²⁵ Weyler K.A, 'Marriage, Coverture, and the Companionate Ideal in the Coquette and Dorval', 26(1), *Legacy*, 2009, 5.

²⁶ Oldham J, 'Creditors and the Femme Covert, Georgetown University Law Centre Research Paper Number 13(002), 2013, 4, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2159&context=facpub>, on 28 November 2016.

²⁷ Weyler K.A, 'Marriage, Coverture, and the Companionate Ideal in the Coquette and Dorval', 2009, 6.

²⁸ Ablow R, 'One Flesh, One Person and the 1870 Married Women's Property Act', *Britain, Representation and Nineteenth-Century History*, 2007, 2, http://www.branchcollective.org/?ps_articles=rachel-ablow-one-flesh-one-person-and-the-1870-married-womens-property-act, on 28 November 2016.

²⁹ Tennyson S and Geddes R, 'Passage of the Married Women's Property Acts and Earnings Acts in the United States: 1850 To 1920', *Researchgate*, 2013, 150.

³⁰ Griffin B. 'Class, Gender and Liberalism in Parliament, 1868-182: The Case of Married Women's Property Acts', *The Historical Journal*, 46(1), 2003, 66.

³¹ Griffith J R, *The Married Women's Act and the Amendment Act 1874 In Relation to the Doctrine of Separate Use*, 3rd ed, Stevens and Haynes Law Publishers, London, 1875, 2.

Property Act of 1882. This act abolished the doctrine of coverture by giving women a separate legal identity from their husbands allowing women to own separate property as well a stake in the ownership of matrimonial property.³² The 1882 Act was then received as part of Kenyan law and will be discussed in a later section.

2.2.2. Kenyan Colonial History on Division of Matrimonial Property

To begin with, the promulgation of the East African Order in Council of 1897 introduced Indian and British laws, which governed marriages, into Kenya.³³ The variation in matrimonial regimes made it difficult to apply a standard principle for dissolution of marriages as well as division of matrimonial property. The natives were allowed to use their native customs in matters of marriage and divorce so long as these customs were not repugnant to justice and morality.³⁴

Christian marriage was governed by the African Christian Marriage and Divorce Act.³⁵ This law provided a simplified procedure which Christians could follow formalize a valid marriage by a religious minister, it provided for the conversion of a marriage from the customary matrimonial regime to the Christian marriage regime, it had special provisions for African Christian widows and finally gave jurisdiction to subordinate courts of the first class to dissolve marriages under this Act.³⁶ The Marriage Act³⁷ applied to individuals who wished to get married under the general law regardless of their religious or ethnic affiliations. Divorce of marriages under the African Christian Marriage and Divorce Act and the Marriage Act were governed by the Matrimonial Causes Act³⁸ which provided for the grounds of divorce and nullity of the marriage. Worth noting is that this Act made provisions for judicial separation and how the wife's property would be treated during the period of judicial separation. Section 18 of the Matrimonial Causes Act provided that from the date the judicial separation order is made, the wife will be considered a *feme-sole* and she will have ownership over any property she acquires or is devolved upon her.

³² Hammon P, 'Rethinking Women and Property in 16th and 17th Century England, Literature Compass, 2006, 1392, <http://onlinelibrary.wiley.com.ezproxy.library.strathmore.edu/doi/10.1111/j.1741-4113.2006.00385.x/pdf>, on 28 November 2016.

³³ Baraza N Philosophical and Historical Development of Families', 5. Examples of such laws include the Hindu Marriage Act, the Matrimonial Causes Act and the Married Women's Property Act of 1882.

³⁴ Cotran E, 'The Development and Reform of the Law in Kenya'.1983, 48.

³⁵ African Christian Marriage and Divorce Act (Act No. 51 of 1931) (repealed).

³⁶ Cotran E, Restatement of African Customary Law I, 2.

³⁷ The Marriage Act (Act No.30 of 1902) (repealed).

³⁸ *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

The Matrimonial Causes Act also had provisions for ancillary relief.³⁹ The wife was allowed to petition the court for alimony *pendente lite*. However, such an order was limited to not more than one fifth of the husband's net worth for the three years preceding the date of the order.⁴⁰ Section 28 of the Matrimonial Causes Act gave the courts the discretion to refer to any antenuptial or post-nuptial agreement made by the parties with regards to how they will share their property upon divorce.⁴¹

Upon issuance of the decree of divorce, the court could make an order for the husband to pay a settlement to the wife based on the property he has or make periodic payments to the wife for the duration of her life.⁴² These payments would be made subject to review of the court if the net worth of the husband changed over time.⁴³ The court also possessed the power to appoint a trustee to receive the periodic payments made by the husband to the wife.⁴⁴ If a husband deserted his wife, and had gained an interest in the wife's property, the wife was allowed to seek a protection order against her husband, barring him or any of his creditors from claiming any property she acquired after her husband's desertion.⁴⁵

English Common Law was made applicable to African Christians as well as European settlers in Kenya. Muslims were to abide by the Islamic laws of marriage, divorce and division of matrimonial property. Indians domiciled in Kenya also had their own matrimonial laws.

2.3. Post- Independence Era of Division of Matrimonial Property

The repealed Constitution of Kenya did not expressly provide for the rights of spouses in ownership of matrimonial property; this was provided by the various marriage laws applicable in Kenya at the time.⁴⁶ Each of the marriage regimes was governed by their own distinctive Acts of Parliament.⁴⁷

Another law that governed the distribution of matrimonial property upon dissolution of a marriage was the Married Women's Property Act which applied in Kenya by virtue of section 3

³⁹ Part VI, *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

⁴⁰ Section 25 *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

⁴¹ Section 28 *Matrimonial Causes Act* (Act No. 33 of 1939) (Repealed).

⁴² Section 25(2) *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

⁴³ Section 31 *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

⁴⁴ Section 26(2) *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed). .

⁴⁵ Section 29 *Matrimonial Causes Act* (Act No. 33 of 1939) (repealed).

⁴⁶ Baraza N, 'Philosophical and Historical Development of Families', 5.

⁴⁷ *Hindu Marriage and Divorce Act* (1960, Repealed) governed Hindu marriages and divorce and *Mohammedan Marriage and Divorce Registration Act* (Act No.13 of 1906, repealed) governed Islamic marriages.

of the Judicature Act.⁴⁸ Under the terms of the Married Women Property Act, married women had the same rights over their property as unmarried women.⁴⁹ The repealed Married Women's Property Act of 1882, in section 17 stated as follows:

“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.”

This section led to a copious amount of matrimonial property dispute cases in English courts as well as Kenyan courts.

*Pettit v Pettit*⁵⁰ was one of the landmark English cases that attempted to wade through the labyrinth that was the law relating to property interests between spouses.⁵¹ The brief facts of the case were that the wife purchased freehold property and had it conveyed into her name. The husband undertook internal decoration work. The issue before the court was whether the husband's actions would entitle him to a beneficial interest in the property. It was held that a husband was not entitled to an interest in his wife's property merely because he had done in his free time jobs which husbands normally do. Since the improvements carried out were generally of an ephemeral character and there was neither fraud nor a mutual intention or agreement for the husband to gain beneficial interest, the husband's claim would fail. An important conclusion made by the court with regards to the application of section 17 was that, the court did not have the power to give a spouse beneficial interest in property that he/ she did not have. The provision was purely procedural where the court was to expedite the process of dividing the existing proprietary interests between spouses. This clearly defined the role of the courts in division of matrimonial property.⁵²

Another important conclusion made by the courts in this case is on the issue of non-monetary contributions. In this case, the husband contributed to the property by making repairs. The court held that where it is reasonable to deduce, from the facts of the case, that the intent of

⁴⁸ Act No.16 of 1967. Section 3 states that ‘The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with ... the statutes of general application in force in England on the 12th August, 1897.’

⁴⁹ Halsbury's Statutes of England (2nd Ed) vol 8 at 799ff. Unmarried women were considered feme-sol and were legally allowed to own property in their name, to enter into contracts in their name and to inherit property. This also extended to married women.

⁵⁰ [1969] ALL ER 2.

⁵¹ Katarina J and Kanjama C, *Family Law Digest on Matrimonial Property*, LawAfrica, Nairobi, 2002, 7.

⁵² Katarina J and Kanjama C, *Family Law Digest on Matrimonial Property*, 9.

the acquiring spouse was that the contributing spouse would acquire interests in the property based on their non-monetary contributions then the contributing spouse would acquire an interest in the property.

A question that was not clearly answered was, in the instance where the contributing spouse has made a substantial contribution and there was no common intention for the spouse to acquire an interest in the property. How would the court settle this issue?

This question was answered in *Gissing v Gissing*⁵³ where a husband purchased the matrimonial home and had it conveyed in his sole name. There was no express agreement as to how the beneficial interest in the house should be shared. The wife provided some money for furniture and improvements, but it was not suggested whether the wife's efforts made it possible for the husband to purchase the house. The court held that where common intention for the contributing spouse was not made clear and the registered owner had not intended for the other spouse to have a beneficial interest, the dispute would be resolved with the law of trusts. However, the Law of Trust in England states that land held in trust for another must be declared in writing⁵⁴ a mere oral declaration would not suffice.⁵⁵

It was also held that there is a distinction to be drawn in law between the position where a contributing spouse makes direct contributions to the purchase of the property and where he/she makes indirect contributions. In this regard, the share of the contributing spouse would be proportionate to the contributions, either of direct payments for the property or a fair estimate of indirect contribution.⁵⁶

The Kenyan jurisprudence on this section mirrors that of the English courts. To begin with, the case of *I v I*⁵⁷ established that the Married Women's Property Act applied to marriages solemnized in Kenya.

*Karanja v Karanja*⁵⁸ was a case where during the course of the marriage the parties acquired several properties which were registered in the husband's name. One property was acquired from money supplied by the wife while the other properties were acquired with her direct

⁵³ [1970] ALL ER 780.

⁵⁴ Section 53(1b), *Law of Property Act* (England).

⁵⁵ Probert R and Harding M, *Cretney and Probert's Family Law*, 9th ed, Sweet and Maxwell, London 2015, 93.

⁵⁶ Ojienda T.O, *Principles of Conveyancing in Kenya a Practical Approach*, 119.

⁵⁷ [1971] EA 278.

⁵⁸ [1976] KLR 307.

or indirect contribution. The court considered whether customary law would operate to disqualify any imputation of trust in favor of a married woman, especially one in salaried employment. In this case, the Kenyan Courts deviated from the position of the English court in *Pettit*. The husband's advocate claimed that under Kikuyu Customary law, property was to be held by the husband and the wife could not have a share. The Honorable Justice Simpson held that where an African husband and wife are both in salaried employment and are both contributing towards the household expenses and education of the children, English authorities would not be applicable. The court held that in this instance it would be assumed that the husband was holding the property in trust for the wife because the wife had been making indirect contributions like paying for household expenses and buying clothes for the children and herself, expenses that the husband would have otherwise had to meet. Additionally, the court held that the interpretation of section 17 is not only limited to the matrimonial home. *Essa v Essa*⁵⁹ dealt with application of the Married Women's Property Act to resolve a marital property dispute between Muslim couples.

In *Kivuitu v Kivuitu*⁶⁰ the Court of Appeal held that the fact that the property was registered in the joint names of husband and wife means that each party owns undivided equal shares therein. The wife's indirect and direct contribution in addition to the joint tenure over the matrimonial home warranted her to receive an equal interest in the matrimonial home.

The court's ruling in *Nderitu v Nderitu*⁶¹ buttressed that of *Kivuitu v Kivuitu*. It was held that the non-monetary contributions of an African housewife that is bearing children and taking care of them contribute towards acquisition of property. Justice Kwach stated that:

'The wife was putting her life at risk to augment the numerical strength of the family and I cannot think of a greater contribution than bearing children'

Before the promulgation of the Constitution of Kenya in 2010, the landmark case of *Echaria v Echaria*⁶² created a new precedent in relation to division of matrimonial property upon divorce. In this case, the husband was an ambassador therefore his wife was required by law not to work. Upon divorce, the question of the division of their 118 hectare Tigoni Farm arose. The High Court, staying true to the decision in the *Kivuitu* case, held that the interests in the farm

⁵⁹ [1995] LLR 384.

⁶⁰ [1985] LLR 1411. The wife assisted her husband in acquiring the matrimonial home while the husband was abroad on business. The property was registered jointly. Upon divorce, the wife applied to the courts to have the proceeds from the sale of their matrimonial home shared equally.

⁶¹ [1997] LLR 606.

⁶² (2007) eKLR.

should be divided on an equal basis due to the fact that the wife made substantial contributions, both direct and indirect, to the acquisition of the property.

The husband filed an appeal with the Court of Appeal which reversed the decision of the High Court. The Court of Appeal in its ruling reiterated three crucial facts laid out in *Kivuitu*⁶³ that must be proved in order for any disputed property to be shared on an equal basis. First, the property should have been registered in the joint names of the parties, that there must be substantial indirect contribution to the acquisition of the property and finally that there must be an intention to own the property in equal shares.⁶⁴ The court further clarified that based on the facts of that specific case, the law in *Kivuitu v Kivuitu* was valid on condition that the three requirements given above were met.

2.3.1. Application of Section 28 of the Matrimonial Causes Act (Repealed).

As stated, earlier this section of the Matrimonial Causes Act allowed the courts to refer to antenuptial or postnuptial agreements made by spouses that detail how they wish their property to be divided upon divorce.⁶⁵ This section did not provide any further guidelines on what form such contracts would take in order to be valid. However an appropriate form is alluded to in the Law of Contracts Act⁶⁶ which states that any suit brought before a court regarding a claim for disposition of interest in land must be based on a written contract. The contract must then be signed by the parties and their signatures must be attested by competent witnesses. Therefore, any marital agreement for the transfer of interests in land from one spouse to another in the event of a divorce must comply with this provision. The Law of Contract Act is still in effect, therefore the provision in section three stipulated above is still in force.

The use of marital agreements was not a common concept. Few individuals made use of them consequently there were few cases brought before the courts regarding such agreements. In *CYC v KSY*,⁶⁷ the wife had petitioned the court for alimony *pendente lite*. The husband, however, claimed that he had already made a lump sum payment sufficient to sustain his wife and children as was reflected in their post-nuptial agreement. The wife contested the validity of the post-nuptial agreement claiming that such agreements were not recognized in Kenyan law and were therefore unenforceable. The court held that by virtue of Section 28 of the Matrimonial Causes Act, such

⁶³ [1985] LLR 1411.

⁶⁴ *Echaria v Echaria* (2007) eKLR, 16.

⁶⁵ Section 28, *Matrimonial Causes Act* (Act No. 33 of 1939) (Repealed).

⁶⁶ Section 3, *Law of Contracts Act* (Act No 46 of 1960).

⁶⁷ (2015) eKLR.

agreements were recognizable in law but could only be implemented once a decree of divorce had been issued and not before.

2.4. Current Legal Regime on Matrimonial Property

2.4.1. The Constitution of Kenya 2010.

The current matrimonial property legal regime is enshrined in various laws starting with the Constitution of Kenya 2010. The Constitution recognizes⁶⁸ the entitlement of each spouse to equal rights at the time of marriage, during the marriage and at its dissolution. This is the first time in Kenya's history that the Constitution gives a clear guideline as to the rights of spouses with regard to property. The Bill of rights also eliminates discrimination on the basis of gender.⁶⁹ The Constitution⁷⁰ lists down equitable distribution of land and non-discrimination as some of the principles of land use in Kenya. All these provisions aim at rectifying the inequality and discrimination that existed in the previous regimes especially against women.

The courts have interpreted the provisions of Article 45(3) in different ways, some in favour of the 50:50 ratio while others on the basis of their contribution as will be discussed in this section. Before the enactment of the Matrimonial Property Act of 2013, the provision of Article 45(3) was heavily relied on for the division of matrimonial property upon divorce.⁷¹ The authority for this is *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*.⁷² In this case the Court of Appeal stated that:

“This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. 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. However pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home....Pending such enactment, we are nonetheless of the considered view that the Bill of rights in our Constitution can be invoked to meet the exigencies of the day.”

This case established that Article 45(3) read on its own means that division of matrimonial property should be done on a 50:50 basis. This same rationale was the basis of the courts *ratio* in

⁶⁸ Article 45(3), Constitution of Kenya, 2010.

⁶⁹ Article 27, Constitution of Kenya, 2010.

⁷⁰ Article 60, Constitution of Kenya, 2010.

⁷¹ ‘Forget 50-50, Your Contribution is Key to Sharing Property after Divorce in Kenya,’ <http://ilaw.co.ke/blawg/forget-50-50-your-contribution-is-key-to-sharing-property-after-divorce-in-kenya/#.WHYnTlyYOiY>, accessed 28 November 2016.

⁷² Civil Appeal 127 of 2011.

*P M S v M S*⁷³ in which the parties were married under Maragoli customary law. The husband evicted the wife from their matrimonial home. The wife petitioned the court to stop her husband from auctioning, selling or mortgaging their matrimonial property. The court, ordered that despite the fact that the property was registered in the name of the husband, he was presumably holding it in trust for his wife and that it was owned jointly by both spouses. The court ordered that the property be divided equally between the two spouses.

In *U M M v I M*,⁷⁴ the High Court deviated from the position of the Court of Appeal in the *Agnes Nanjala case*. The facts of this case are that the wife worked with her husband in his auto spares business. Upon divorce the wife petitioned the court for division of matrimonial property acquired by the joint contribution of the spouses. The court in reaching its decision agreed with the Court of Appeal in the *Agnes Nanjala case* in that the provisions of Article 45(3) ameliorate the harshness of the holding in *Echaria*. However, the court held that the enactment of the Matrimonial Property Act of 2013 served to further expound on the provision of Article 45(3). The court stated that, if it is just (based on the monetary and non-monetary contribution of the spouses) to divide the matrimonial property on a 50:50 basis, then it has the discretion to do so. However, if it does not see it fit to do so, the court has the discretion not to divide the matrimonial property on a 50:50 basis.

Another case similar to *UMM is F.S v E Z*.⁷⁵ In this case, the husband and wife acquired property jointly with the husband making financial contribution while the wife made non-monetary contributions. The High Court held that Article 45 of the Constitution did not call for 50:50 sharing of matrimonial properties after a marriage was dissolved. If that were to be the case, then marriages would be converted to economic traps whereby an individual would lure a rich man or woman, get married to them and soon thereafter seek divorce. Such a person could repeat the same process with another spouse and enrich himself or herself without making any monetary contribution.⁷⁶ Furthermore, the court stated that there was a rebuttable presumption of equal ownership of property, a presumption which could be contested by adducing evidence that a party's contribution towards the acquisition of that property did not warrant half of the property interests.⁷⁷

⁷³ (2016) eKLR.

⁷⁴ (2014) eKLR.

⁷⁵ (2016) eKLR.

⁷⁶ *F.S v E.Z* (2016) eKLR, 12.

⁷⁷ *F.S v E.Z* (2016) eKLR, 12.

2.4.2. The Land Laws

The current land laws also provide for matrimonial property. The Land Registration Act states that matrimonial property acquired for the joint use of the spouses is presumed to be owned jointly by the spouses.⁷⁸ Joint tenure implies that the owners have undivided interests in the land and upon the death of one of them, the remaining interests are transferred to the surviving owner.⁷⁹ This provision aims at trying to ensure equality in dividing ownership of matrimonial property, a problem that had been experienced in the previous regimes. Spousal rights in matrimonial property have been made overriding interests.⁸⁰ For example, spousal consent was compulsory before taking out a charge on the matrimonial home⁸¹ as well as before making any disposition of land.⁸² The Land Law Amendment Act⁸³ has deleted section 28 of the Land Registration Act which provided for spousal rights in matrimonial property as an overriding interest.

These provisions have addressed the problem experienced in the previous regimes of husbands misusing, disposing or charging matrimonial property without the wife's consent. The Land Registration Act also acknowledges both monetary and non-monetary contributions to the acquisition or improvement of land registered in the name of one of the spouses in the form of tenancy in common based on the values of their contribution.⁸⁴

The Land Act⁸⁵ gives the definition of matrimonial home as any property owned or leased by one or both spouses and occupied by them as their family home.⁸⁶ It states as part of the guiding values of land use, equitable access to land and elimination of all forms of discrimination based on gender,⁸⁷ a problem that had been experienced in the colonial and pre-colonial periods. This act also requires spousal consent before taking a charge on matrimonial property.⁸⁸

2.4.3. Matrimonial Property Act

This Act specifically deals with ownership and division of matrimonial property. Matrimonial property has been defined to include the matrimonial home or homes, household

⁷⁸ Section 93(2), *Land Registration Act* (Act No. 3 of 2012).

⁷⁹ Section 2, *Land Act*, (Act No. 6 of 2012).

⁸⁰ Section 28, *Land Registration Act* (Act No. 3 of 2012).

⁸¹Section 93(3), *Land Registration Act* (Act No. 3 of 2012).

⁸² Section 44 (5) (d), *Land Registration Act* (Act No. 3 of 2012).

⁸³ Act No. 28 of 2016.

⁸⁴ Section 93(2), *Land Registration Act* (Act No. 3 of 2012).

⁸⁵ Act No. 6 of 2012.

⁸⁶ Section 2, *Land Act*, (Act No. 6 of 2012).

⁸⁷ Section 4 *Land Act*, (Act No. 6 of 2012).

⁸⁸ Section 79(3), *Land Act*, (Act No. 6 of 2012).

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.⁸⁹

The most important provision given by this law is the recognition of non-monetary contribution to the acquisition of matrimonial property.⁹⁰ Previously, such recognitions was given at the discretion of the courts as has been illustrated by the cases discussed above. Non-monetary contributions include domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.⁹¹ This Act reiterates the provision of the Constitution on equality.⁹²

Individuals who subscribe to the Islamic religion are allowed to apply Sharia law in matters that pertain to division of matrimonial property.⁹³ For those in polygamous marriages, the law states that ownership of matrimonial property resides in the husband and the first wife to the exclusion of the other wives if this property was acquired before the husband married the second wife in which case the property is owned by the husband and the wives based on their contribution.⁹⁴

Liability acquired by any spouse prior to marriage does not transfer to the other spouse.⁹⁵ However, liability incurred on matrimonial property by both spouses fall on both of them.⁹⁶ Marriage does not take away the right of the spouses to acquire and own separate property⁹⁷ as had been the case with the doctrine of coverture.

Ownership of matrimonial property is on the basis of spousal contribution (both monetary and non-monetary) to the acquisition of the property.⁹⁸ Section 6(3) makes a provision that allows parties to enter into antenuptial agreements that will prescribe how property will be shared in the marriage. Once entered into they exclude the application of general provisions of the Act in relation to spouses' entitlements to matrimonial property.⁹⁹ However, such an agreement must not

⁸⁹ Section 6(1), *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁰ Section 2, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹¹ Section 2, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹² Section 4, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹³ Section 3, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁴ Section 8, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁵ Section 16, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁶ Section 10(1), *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁷ Section 13, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁸ Section 7, *Matrimonial Property Act* (Act No.49 Of 2013).

⁹⁹ Murungi N L, 'Consolidating Family Law in Kenya,' 17(2) *European Journal of Law Reform*, 2015,326.

contradict the terms of the Matrimonial Property Act. These pre-nuptial agreements can however be set aside by the court if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.¹⁰⁰ Post-nuptial and settlement agreements however, are not envisaged by this law.

The current legislative framework on matrimonial property exhibits the following shortcomings; for example, the provision of ownership on the basis of contribution provided by section 7 of the Matrimonial Property Act is said to violate the provision of Article 45(3) of the Constitution, it has therefore been suggested that the Act should be reviewed so as to streamline it with the Constitution.¹⁰¹ This has also been the centre of dispute in the court cases relating to Article 45(3) explained above. The removal of the compulsory spousal consent provided for by the Land Registration Act can also be viewed as a setback to the matrimonial property laws. This is because it makes matrimonial property vulnerable to disposal or encumbrance without the consent of one of the spouses.

¹⁰⁰ Section 6(4), *Matrimonial Property Act* (Act No.49 Of 2013).

¹⁰¹ Ayodo H, 'Confusion over Kenya's matrimonial property law,' *The Standard* 9 July 2015, <https://www.standardmedia.co.ke/business/article/2000168543/confusion-over-kenya-s-matrimonial-property-law> on 17 March 2017.

Chapter 3

Use of Marital Agreements in the Division of Matrimonial Property upon Divorce: The Situation in South Africa and England

3.1. Introduction.

This chapter contains an analysis of the use of marital agreements in England and South Africa. England forms part of this case study due to the fact that it colonised Kenya and as a result the common law system was adopted as part of our legal system. South Africa on the other hand is an African state whose jurisprudence on the use of marital agreements is wide. Additionally, Kenyan jurisprudence has continually been influenced by that of South Africa in recent years. More so, South Africa's community of property system is useful in analysing the division of matrimonial property upon divorce using marital agreements.

3.2. Use of Marital Agreements in the South Africa

South African law acknowledges the following types of marriages: civil marriages, civil unions and customary marriages.¹ Prior to the promulgation of the Constitution,² the only type of marriage that was recognised was civil marriage.³ This meant that the provisions of the Matrimonial Property Act⁴ of South Africa only applied to those in a valid civil marriage.⁵ However, with the enactment of the Recognition of Customary Marriages Act⁶ as well as the Civil Union Act⁷, customary marriages as well as civil unions were given the same legal status as civil marriages and therefore, the provisions of the Matrimonial Property Act extended to spouses married under these regimes.⁸

The matrimonial property system in South Africa is divided into three categories: in community of property, out of community of property without accrual and out of community property with accrual. These systems are provided for by the Matrimonial Property Act of 1984.⁹

¹ Marriage Types, http://www.marriageregistrar.co.za/marriage_types.htm, on 3 January 2017.

² Constitution of South Africa, (1996).

³ Maithufi IP, Bekker JC, 'The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa,' 35(2) *The Comparative and International Law Journal of Southern Africa*, 2002,183.

⁴ Matrimonial Property Act, Act No 88 of 1984, (*South Africa*).

⁵ Lowndes G.S, 'The Need For A Flexible and Discretionary System of Marital Property Distribution in The South African Law of Divorce,' Published, University Of South Africa, Pretoria, 2014, 9.

⁶ Act No. 120 of 1998(South Africa).

⁷ Act No 17 of 2006 (South Africa).

⁸ Maithufi IP, Bekker JC, 'The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa,' 192.

⁹ Matrimonial Property Act (*South Africa*).

The distinction among the three systems is the availability of a signed antenuptial agreement between the parties.¹⁰ Such agreements are drafted and executed prior to entering the marriage. In addition to the antenuptial agreements, spouses may draft a post-nuptial agreement as well as a settlement agreement that contains how the property will be shared by the couple upon divorce.¹¹

Unlike the Kenyan legal system, the South African matrimonial property laws do not provide a definition of what constitutes matrimonial property. The Matrimonial Property Act however gives a definition of joint estate as the combined property of a husband and wife in community of property.¹² It also provides for separate property as that which does not form part of the joint estate.¹³ The South African Matrimonial Property Act does not give a definition of what an antenuptial agreement is or what it should contain.

3.2.1. In Community of Property

The in community system of matrimonial property enjoins the estates of the spouses at the time of entering into the marriage as well as any property acquired in the duration of the marriage.¹⁴ It gives the spouses equal powers to use and dispose of their joint estates.¹⁵ This is the default matrimonial property system for spouses in South Africa.¹⁶ The consequence of this system is that upon the termination of the marriage either by death or divorce, the joint estate is divided on a 50/50 basis regardless of their individual contributions.¹⁷ Despite the unity of property ownership, the in community property system does not absolve the individual legal identities of the spouses; they can still transact in their own names.¹⁸ The spouses act as joint administrators of their joint estate¹⁹ and can perform a certain number of juristic acts with regard to the joint estate without the consent of their spouse. However, the right to undertake juristic acts without spousal consent is limited. Instances where spouses are required to seek spousal consent before acting include:

¹⁰ Section 3, Chapter 1, *Matrimonial Property Act* (South Africa).

¹¹ Settlement Agreements in South Africa, <https://divorceattorneys.wordpress.com/2010/12/29/divorce-settlement-agreements-in-south-africa/>, on 5 January 2017.

¹² Schedule 1, *Matrimonial Property Act* (South Africa).

¹³ Section 2, Chapter 1, *Matrimonial Property Act* (South Africa).

¹⁴ *Estate Sayl v Commissioner for Inland Revenue* (1945) The High Court of South Africa.

¹⁵ Section 14, Chapter 3, *Matrimonial property Act* (South Africa).

¹⁶ Marriage in Community of Property, <http://www.divorcelaws.co.za/marriage-in-community-of-property.html>, on 5 January 2017.

¹⁷ Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000.

¹⁸ Section 11, Chapter 3, *Matrimonial Property Act* (South Africa).

¹⁹ Section 14, Chapter 3, *Matrimonial Property Act* (South Africa).

- a) entering into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;
- b) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
- c) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;
- d) withdraw money held in the name of the other spouse in any account in a banking institution, a building society of the Post Office Savings Bank of the Republic of South Africa;
- e) receive any income in whatever form that accrues to the other spouse by virtue of their professional work or vocation or damages as a result of the loss income from their work;
- f) accepting inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
- g) receiving income derived from the separate property of the other spouse.
- h) receiving dividends or interest on or the proceeds of shares or investments in the name of the other spouse;
- i) receiving the proceeds of any insurance policy or annuity in favour of the other spouse.²⁰

The property acquired by a spouse from the above listed actions do not constitute the joint estate.²¹

3.2.2 Out of Community of property without accrual

The out of community matrimonial property system is one where the spouses maintain their separate property all throughout the duration of their marriage and any property acquired before marriage remains the separate property of the individual spouses.²² For spouses to fall within the out of community property system without accrual, they must sign and register an antenuptial agreement specifically excluding them from the in community of property and profit and loss as well as the out of community property with accrual.²³ The effect of this system is that

²⁰Section 15(2), *Matrimonial Property Act* (South Africa).

²¹ Section 15(2), *Matrimonial Property Act* (South Africa).

²² Schedule, *Matrimonial Property Act* (South Africa).

²³ Section 2, Chapter 1, *Matrimonial Property Act* (South Africa).

neither of the spouses has a direct claim to the separate property of their spouse unless that spouse expressly gives their consent. This means that debts and liabilities cannot be shouldered by the property of a spouse who did not incur the debt.²⁴

3.2.3 Out of Community of Property with accrual

This system is similar to the out of community property system without accrual, in that each spouse maintains their own separate property for the duration of the marriage. However, the out of community with accrual property system requires that at the time of the dissolution of the marriage, the increase in the value of the spouses property is shared equally between them.²⁵ In the instance that the value of one of the spouses does not increase, the increase of the other spouse is shared equally with them.²⁶

Calculation of an accrual to the value of a spouse's estate is made possible by the fact that spouses declare the value of their estates at the commencement of the marriage in their antenuptial contract.²⁷ If they do not do so, they are required to declare the value of their estate at the commencement of the marriage in a separate statement which is to be signed by a notary and attached to their antenuptial agreement.²⁸

3.3. Antenuptial Contracts in South Africa

The Matrimonial Property Act does not give a definition of what an antenuptial contract is. However, it is acknowledged as an essential document that allows a couple to tailor-make their matrimonial property regime.²⁹ As indicated above, the default matrimonial property regime is that of in community of property. An antenuptial agreement automatically puts a couple in the alternative out of community property regime. The law does not set out all the terms that should be included in an antenuptial agreement so as to give couples the freedom to decide on how they would share their property.³⁰

²⁴ Marriages out of community without accrual, <http://www.divorcelaws.co.za/division-of-assets-at-divorce.html>, on 5 January 2017.

²⁵ Section 4(1a), Chapter 1, *Matrimonial Property Act* (South Africa).

²⁶ Section 3(1), Chapter 1, *Matrimonial Property Act* (South Africa).

²⁷ Section 6(1), Chapter 1, *Matrimonial Property Act* (South Africa).

²⁸ Section 6(1), Chapter 1, *Matrimonial Property Act* (South Africa).

²⁹ Jassem S. M, 'Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes Published, University of the Western Cape, Cape Town, 2010, 29.

³⁰ Marriage in South Africa: out of community of property, <http://www.webberslaw.com/marriage-in-south-africa-out-of-community-of-property/>, on 5 January 2017.

South African Law requires that a formal antenuptial agreement have the following characteristics:³¹

- a) Be in written form;
- b) Signed by both parties in the presence of a notary;
- c) Signed by the notary;
- d) Registered at the deeds registration office in the area what the couple intends to get married, no later than three months after the date of execution.

The importance of registering the antenuptial agreement is to ensure that the state and other third parties recognize that a couple is classified under the out of community property regime.³² If the contract is not registered within the stipulated time period, it is not legally binding to third parties.³³ However, the courts have held that an unregistered antenuptial shows the intention of the parties to be bound by it; therefore when dividing property upon divorce, the court will take into consideration the terms of an informal antenuptial contract.³⁴

The law allows couples to change their matrimonial property regimes through a court order once the couple has furnished the court with sufficient and just causes as to why their matrimonial property regime should be changed.³⁵ Once a court sanctions the change of regime, a couple may register a formal antenuptial agreement as per the requirements of the Deeds Registration Act of South Africa.³⁶

The Matrimonial Property Act of South Africa sets out important express and implied terms that may be included in the antenuptial contract. To begin with, the contract must expressly indicate that a couple does not wish to be classified in the community of property regime.³⁷ Furthermore, it must clarify whether or not the couple intends to be classified under the out of community property regime with or without the accrual system.³⁸ If the contract does not expressly exclude the out of community system with accrual, the law states that the couple will be placed in that system by default.³⁹

³¹ Section 87, *Deeds Registration Act* (South Africa).

³² *Ex parte Spinazze and Another* (1985) The High Court of South Africa.

³³ *S v S* (2015) The High Court of South Africa.

³⁴ *Mathabathe v Mathabathe* (1987) The High Court of South Africa.

³⁵ Section 21(1), Chapter 4, *Matrimonial Property Act* (South Africa).

³⁶ Section 87, *Deeds Registration Act* (South Africa).

³⁷ Section 2, Chapter 1, *Matrimonial Property Act* (South Africa).

³⁸ Section 2, Chapter 1, *Matrimonial Property Act* (South Africa).

³⁹ Section 2, Chapter 1, *Matrimonial Property Act* (South Africa).

For couples that opt for the out of community property with accrual, the contract must include the value of each spouse's estate at the commencement of the marriage.⁴⁰ This facilitates calculation of an increase in the value of their estates at the time of the divorce. If the value is not indicated in the contract, the spouses must ascertain the respective values of the estates and have the valuation documents signed by the notary and attached to their antenuptial agreement.⁴¹ Courts can set aside an antenuptial contract if the contract contains terms that are contrary to public good and public morals.⁴² Courts can also set aside an antenuptial agreement if it is proven that one of the parties was unduly influenced or coerced into signing it.⁴³

3.4. Divorce Settlement Agreements in South Africa

Upon divorce, the spouses have a right to agree on how to divide the joint estate between them. They can do so by drafting a settlement agreement which can be presented to the court for enforcement together with the decree of divorce.⁴⁴ An issue that arises concerning settlement agreements (otherwise known as deed of settlement or consent papers) are what constitutes a valid deed of settlement. Section 7(1) of the Divorce Act⁴⁵ alludes to a written agreement. But does this disqualify any oral settlement agreements from being enforced? For the purpose of enforceability, most couples reduce their oral agreements to written ones so as to have them enforced as court orders.⁴⁶

Once the settlement agreement is joined to the divorce decree, any alterations must be sanctioned by the court.⁴⁷ Such an agreement may constitute any agreed terms so long as those terms are not illegal, unjust or prejudicial to good morals.⁴⁸ This can include the manner in which both movable and immovable property is to be shared, maintenance agreements as well as custody sharing agreements. Such an agreement may also make provisions for the appointment of a receiver/liquidator to divide the joint estate.⁴⁹ In the absence of such an agreement, the court may

⁴⁰ Section 6(1), Chapter 1, *Matrimonial Property Act* (South Africa).

⁴¹ Section 6(1), Chapter 1, *Matrimonial Property Act* (South Africa).

⁴² 'Marriage Contracts Explained,' <http://www.burneandburne.co.za/services/notarial/antenuptial-contract>, on 5 January 2017.

⁴³ *EAL v ECE* (2015) The High Court of South Africa.

⁴⁴ Section 7, *Divorce Act* (South Africa).

⁴⁵ Act No 70 of 1979.

⁴⁶ *TR v TN and The Standard Bank of South African Ltd* (2015) The High Court of South Africa.

⁴⁷ *Kruger v Kruger* (2007) High Court of South Africa.

⁴⁸ <https://divorceattorneys.wordpress.com/2010/12/29/divorce-settlement-agreements-in-south-africa/> on 5 January 2016.

⁴⁹ Appointing a receiver or liquidator in divorce – where the spouse can't agree how to divide their estate, <https://divorceattorneys.wordpress.com/2011/12/02/appointing-a-receiver-or-liquidator-in-divorce-where-the-spouse-cant-agree-how-to-divide-their-estate/>, on 5 January 2016.

order a receiver/liquidator to assist the couple in the division of their joint estate.⁵⁰ The appointment of a receiver/liquidator for the division of a joint estate is at the court's discretion.⁵¹ The court can also issue an order of forfeiture of patrimonial benefits upon divorce.⁵² Before issuing such an order, the courts take into consideration the duration of the marriage, the circumstances that led to the break-down of the marriage and the substantial misconduct of either of the spouses.⁵³ The purpose of the order of forfeiture is to prevent the person against who the order is sort from unduly benefiting from the joint estate.⁵⁴ Courts have however, not come up with a unanimous definition of what undue benefit is.⁵⁵

Contribution to the acquisition or improvement of a spouse's estate in the out of community system is also a consideration during the division of matrimonial property. If parties fail to come up with an agreement for the division of property upon divorce, the court may assist the couples to do so. One of the ways is by dividing the property as it sees fit. Additionally, the courts have the power to make adjustments in the manner of division if it is proven that the division of the property was unjust/unfair to one of the parties. The law recognizes direct or indirect contributions in the acquisition or improvement of a spouse's separate property,⁵⁶ a concept similar to the Kenyan jurisdiction. Courts have acknowledged indirect contributions such as raising of children and direct contributions such as taking care of books of accounts for the husbands business.⁵⁷

3.5. The Use of Marital agreements in England

As indicated at the beginning of this chapter, England forms part of the case study in this study due to the fact that the common law system adhered to in Kenya originated from Great Britain. Additionally, the jurisprudence from England is still influential in Kenya.

The marital property regime in England is the separate property regime meaning that

⁵⁰ Appointing a receiver or liquidator in divorce – where the spouse can't agree how to divide their estate, <https://divorceattorneys.wordpress.com/2011/12/02/appointing-a-receiver-or-liquidator-in-divorce-where-the-spouse-cant-agree-how-to-divide-their-estate/>, on 5 January 2016.

⁵¹ *Robson v Theron* (1978) High Court of South Africa.

⁵² Section 9(1), *Divorce Act* (South Africa).

⁵³ Section 9 (1), *Divorce Act* (South Africa).

⁵⁴ Forfeiture of Assets in a Divorce, <http://www.divorcelaws.co.za/forfeiture-of-assets-in-a-divorce.html>, on 5 January 2017.

⁵⁵ Marumoagae CM, 'The regime of forfeiture of patrimonial benefits in South Africa and a Critical Analysis of the Concept of Unduly benefited,' 42(1) *De Jure Law Journal*, 2014,90.

⁵⁶ Jassem S. M, 'Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes, 33.

⁵⁷ *Gates v Gates* (1940) High Court of South Africa).

spouses maintain their separate estate from the beginning of the marriage until its dissolution.⁵⁸ Upon divorce, in addition to their separate property, spouses may petition the court for ancillary relief or equitable interests gained from their spouse's estate.⁵⁹ The law does not provide a specific manner in which such ancillary relief shall be granted, instead it gives the courts a wide discretion as to how they can grant such orders by listing certain considerations that the courts look into before granting these orders.⁶⁰ Such considerations include: The standard of living of the couple during the marriage, any contributions made towards acquisition or maintenance of property, the conduct of the parties, any mental or physical disabilities and the children in the family.⁶¹ The discretion to recognise any private marital contract is however not listed in the Matrimonial Causes Act of 1973.

Chapter two introduced the Common Law history on the division of matrimonial property and the use of marital agreements in the period before 1897. They were mostly available to the rich who could afford legal expertise as well as property to protect through marital contracts. Courts were however hostile towards the concept of marital property agreements with most courts refusing to uphold the contractual validity of any marital property agreements entered into by couples.⁶² The rationale behind this hostility was the fact that contracts made in anticipation of separation or divorce were contrary to the public good and were therefore void *ab initio*.⁶³ In the past, the wife had a strict duty to cohabit with her husband.⁶⁴ This right was deemed to be threatened by a marital agreement which was made in anticipation of a separation. This position has changed due to the fact that a divorce is now no longer a unilateral action initiated by the husband. Furthermore, the wife is no longer under a strict duty to cohabit with her husband.⁶⁵

The state's duty to protect the institution of marriage also made the enforcement of marital property agreements difficult. Marital property agreements were said to encourage divorce due to the fact that spouses could foresee an end to the marriage in terms of a divorce as opposed to

⁵⁸ Lowe N and Douglas G, *Bromely's Family Law*, 10 ed, Oxford University Press, Oxford, 2007, 106.

⁵⁹ Section 23, *Matrimonial Causes Act*, 1973 c. 18 England.

⁶⁰ Section 25, *Matrimonial Causes Act*, 1973 c. 18 England.

⁶¹ Section 25 *Matrimonial Causes Act*, 1973 c. 18 England.

⁶² Fairbairn R, 'Pre-Nuptial Agreements', http://www.onepaper.co.uk/wp-content/uploads/2014/01/N11_Pre-nuptial-Agreements.pdf, on 5 January 2017.

⁶³ Sanders A 'Private Autonomy and Marital Property Agreements' 571.

⁶⁴ Brabcová A, 'Marriage in Seventeenth-Century England: The Woman's Story', http://www.phil.muni.cz/angl/thepe/thepe_02_02.pdf, on 5 January 2017.

⁶⁵ The Law Commission for England and Wales, *Marital Property Agreements*, 2015, 41.

dissolution by death. The fact that a spouse would know how much property they would get after a divorce was also deemed to incentivise divorce.⁶⁶

3.5.1. Separation Agreements in England

Another reason why the use of marital property agreements was met with resistance from the courts was if such agreements purported to take away the court's jurisdiction over granting ancillary relief orders.⁶⁷ This is because such agreements may have been concluded unjustly and would therefore prejudice the vulnerable spouse.⁶⁸ If such an unfair contract was to be implemented *per se*, the vulnerable party would have no recourse in law and would be at the mercy of the other party.⁶⁹ This was the holding in the landmark case of *Hyman v Hyman*⁷⁰ where the couple had concluded a separation agreement on how they would divide their property as well as the amount of money the wife was to receive as her maintenance. One of the terms of this agreement was that the wife could not go to court to contest the terms of the agreement in so far as her maintenance was concerned. In the House of Lords, the court held that a contract that professed to expel the jurisdiction of the court to grant ancillary relief is void as being against the public interest.⁷¹

As the idea of divorce increasingly gained acceptance in the English society, so did the stance of the courts regarding marital agreements. They began to take into consideration marital property agreements as part of the wide discretion in granting ancillary relief or sharing joint property or granting equitable interests.⁷² In *Edgar v Edgar*⁷³ the Court of Appeal highlighted some principles to guide courts in enforcing separation agreements. These principles known as the Edgar principles are; the agreements should be properly and fairly arrived at with competent legal advice. If such agreements met such requirements they should be implemented unless there exists good and substantial reason not to enforce them.

⁶⁶ S. Bridge, "Marriage and divorce: the regulation of intimacy", Herring J (ed.), *Family Law: Issues, Debates, Policy*, Willan Publishing, London, 2001, 27.

⁶⁷ The Law Commission for England and Wales, *Marital Property Agreements*, 2015, 36.

⁶⁸ Buckley L.A, 'Ante-nuptial Agreements and "Proper Provision": An Irish Response to Radmacher v Granatino,' 14 (1) *Irish Journal of Family Law*, 2011, 2.

⁶⁹ Buckley L.A, 'Ante-nuptial Agreements and "Proper Provision": An Irish Response to Radmacher v Granatino,' 2.

⁷⁰ (1929) The United Kingdom House of Lords.

⁷¹ (1929) The United Kingdom House of Lords.

⁷² Rose T R. 'Asset protection Through the Use of Premarital Agreements' 22.

⁷³ (1980) The United Kingdom Court of Appeal.

3.5.2 Antenuptial and Post Nuptial agreements in England

In *S v S*,⁷⁴ the courts recognised that a pre-nuptial agreement entered into by parties freely and with proper legal advice may be regarded by courts a part of the discretion given to it by section 25 of the Matrimonial Causes Act. The court however cautioned against the strict application of such agreements due to the fact that some may be unjust or unfair to one of the parties.⁷⁵

In *K v K*,⁷⁶ a husband was under pressure to marry the wife, who was pregnant at the time, and he had done so on the basis of a pre-nuptial agreement that restricted any capital claim she might make in the event of divorce. The wife then applied for financial provision beyond what the agreement gave her. The court established the following questions that should be asked when assessing whether parties should be bound by the terms of their prenuptial agreement:

- i. Did they understand the agreement?
- ii. Were they properly advised as to its terms?
- iii. Was there any pressure to sign?
- iv. Was there full disclosure?
- v. Did they willingly sign the agreement?
- vi. Did the husband exploit a dominant position, either financially or otherwise?
- vii. Was the agreement entered into in the knowledge that there would be a child?
- viii. Has any unforeseen circumstance arisen since the agreement was made that would make it unjust to hold the parties to it?
- ix. Does the agreement preclude an order for periodical payments for the wife?
- x. Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement?
- xi. Is the agreement one of the circumstances of the case to be considered?

In this case, it was held that she had understood the agreement and had not been under pressure to sign it, and that there had been no unforeseen circumstances that would make it unfair to hold her to it so far as capital provision was concerned. Nevertheless, the judge held that she was entitled to ongoing maintenance payments in order to enable her comfortably to bring up the

⁷⁴ (1997) The United Kingdom High Court.

⁷⁵ *S v S*, <http://swarb.co.uk/s-v-s-matrimonial-proceedings-appropriate-forum-divorce-staying-proceedings-fd-27-mar-1997>, on 5 January 2016.

⁷⁶ (2003) The United Kingdom High Court.

child of the marriage.

*Macleod v Macleod*⁷⁷ is a landmark case in division of matrimonial property due to the fact that the Privy Council gave a succinct distinction between pre and post-nuptial agreements. The facts of the case were that Mr Macleod and his wife had signed two agreements; one before marriage and another after marriage. The antenuptial agreement guaranteed Mrs. Macleod a substantially lower amount of maintenance than the post-nuptial agreement. However, she petitioned the court with the view that she could get a higher amount of maintenance than what was guaranteed by the post-nuptial agreement. The High Court and Court of Appeal allowed her petition. Her husband appealed to the Privy Council. In finding for the husband, the council stated that:

“The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense...There is an enormous difference in principle and practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future.”

This statement acknowledged that post-nuptial agreements have a better standing before a court due to the fact that it would be a true reflection of the status of the marriage as opposed to antenuptial agreements which may not be practical as the marriage progresses.⁷⁸

The most recent case regarding the position of antenuptials is *Radmacher v Granatino*⁷⁹. In this case, the wife was of a greater financial status than her husband. To secure the wife's wealth, her family insisted that both parties sign an antenuptial agreement that would ensure that her husband would not lay claim to her wealth. The contract was drafted and signed before a German notary and was subject to German law and was written in German. They resided in London and in the course of their marriage had two children. When the marriage broke down in 2008, the husband applied to the High Court for ancillary relief. The High Court granted him a sum in excess of

⁷⁷ (2008) Judicial Committee of the Privy Council in the United Kingdom.

⁷⁸Scott T, 'MacLeod v MacLeod: Pre-nups, Post-nups and s35 of the MCA,' <http://www.familylawweek.co.uk/site.aspx?i=ed31283>, on 5 January 2016.

⁷⁹ (2010) The United Kingdom Supreme Court.

£5.5m which would afford him an annual income of £100,000 for life and allow him to buy a home in London where his children could visit him. The judge took into account the existence of the ante-nuptial agreement but reduced the weight attached to it because of the circumstances in which it was signed. Upon appeal, the Court of Appeal overturned the decision of the High Court stating that they should have taken into consideration the terms of the contract and made provisions insofar as the children were concerned.

The husband appealed to the Supreme Court where it was held that the notion that antenuptial agreements are prejudicial to the public good should be done away with. The courts also reversed the decision in *Macleod* that there is a fundamental difference between post-nuptial and pre-nuptial agreements.⁸⁰ It stated that the same status should be afforded to both as it makes no difference whether a contract is signed a day before or after the wedding.

Additionally, the Supreme Court stated that factors that render an antenuptial contract voidable are the conventional factors of duress, fraud and misrepresentation. The court stated that for as long as the parties freely entered into the antenuptial contract and had the intention of being bound by it, then the courts would oblige by the intention of the parties. However, the Supreme Court echoed the fact that such agreements must not curtail the right of a spouse to petition the court for ancillary relief especially if such an agreement did not factor in the children born into a family.⁸¹

In Conclusion, the Law in England now recognizes all three types of marital property agreements. The view that such agreements were prejudicial to the public good has been thrown out and parties are now free to enter into any marital property agreements so long as they are not unfair to any party and do not oust the court's jurisdiction to grant ancillary relief.

⁸⁰ Fairbairn R, 'Pre-Nuptial Agreements', http://www.onepaper.co.uk/wp-content/uploads/2014/01/N11_Pre-nuptial-Agreements.pdf, on 5 January 2016.

⁸¹ The Law Commission for England and Wales, *Marital Property Agreements*, 2015, 45.

Chapter Four

Lessons Learnt from the Marital Agreement Laws in South Africa and England and their Application to the Kenyan Context

4.1. Introduction

The previous chapter analyzed the use of marital property agreements in England and South Africa. It highlighted the circumstances in which such contracts are enforced, the requirements for their validity and finally the role played by courts in ensuring the fairness of these contracts. Compared to South Africa and England, Kenya's jurisprudence on marital property agreements is not as developed. Apart from the recognition of antenuptial contracts by the Matrimonial Property Act,¹ there is no further mention of such agreements in any other Kenyan statute. This chapter will list the lessons that the Kenyan marital agreement system can learn from the English and South African systems.

4.2. Comparison between the Kenyan and South African Matrimonial Property Systems

The Kenyan matrimonial property system has notable similarities with the South African system. To begin with, both systems recognize the separate property of spouses.² The out of community property system without accrual is similar to the separate property system in Kenya in that both do not automatically enjoin the separate estates of each spouse upon the commencement of marriage.³ This can be done through marital property agreements.⁴ Therefore, each spouse is responsible for their own individual debts and liabilities without affecting their spouse's separate property.⁵ Debts and liabilities incurred on any joint property must be consented to by both parties.⁶ Both systems recognize that a spouse can have a claim to separate property through monetary and non-monetary contribution.⁷

The use of marital property agreements in both jurisdictions is similar in that they must be in written form, signed and the signatures attested.⁸ This ensures that such agreements are binding.

¹ Section 6(3), *Matrimonial Property Act* (Act No.49 of 2013), Kenya.

² Section 13 of The Matrimonial Property Act of Kenya gives a clear definition of what constitutes separate property of a spouse, while section 2 of the South African Matrimonial Property Act gives a definition of separate property.

³ Section 93 of the Land Registration Act, Kenya, provides for a rebuttable presumption of joint ownership of matrimonial property. This however takes effect upon the commencement of the marriage.

⁴ Section 6(3), *Matrimonial Property Act* (Act No.49 Of 2013). Section 7, *Divorce Act* (South Africa).

⁵ Section 10(1), *Matrimonial Property Act* (Act No.49 Of 2013). Section 19, *Matrimonial Property Act* (South Africa).

⁶ Section 15(2), *Matrimonial Property Act* (South Africa).

⁷ Section 7, *Matrimonial Property Act* (Act No.49 Of 2013). Section 7(2), *Divorce Act*, (South Africa).

⁸ Section 87, *Deeds Registration Act* (South Africa) see also *Law of Contracts Act* (Act No 46 of 1960), Kenya.

An important similarity is the role of the courts in enforcing marital property agreements. In both jurisdictions, courts have the authority to set aside such agreements if they were concluded as a result of fraud, misrepresentation and force,⁹ thus protecting vulnerable parties. In both jurisdictions, parties usually attach their marital agreements to divorce petitions. Upon the issuance of a decree of divorce the courts can enforce the agreements as court orders. The difference between the practice of using marital agreements in Kenya and South Africa is that the antenuptial agreements in South Africa must be registered with the registrar of deeds for them to be enforceable against third parties.¹⁰ In Kenya no such registration is required.

Ante-nuptial agreements are advantageous due to the fact that spouses, especially those in community of property regimes, can maintain their own separate property throughout the duration of the marriage.¹¹ They can also be used by those entering their second marriage after a divorce to protect the interests of their children from the consequences of remarriage on property.¹² Prenuptials can be used in Kenya where both parties come from affluent backgrounds to protect their separate property especially because of the scope of Article 45(3) of the Constitution of Kenya.¹³ However, such agreements would not be practical for spouses who have no property prior to the marriage. Such spouses would be better off making post-nuptial agreements as to the division of property acquired during marriage.

Despite these advantages, ante-nuptial agreements cannot envision all the property spouses will acquire during the marriage.¹⁴ Such agreements rely on full disclosure of the wealth of both parties.¹⁵ This loophole can be manipulated by a spouse to keep part of their property a secret from their partner. Moreover, when an ante nuptial agreement is being made, parties can be swept up in the excitement of marriage and love thus clouding their judgment and affecting their ability to

⁹ Section 6(4), *Matrimonial Property Act* (Act No.49 Of 2013) see also *EAL v ECE* (2015) The High Court of South Africa.

¹⁰ *Ex parte Spinazze and Another* (1985) The High Court of South Africa.

¹¹ 'Ante-nuptial Agreements,' <http://jjmm.co.za/page/antenuptial-agreements/>, on 14 January 2017.

¹² '8 Reasons Why You Should Get a Pre-Nuptial Agreement,' <http://www.prenuptialagreements.org/why-get-prenup/>, on 14 January 2017.

¹³ Mputhia C, 'Use Pre-Marriage Deal to Protect Key Assets,' *Business Daily*, 26 October 2014, <http://www.businessdailyafrica.com/Use-pre-marriage-deal-to-protect-key-assets/-/539444/2500086/-/2uhafp/-/index.html>, on 14 January 2017.

¹⁴ Thibodeaux W M, 'The Pros and Cons of Pre-nuptial Agreements', <http://www.prenuptialagreements.org/pros-cons/>, on 14 January 2017.

¹⁵ Leech S, 'With "All" My Worldly Goods I Thee Endow"? The Status of Pre-Nuptial Agreements in England and Wales,' 34(2) *Family Law Quarterly*, 2000, 205.

rationally conclude pre-nuptial agreements.¹⁶ The South African courts recognize the importance of post-nuptial agreements and give parties an opportunity to make them instead of subjecting the property to court division. The Kenyan system can learn from this by encouraging parties to enter into settlement agreements and post-nuptial agreements which may reduce the courts work load with regard to division of matrimonial property cases. Such agreements would also be helpful in the realization of Article 159(2)¹⁷ which encourages the judiciary to promote alternative forms of dispute resolution. In May 2016, former chief Justice Dr. Willy Mutunga launched a court annexed mediation programme that would help reduce the backlog of cases in the court system.¹⁸ This pilot programme deals with cases in the commercial and family divisions' of the high court.¹⁹ In an effort to actualize this programme as well as Article 159(2), spouses can negotiate post-nuptial or settlement agreements during mediations sessions.

The mediation process can be slowed down by the fact that at the point of divorce, spouses may not be willing to meet or negotiate on property ownership. Therefore, post-nuptial agreements would be better suited since they are made during the subsistence of marriage instead of at the tumultuous end.

4.3. Comparison between the use of Matrimonial Property Agreements in England and Kenya.

Both jurisdictions recognize separate matrimonial property as their matrimonial property system. The consequence of this system has been explained in the previous chapter. Despite the fact that Kenya borrows a lot from English laws, the Kenyan jurisprudence towards matrimonial property agreements has not been as harsh as the English approach. Whereas the biggest dilemma courts faced in Kenya's history is the equal rights of spouses in the division of matrimonial property,²⁰ the biggest concern for the English courts with regard to division of matrimonial property through marital agreements was the security of marriage as a social institution.²¹ The question that could therefore be asked within the Kenyan context is which type of marital property

¹⁶ Landers J, 'Five Reasons Your Prenup Might Be Invalid,' Forbes 2 April 2013, <http://www.forbes.com/sites/jefflanders/2013/04/02/five-reasons-your-prenup-might-be-invalid/#50722b4c2e3d>, 14 January 2017.

¹⁷ Constitution of Kenya (2010).

¹⁸Wanjala M, 'Judiciary sets stage for alternative dispute resolution,' Capital FM, <http://www.capitalfm.co.ke/eblog/2016/03/23/judiciary-sets-stage-alternative-dispute-resolution/>.

¹⁹ 'Judiciary opens its doors to Mediation,' <http://kenyalaw.org/kenyalawblog/judiciary-opens-its-doors-to-mediation/>, on 12 January 2017.

²⁰ Murungi N.L, 'Consolidating Family Law in Kenya,' 319.

²¹ Sanders A 'Private Autonomy and Marital Property Agreements' 571.

agreements best promotes fairness and equality between spouses.

As stated above, pre-nuptials would be useful for spouses who have each amassed a great deal of property prior to the marriage.²² However, not many Kenyans have the privilege of owning that much property. Additionally, if a wealthy spouse marries a poor one, the pre-nuptial can be used unfairly to prevent that spouse from acquiring any part of their partner's wealth despite any contribution. In Kenya, where the wife is considered economically inferior to the husband²³, pre-nuptial agreements may prejudice their right to equal ownership of matrimonial property. Given our history of discrimination against women in division of matrimonial property upon divorce, post-nuptial and settlement agreements would be better suited for use in Kenya so as to protect the rights of the economically inferior spouse.

Kenyan law recognizes multiple types of marriages including Christian²⁴, customary,²⁵ civil²⁶, Hindu²⁷ and Islamic.²⁸ Apart from the elements of a valid marriage prescribed in the Marriage Act, there are some types of marriages that require spouses to go through extra steps such as pre-marital counselling for Christian marriages.²⁹ This is based on the doctrines and beliefs of the different denominations. The Catholic Church for example is opposed to spouses signing pre-nuptial agreements as it contradicts the catholic teachings on marriage as the complete union of man and wife.³⁰ This implies a union of the soul, the body as well as corporeal goods.³¹ In light of such opinions regarding premarital agreements in Kenya, post-nuptial and settlement agreements can be used as an alternative to parties whose personal beliefs do not permit them to sign pre-marital agreements.

A question that has been raised about the use of matrimonial property agreements, is how such agreements will help in the distribution of property owned jointly by spouses. Both Kenyan and English courts have recognized that division of joint property may be done equally or on the

²² Mweresa E.S 'Prenuptial Agreements Blessing or Curse?' <http://salclaw.co.ke/prenuptial-agreements-blessing-or-curse/> on 14 January 2017.

²³ Institute of Economic Affairs-Kenya, *Profile of Women's Socio- Economic Status in Kenya, 2008, 18.*

²⁴ Part III, *Marriage Act* (Act No 4 of 2014), Kenya.

²⁵ Part V, *Marriage Act* (Act No 4 of 2014), Kenya.

²⁶ Part IV, *Marriage Act* (Act No 4 of 2014), Kenya.

²⁷ Part VI, *Marriage Act* (Act No 4 of 2014), Kenya.

²⁸ Part VII, *Marriage Act* (Act No 4 of 2014), Kenya.

²⁹ <http://kenyamarrriagecounselling.com/Kenyan-pre-marriage-counselor.htm>, on 14 January 2017.

³⁰ 'Pre-nups and Catholic teachings,' <https://marriageresourcecentre.org/2013/04/06/prenups-and-catholic-teaching/>, on 12 January 2017.

³¹ 'Pre-nups and Catholic teachings,' <https://marriageresourcecentre.org/2013/04/06/prenups-and-catholic-teaching/>, on 12 January 2017.

basis of contribution; depending on the facts of the case. Post-nuptial and settlement agreements can be used to clearly indicate each spouse's share to the joint property, be it on the basis of their contribution or on a 50:50 basis.

The role of the courts in the enforcement of these agreements is also a good practice that Kenya can borrow from the English courts. It is a common law principle that the role of the courts in interpretation of ordinary contracts is to interpret the contract without trying to create an intention or obligation that is not evident from the terms of the contract between parties.³² However, marital property agreements are more sensitive than other ordinary contracts.³³ This is because of the important position that marriages have in a society.³⁴ The state has a responsibility to protect the institution of marriage and those affected by it that is; the husband, the wife and the children. Sometimes, pre-nuptial and post-nuptial contracts if enforced word for word, would be prejudicial to justice and fairness.³⁵

The intervention of the courts is important because a spouse who feels dissatisfied or oppressed by the terms of a marital contract can have recourse for this in a court of law.³⁶ This is why, despite the fact that the English courts have given recognition to the three main types of matrimonial property agreements, they insist on nullifying any provision in such contracts that prevent a spouse from petitioning the court for higher alimony or for a share in property that may not have been dealt with in the marital contract. The right of a spouse to petition the court for alimony or for a claim to property should also be fiercely protected by courts in the Kenyan marital agreement system.

In conclusion, pre-nuptial agreements alone may not be able to achieve equality as envisioned in Article 45(3) of the Constitution of Kenya, post-nuptial and settlement agreements included will give spouses a better chance of negotiating a fair and equitable agreement for the division of matrimonial property.

³² Smith S.A, *Atiyah's Introduction to the Law of Contract*, 6th ed, Clarendon Press, Oxford, 2006,147.

³³ 'Marriage and Domestic Partnership,' <https://plato.stanford.edu/entries/marriage/> on 12 January 2017.

³⁴ Article 45(1), Constitution of Kenya (2010).

³⁵ *S v S* (1997) The United Kingdom High Court.

³⁶ *Hyman v Hyman* (1929) The United Kingdom House of Lords.

Chapter Five

Conclusion, Findings and Recommendations

5.1. Introduction

This chapter concludes the study by outlining the findings and recommendations on the use of marital property agreements in Kenya. It reflects on the statement of the problem, the research objectives and the hypothesis stated in Chapter One.

5.2. Findings

a) On the Status of Marital Agreements in Kenya.

Chapter One and Two, have established that Section 6(3) of the Kenyan Matrimonial Property Act recognizes spouses' right to enter into premarital/antenuptial agreements outlining how their matrimonial property is to be shared out upon divorce. However, the Act does not have provisions for post-nuptial or settlement agreements. The courts have nonetheless upheld post-nuptial and settlement agreements made between spouses for the division of matrimonial property upon divorce.

b) On the Rights of Spouses to Matrimonial Property

Chapter Two analyzed the law regarding matrimonial property interests between spouses. Article 45(3) of the Constitution of Kenya 2010, gives spouses equal rights at the beginning of the marriage, during the marriage and at the end of the marriage. This right is also provided for by section 4 of the Matrimonial Property Act of Kenya. Nonetheless, the Matrimonial Property Act still states that ownership of matrimonial property is on the basis of contribution (both monetary and non-monetary). This dispute has been a characteristic of Kenya's matrimonial property system since the post-colonial era. The Courts today have issued varied judgments on the status of spousal rights to matrimonial property, with the Court of Appeal ruling in favour of 50:50 ownership of property while the High Court has ruled in favour of ownership on the basis of contribution. The courts is yet to give guidelines on how division of matrimonial property should be carried out.

c) On Appropriate Marital Agreements

From the case studies in Chapter Three and the lessons in Chapter Four, it has been highlighted that different marital agreements are appropriate at different stages of a marriage. Pre-nuptials are most appropriate in instances where there is a community of property regime, post-nuptial and settlement agreements are most suitable for spouses who have been married out of

community of property and wish to outline their interests in matrimonial property or those planning on getting a divorce. In Kenya, post-nuptial and settlement agreements would be most appropriate because of they are better suited to fulfill the provisions of Article 45(3) on equality.

d) On the Role of Courts in Enforcing of Matrimonial Property Agreements.

The courts have an important role to play in the enforcement of matrimonial property agreements as has been established in Chapter Four. This is because of the need to protect the interests of the spouses in the marriage. They can vary the terms of the agreement by giving a spouse a higher interest in matrimonial property than had been provided for by any matrimonial property agreement. They may also set aside the agreement if they were concluded fraudulently or by coercion.

5.3. Recommendations

a) Clarification on Spousal Interest in Matrimonial Property

The courts need to settle the disputed interpretation of Article 45(3) of the Constitution of Kenya and section 7 of the Matrimonial Property Act on how to divide matrimonial property upon divorce. Issuing guidelines on how matrimonial property should be shared out upon divorce will aid in clarifying this contradiction. For example, the guidelines given by the court in *Kivuitu v Kivuitu*¹ discussed in Chapter Two, clearly indicate circumstances in which the courts can assume joint tenancy on the basis of contribution. A similar set of principles should be implemented by court in the division of matrimonial property. In addition, the presumption of joint ownership of matrimonial property forms a good basis for the courts to begin from in the process of division of matrimonial property. This presumption can be rebuttable so that those spouses that feel that joint ownership is unfair can adduce evidence to rebut this presumption.

b) Recognition of Post-nuptial and Settlement Agreements by Law

In addition to the recognition of pre-nuptial agreements, the law should also give explicit recognition to post-nuptial and settlement agreements so as to remove any ambiguity on their validity and enhance equality between spouses.

c) Guidelines on enforcing Marital Agreements

Issuing guidelines on how courts should enforce marital agreements in different

¹ (1991) eKLR.

circumstances would help parties draft the agreements in a clear manner based on the guidelines and thus, improving the efficiency of such agreements. The guidelines given by the English courts *Edgar v Edgar*² which include competent legal counsel in drafting and signing as well as a fair and proper negotiation of terms should be adopted by the Kenyan courts. Additionally, the principles set out in the case of *K v K*³ discussed in Chapter Three would also be useful in guiding the implementation of marital agreements by Kenyan courts.

5.4. Conclusion

The statement of the problem in this research was that the law only recognizes pre-nuptial agreements despite the fact that such agreements may cause inequality and injustice in the division of matrimonial property upon divorce. The ideal scenario would be the recognition of all three types of marital property agreements for more efficient and just division of matrimonial property upon divorce. This research has established that post-nuptial and settlement agreements are the most efficient and just forms of marital property agreements that can be used in Kenya and should be recognized by law.

The research objectives that were outlined in Chapter one have been achieved as follows:

i. **To assess the viability of marital agreements in division of matrimonial property.**

This study has established that marital property agreements are a viable method of dividing matrimonial property. They have been recognised by law and have been upheld by courts as legally valid documents once concluded with the mutual consent of the parties and in a non-fraudulent manner.

ii. **To find out whether marital agreements are a just and efficient way of dividing matrimonial property.**

This research has established that marital property agreements can be just if drafted and implemented with proper legal guidance.

iii. **To draw out lessons from how marital agreements work in other jurisdictions that use them in division of matrimonial property.**

This research has achieved the third objective by carrying out a comparative study and coming up with lessons and recommendations for the use of matrimonial property

² (1980) The United Kingdom High Court.

³ (2003) The United Kingdom High Court.

agreement in Kenya

The hypothesis of this research was that prenuptial, post-nuptial and settlement agreements are a practical method of division of matrimonial property when used appropriately and can aid the court in dividing the property upon divorce.

The study has tested this hypothesis and proved that marital property agreements can be a practical method of division of matrimonial property.

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