

**A CONTRACTUAL MARRIAGE: WHAT IS THE PLACE OF PRENUPTIAL
AGREEMENTS IN KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

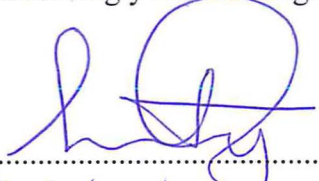
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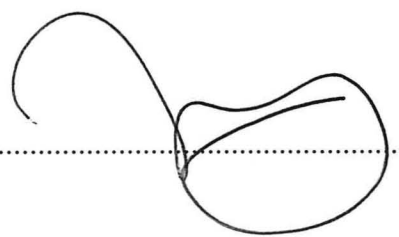
Declaration

I, MWAURA LUCY WANGARI, 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.

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

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[Supervisor's Name]

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CHAPTER ONE

WHAT IS THE PLACE OF PRE-NUPTIAL AGREEMENTS IN KENYA AND COULD THEY BE THE HOPE OF AN END OF CONFLICTS ARISING UPON DISSOLUTION OF A MARRIAGE.

1.1 INTRODUCTION

The laws of Kenya define a marriage as a voluntary union between a man and a woman whether in a polygamous or monogamous union and must be registered in accordance with the Marriage Act¹. The Holy book defines marriage as an intimate and complementing union between a man and a woman where they become one body in flesh till death separates them². From the legal definition and a sentimental approach to marriage it is not difficult to draw that, indeed marriage is a very important stage within one's life cycle. Therefore it is prudent for one to enter this union with a degree of legal and psychological preparedness. Hence prenuptial agreement is one such step towards preparedness.

A prenuptial agreement is a form of consensus that parties, intending to marry, state the fate of their property they presently own and even the property they shall acquire in the course of their marriage. Pre-nuptial agreements have been legalised in Kenya³ where the Matrimonial Property Act of 2013, states that parties to an intended marriage may enter into a pre-nuptial agreement to determine their property rights⁴.

However with this said, sadly it is not common and not largely practiced in Kenya. Maybe this could be owed to the Kenyan culture, upbringing or even religious faith. The Kenyan culture especially, has informed the way in which Kenyans approach marriage example: in some communities marriage is arranged by the parents and the partners may or may not have a say in it. So if parties are not even allowed to contribute or choose whom to marry; then what about construction of a prenuptial agreement which is far more complicated!⁵ Well, your guess is as good as mine.

¹ Section 3, *Marriage Act*, 2014.

² Genesis 1:26-27 and Galatians 3:28, The Holy Bible, *New International Version*.

³ http://www.academia.edu/13746937/Legal_status_of_prenuptial_agreements_in_Kenya.

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

⁵ Ngugi Wa Thiongo, 'The River Between' (1995).

Although Kenyan Constitution declares Kenya to be a secular state⁶, key religious groups have also played a key role in un-popularising prenuptial agreements. Religious figures argue that prenuptial agreements distract couples from the 'five C's of marriage'. These are communication, commitment, conflict resolution, children and church.⁷ As one clergyman cautions, "people have to be prepared for the idea that marriage is work. It's not just a merging of assets⁸. Therefore it is quite clear that the religious forum is not in full support of prenuptial agreements.

Other right thinking members of society, view a prenuptial agreement as a worst way to begin a marriage. Others view it as an impediment to individuals focused on one of life's strongest emotions which is love. Others, that it does not conjure an image of marital equality. Prenuptial agreement are also seen as portraying a lack of trust in one's partner. Other objections include allegations that prenuptials dampen the romance in a marriage, introduce the grasping morals of the market place into an intimate relationship and it places too much emphasis on the interest of an individual at the expense of the common good of the couple⁹.

With these impediments listed above, this paper seeks to create an awareness of the nature, function and importance of prenuptial agreement and demystify the myths which have caused pre-nuptial agreements to be such an infamous phenomena.

Therefore this thesis is based on the following legal problem:

1.2 LEGAL PROBLEM:

Is there a need for parties to have a prenuptial agreement in Kenya?

There is great opportunity for pre-nuptial agreements if the Matrimonial Property Act ¹⁰was interpreted widely to mean that pre-nuptial agreements could be entered before a marriage, during marriage or even upon dissolution of a marriage¹¹. In addition, if an awareness was created to parties intending to marriage.

⁶ Article 8, *Constitution of Kenya*, 2010.

⁷ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917

⁸ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917

⁹ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917.

¹⁰ Section 6, *Matrimonial Property Act*, (2013).

¹¹ Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140.

There is great opportunity for this agreement especially to the young wealthy couples of the 21st Century who quickly contract a marriage without proper counselling and guidance from their elders and within a short time, the marriage is in the drain¹².

Prenuptial agreement are very important because:

- They state the fate of property acquired before marriage and within a marriage. It also states how such property may be shared out between the spouses and among the children if any¹³.
- They protect a wealthy party from having to share his wealth in the case where the other party fraudulently and pretentiously procured the marriage in order to have a share of the wealth¹⁴.
- Reduced conflict upon the breakdown of the marriage.
- Greater choice of parties to the agreement to order their own financial affairs (instead of leaving it to the court to decide on their behalf¹⁵)
- Pre-nuptial agreement could work the same way as a will, hence parties may not be subject to intestacy rules.

1.3 Hypothesis

Prenuptial Agreements have been provided for under Matrimonial Property Act however have they been enforced or validated in Kenya. When these prenuptial agreements are enforced in Kenya can it be a tool to foster harmony and solidarity in marriages in addition to this can it be a tool to eliminate the rising cases of divorce.

1.4 Objectives

General Objective

The objective of this study is to create an awareness to the Kenyan populace of the existence of pre-nuptial agreements. That they do exist and can be drafted before solemnization of a marriage and even for those who are already within a marriage union that they can still draft a

¹² Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917.

¹³ Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140.

¹⁴ Gail F. Brod, 'Premarital Agreements and Gender Justice' *Yale Journal of Law and Feminism* (1993).

¹⁵ Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140.

pre-nuptial agreement. Where they can expressly state their individual interests in regards to property and the fate of such property upon dissolution of a marriage.

To demystify the myths surrounding pre-nuptial agreements. Some think that it is an agreement on how to end a marriage, others say it is a bad way to begin a marriage while others think marriage is about love and hence love should dictate how parties conduct their day-to-day affairs and not a pre-nuptial agreement. They say that knowledge is power. Hence my task shall be to bring out the merits versus demerits of a pre-nuptial agreement and strike a balance of whether they are a necessary evil.

Specific Objectives

To analyse the place of pre-nuptial agreements in Kenya and what laws are there in place to govern them.

To discuss the purpose and importance of pre-nuptial agreements. What role do they play in marriages and how have they fostered harmony in marriages. Also have a look at the drawbacks of having pre-nuptial agreements. In relation to this, the study shall attempt to draw a comparison between a pre-nuptial agreement and a will.¹⁶

To discuss the contents of a pre-nuptial agreement. Should they have a particular format? What are the particular clauses the agreement should have? What is the scope of a pre-nuptial agreement? Can a pre-nuptial agreement cover all interest of the parties?¹⁷

To conduct a case analysis to evaluate how courts perceive pre-nuptial agreements. To examine which clauses within a pre-nuptial agreements, have remained unenforceable to date¹⁸.

1.5 Research Methodology

Information for this study shall be obtained in the following way:

I. Secondary source

The secondary sources shall include written works on the subject matter of Pre-nuptial Agreements. These include statutes such as the Marriage Act and Matrimonial Property Act

¹⁶ Mweresa Eugene Sudi, 'Pre-nuptial Agreements: Blessing or Curse?' (2015).

¹⁷ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' 4 *Stanford Law Review*, (1997), 887-917.

¹⁸ Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140.

of Kenya. Online sources such as journal articles. It shall also include judicial precedents both in the local and international arena.

1.6 Limitation of Study

This study is subject to the following limitations:

- II. The jurisprudence on pre-nuptial agreements has not developed in Kenya. This is for the reason that pre-nuptial agreements are not common in Kenya unlike in other States such as Australia.
- III. Therefore, majority of the sources used are from foreign jurisdictions.
- IV. Therefore, some principles advanced by the international scholars may not apply within the Kenyan jurisdiction.

1.7 Literature Review

This refers to the existing works or writings on the subject matter. One of the greatest scholars on Family Law and matters of Pre-nuptial Agreements is Dr Judith Younger from the University of Minnesota. She is authored several journal articles on the subject of Pre-nuptial agreements together with other authors who shall be listed below.

- Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140. This Article analyses the effectiveness or lack of it, of prenuptial agreements within Australia and what lessons Australia has learnt after a year of application of pre-nuptial agreements and recommendations of possible amendments for the efficiency of the agreements¹⁹.
- Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917. This article examines the increasing use of prenuptial agreements in America, the clauses that a court may or may not enforce within a pre-nuptial agreement²⁰.
- Jonathan E. Fields, 'Forbidden Provisions in Pre-nuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer' (2008). This article shall discuss certain provisions within a pre-nuptial agreement that would be rendered void or voidable by a court of law. It also discusses the importance of having an

¹⁹ Belinda Fehlberg and Bruce Smyth, 'Binding Pre-nuptial Agreements in Australia – The First Year' *International Journal of Law, Policy and the Family* 16, (2002), 127-140.

²⁰ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' *4 Stanford Law Review*, (1997), 887-917.

advocate to assist in the drafting of these agreements so as to limit issues of technicalities and ambiguity²¹.

- Ivor Weintraub²², 'Benchmarks: Tying the Note around Pre-nuptials' *Law Society Gazette* (2003). This article examines the *obiter dicta* and *ratio decidendi* of different cases that have been brought to court. It outlines some of the clauses, within a pre-nuptial agreement, that are void or voidable. It also discusses the courts attitude towards these agreements and how they are enforced²³.
- Gail F. Brod, 'Premarital Agreements and Gender Justice' *Yale Journal of Law and Feminism* (1993). This article brings the rights of women to perspective. It states that pre-nuptial agreements ensure equality of for both women and men but most specifically it protects women who are capital inferior.²⁴
- *Posner v Posner*, 206 So.2d 416 (Fla. Dist. Ct. App. 1968). This case shall be important for our discussion as it looks into the enforceability of pre-nuptial agreements²⁵.

1.8 Chapter Breakdown

Chapter one: The background and introduction of the study. The objectives of the study. The research methodology to be used in the conduct of the study and possible limitations subject to this particular study.

Chapter two: Analyse the different laws that govern marriage and matrimonial property. Evaluate how this laws come into play within the pre-nuptial agreement. Conduct a comparative study between the Kenyan Laws on pre-nuptial agreements with those from other jurisdictions such as South Africa as its jurisprudence on marriage is quite developed, and California which is a federal state of the United States of America and is a civil law state with developed jurisprudence on the issue of marriage and prenuptial agreements.

Chapter three: Shall conduct an analysis of the various cases regarding pre-nuptial agreements. How courts perceive these agreements. Using decided case, the study shall strive to draw a conclusion on the types of clauses that ought to make content of the pre-nuptial agreement (meaning those that are enforceable and those that are not).

²¹ Jonathan E. Fields, 'Forbidden Provisions in Pre-nuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer' (2008).

²² Ivor Weintraub, is a District Judge, who sits at Bournemouth County Court.

²³ Ivor Weintraub, 'Benchmarks: Tying the Note around Pre-nuptials' *Law Society Gazette* (2003).

²⁴ Gail F. Brod, 'Premarital Agreements and Gender Justice' *Yale Journal of Law and Feminism* (1993).

²⁵ *Posner v Posner*, 206 So.2d 416 (Fla. Dist. Ct. App. 1968).

Chapter four: Discuss the purpose and importance of pre-nuptial agreements. What role do they play in marriages and how have they fostered harmony in marriages. In relation to this, the study shall attempt to draw a comparison between a pre-nuptial agreement and a will.

Chapter five: Shall contain the conclusion. Where it shall attempt to give recommendations of the importance or lack of it, of pre-nuptial agreements. Recommendations on any amendments of the Kenyan laws to foster efficiency of the pre-nuptial agreements.

However, above all, this study aims to show the Kenyan why they should or should not enter into a pre-nuptial agreement.

CHAPTER TWO

THE VARIOUS LOCAL AND INTERNATIONAL LAWS THAT GOVERN PROPERTY RIGHTS UPON MARRIAGE

2.1 Introduction

Chapter one has outlined a brief summary of what this dissertation seeks to analyse. It states in its introduction that prenuptial agreements, especially in Kenya, are still at the infant stage. That the laws have merely recognised the existence of prenuptial agreement ¹but has not taken a step further to outline what should constitute the agreement. Therefore, in line with this observation arose the legal problem which is: “Is there a need for prenuptial agreements in Kenya” and in addition to this how will they be enforceable in Kenya. It has also outlined hypothesis which are questions that this paper shall endeavour to respond in each subsequent chapter.

This chapter is very important as it endeavours to discuss the history of law making in the field of prenuptial agreement. Before the recognition of pre-nuptial agreements there existed other laws that guided how property rights would be allocated once parties have entered into a marriage. Therefore, we shall take a look at the history of the law making process in regards to matrimonial property, the rules that were promulgated to govern the same. Then we shall look at how the law has evolved that they now recognise prenuptial agreements.

This Chapter shall make a flashback of how countries such as Kenya, South Africa, Australia and United States of America have soldiered the journey of the law making process of allocation of property rights within a marriage to present where they have recognised the role of prenuptial agreements in the quest of property rights allocation within the marriage. This history is very important as it reflects the beginning of the journey in regulation of matrimonial property. These laws were enacted to remedy a mischief or a problem that had arisen at that time in society. However, as you shall soon see, even after promulgation of matrimonial property laws the mischief was not entirely dealt with. Spouses continued to be in conflict on who owned what within a marriage.

Therefore, that is where the prenuptial agreements come in. The courts although reluctant at the beginning saw that indeed these agreements were essential and needed to be validated or

¹ Section 6, *Matrimonial Property Act*, 2013.

made enforceable for the benefit of eliminating the said conflicts. We shall first look at Kenya, see what laws they have enacted to regulate and property regime within a marriage then assess their level of evolution into pre-nuptial agreement. Then we shall look at South Africa, then Australia and finally compare the three countries with the United States of America whose jurisprudence has greatly involved in the subject matter of prenuptial agreements.

2.2 The Republic of Kenya

As already mentioned in chapter one, the matter of prenuptial agreements is anchored upon section 6 (3) of The Matrimonial Property Act which provides that parties can enter into an agreement before their marriage to determine their property rights.² This Act is part of the large body of family laws which have been enacted and others appealed. Therefore at this juncture we shall briefly have a look at the reforms that have taken place in marriage and family laws and what effect they have had on prenuptial agreements.

It is imperative that family laws undergo reforms due to universalisation, egalitarianism and secularisation of the Kenyan society, however this change has not been a ride in the park due to some of the challenges mentioned in chapter one but the biggest being that the Kenyan society remains patriarchal grounded on deep rooted culture that subordinates women to men³. However over the years Kenya has signed and enacted some international conventions that eliminate this archaic culture such as Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR) and Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

Kenya is under an obligation to actualise the above mentioned instruments, one of the obligations being to eradicate any discrimination against women in all aspects of life including laws pertaining to marriage. In the economic aspect, there has been a shift of the archetype where women have become financially empowered hence their reliance on men for financial support has greatly reduced and this has led to a partnership model in marriages.⁴ Now husband and wife are considered equal spouses each with their own legal identity.

² Section 6(3), *Matrimonial Property Act*, 2013.

³ Nancy Baraza, "Family Law Reforms in Kenya: An Overview", Presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30th April, 2009.

⁴ Nancy Baraza, "Family Law Reforms in Kenya: An Overview", Presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30th April, 2009.

Consequently, the marital relationship is now constituted as of personal choice with the parties hoping to obtain happiness through intimate association with each other⁵.

The law pertaining to Matrimonial Property is governed by the Constitution of Kenya 2010⁶, Matrimonial Property Act of 2013⁷ and the Law of Succession Act of 1972⁸. However before these Acts came into play, it was governed by Matrimonial Causes Act ⁹and the Married Women's Property Act¹⁰. Prior to this, the English common law applied the doctrine of covertures where a wife had no legal capacity to hold property in her own right and to transact in it. This is for reasons that the law considered spouses as one entity, embodied in the husband. 90-The consequence of this was that any property she owned before and after marriage were seized by the husband and the wife had no legal capacity to dispose of the property¹¹.

The Married Women Property Act, came to remedy this situation by recognising that women have legal capacity to own property and transact in it as unmarried women¹². In the case where ownership of property was in dispute within the marriage then the husband or wife could apply to the High court and the judge would make orders in respect to property in dispute¹³.

These English pieces of legislation were applicable to Kenya by virtue of section 3 of the Judicature Act which states that “where written laws do not extend or apply, courts may also apply the substance of common law, doctrines of equity and Statutes of General Application in force in England on 12th August, 1897 so long as the circumstances of Kenya and its inhabitants permit”¹⁴

The Married Women's Property Act has been used in deciding cases concerning dispute in property between a husband and a wife. In one such case is *Karanja V Karanja*¹⁵ where the wife brought an action under section 17 and she alleged that she had made financial

⁵ Nancy Baraza, “Family Law Reforms in Kenya: An Overview”, Presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30th April, 2009.

⁶ *Constitution of Kenya*, (2010)

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

⁸ *Law of Succession Act*, (No. 14 of 1972).

⁹ *Matrimonial Causes Act*, CAP 152

¹⁰ *Married Women Property Act*, 1882.

¹¹ Nancy Baraza, “Family Law Reforms in Kenya: An Overview”, Presentation at Heinrich Boll Foundation's Gender Forum in Nairobi, 30th April, 2009.

¹² Section 1 & 2, *Married Women's Property Act*, 1882.

¹³ Section 17, *Married Women's Property Act*, 1882.

¹⁴ Section 3, *Judicature Act* (Act No. 14 of 1977).

¹⁵ *Karanja v Karanja* (1967) Kenya Law Reports, 307.

contributions towards the purchasing of the matrimonial property. Her husband on the other hand maintained that even if that was the case, under Kikuyu Customary law a woman was not permitted to own property and therefore his wife's claim could not stand. The court stated that although customary law was a source of law, it was bound to reject it, as it contradicted the MWPA which is a written law. Therefore it awarded the wife one-third of the property.¹⁶

Though the Married Women's Property Act greatly built the jurisprudence on ownership of property by women, it ceased to apply in Kenya after the enactment of Matrimonial Property Act of 2013.¹⁷ This Act is the first substantive piece of legislation that addresses the lacunae in marital property regime¹⁸. It defines what a matrimonial property is under section 6¹⁹, what constitutes as contribution to the said matrimonial property²⁰ and last but not least it makes a provision for pre-nuptial agreements which are the subject matter of this dissertation.

The perception of married women has changed from the mid nineteenth century when they were not recognised and had no legal capacity to own property, when their extended family could easily storm in and take property upon their husband's death and now to brighter days where they can not only own property in their own names (separate legal capacity) but can also pioneer and enter into pre-nuptial agreements to determine their property rights²¹.

2.3 The Republic of South Africa

South Africa has demonstrated a great understanding of the matter of matrimonial property in the development of their laws as discussed below. South Africa seem to have an already established property regime which they termed as community of property provided by the state, however for couples who would like to exercise their right to determine property rights, they enter into an ante-nuptial agreement. Therefore, South Africa has a rich jurisprudence on the subject matter and have even made a step ahead to recognise and enforce prenuptial agreements. Their jurisprudence can serve as a great guide to any country wishing to draft laws on prenuptial agreement and how they would go about it.

¹⁶ *Karanja v Karanja* (1967) Kenya Law Reports, 307.

¹⁷ Section 19, *Matrimonial Property Act*, 2013.

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

¹⁹ Section 6 of the Matrimonial Property Act defines matrimonial property as matrimonial home, household goods and effects in the matrimonial home, any other movable and immovable property jointly owned and acquired during the subsistence of the marriage.

²⁰ Contribution can be in monetary and non-monetary form.

²¹ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007) <http://www.scholarship.law.wm.edu/wmjowl/vol13/iss2/2>

In South Africa this kind of agreement is termed as an Ante-nuptial agreement.²² When parties enter into this agreement they are opting out of the normal community of property matrimonial system.²³ Couples entering into a marriage have three options to choose from, to determine the ownership of their matrimonial property.

2.3.1 The Accrual System

During the era of out of community of property each spouse owned property separately in addition to the profit and loss of the property. This proved to be very unfavourable especially to married women or housewives who had no independent source of income because upon dissolution of the marriage such women were left destitute and could not claim maintenance against their husband's estate²⁴.

Therefore, the Matrimonial Property Act 88 of 1984 developed the Accrual system to curb the mischief of out of community property that was very detrimental to the women. The Accrual System was developed on the premise that both spouses ought to have a stake in the property acquired during the marriage so long as they had both made direct or indirect contribution during the marriage.²⁵

All marriages concluded after the commencement of the Matrimonial Property Act 88 of 1994 are subject to the Accrual system however parties who wish not to apply this system can enter into an ante-nuptial agreement stating that they prefer the out-of-community method of property ownership²⁶.

2.3.2 Exclusion of both Community of Property and Community of Profit and Loss

As already mentioned above, prior to the Matrimonial Property Act of 1984, each spouse retained the property they had before the marriage and also retained what each had acquired during the marriage (community of property and community of profit and loss).²⁷ However with the coming of the above mentioned Act came the Accrual System where the parties to the marriage would all have a stake in the property so long as they had made some form of

²² Section 2, *Matrimonial Property Act 88 of 1984*, South Africa.

²³ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 107.

²⁴ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 118.

²⁵ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 117.

²⁶ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 117.

²⁷ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 116

contribution. The Accrual System automatically applied to marriages concluded after 1984 however parties could enter into an ante-nuptial agreement stating the exclusion of both community of property and profit and loss just for the purpose of emphasis.²⁸

2.3.3 Exclusion of Community of Property but retaining Community of Profit and Loss

This means that each spouse owns and holds their separate property acquired before and during the marriage (exclusion of community property) but any profit or loss that may arise within the marriage is merged into the joint estate.²⁹The parties enter into an ante-nuptial agreement stating that each spouse holds its property separately but profit and loss arising from joint assets are shared equally. This system is hardly ever adopted by parties.

However, even after procuring the marriage, the couple has an opportunity to still choose or change their mind on which regime of ownership of property they would like for their marriage. However, for the change to be admissible in court the parties must bring forth **sound reasons** to convince the court. In the case *Ex Parte Burger*, 1995 the couple married and entered into a pre-nuptial agreement with the regime of complete separation of property however later in their marriage they felt that they would be more happy if their ante-nuptial agreement was in accordance with the Accrual system as the wife would have a share in the appreciating estate of the husband. The South African Court allowed this request and granted the change stating that the couple had advanced **sound reasons**.³⁰

2.4 The Republic of Australia

Australia is instrumental especially because of the fact that it is a common law jurisdiction. This make it very easy to analyse their laws and possibly adopt them in Kenya. Australia is among the developed countries hence their laws are also quite developed. Their courts recognised premarital agreements so long as they only pertained to financial matters.³¹

²⁸ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 117.

²⁹ D. Cronje & J. Heaton, *South African Family Law*, (1999), page 117.

³⁰ *Ex Parte Burger* [1995] 1 S.A. 140.

³¹ Family Law Act, (1975) (Australia).

The rich jurisprudence of pre-nuptial agreements in Australia can greatly be utilized by states such as Kenya to guide in their own development of laws on the subject matter of pre-nuptial agreements.

Binding prenuptial agreements were not admissible in Australia however they were introduced into Australian law on 27th December, 2000. Prior to this, only binding financial agreements between spouses could be entertained. These agreements could only be entered into upon separation and had to be court registered.³²

The existence of a pre-nuptial agreement was viewed as important but not decisive, to how the Family Court's broad discretion under the Family Law Act of 1975³³ to alter interests in property on separation and divorce would be exercised. Therefore prenuptial agreements could only be entered into upon separation of the parties and had to be registered in court.³⁴ Before 27th December, 2000 separating spouses, upon their wish, could enter binding financial agreements as provided under section 86 and 87 of the Family Law Act which had to be registered in court in order for it to be enforceable. The content of the prenuptial agreement could include settlement of property, spousal maintenance and matters concerning the children.³⁵

The legislatures with the mandate of the people felt that this legal regime needed to be amended. They asserted their right to property and the right to ascertain how they would want to share out their property. They felt that they should not wait until upon the dissolution of a marriage in order to assign property rights, they wanted to be in control of their property even before marriage. The introduction of a legally binding pre-nuptial agreement was recommended by the Australian Law Reform Commission's Matrimonial Property Report and by the Joint Select Committee on Certain Aspects of the Family Law Act during the period of 1982.³⁶ Therefore, in February 1999 this process of amendment began with a press statement by the federal Attorney General where he stated that the rationale for the proposed amendment was the benefits that accrue from recognising a pre-nuptial agreement. There was a lot of deliberations and brainstorming on this matter especially during the second

³² B. Fehlberg and B. Smith, "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

³³ *Family Law Act*, (1975), Australia.

³⁴ B. Fehlberg and B. Smith, "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

³⁵ Section 86 and 87, *Family Law Act* (1975) Cth.

³⁶ B. Fehlberg and B. Smyth, 'Pre-nuptial Agreements of Australia: Why not?', *14 Australian Journal of Family Law* 80.

reading in the Senate and this led to an inquiry by the Senate Legal and Constitutional Committee into the Bill. The Committee reported to the House, recommending that binding pre-nuptial agreements should be introduced.³⁷

Therefore, this led to the Family Law Amendment Act of 2000, with the insertion of Part VIIIA. The new Part VIII of the Family Law Act provides that couples can enter into a prenuptial agreement before marriage³⁸, during marriage³⁹ or upon dissolution⁴⁰ of a marriage on matters concerning the property they have at present and a clause for those that they shall acquire in the future, spousal maintenance⁴¹ and any other incidental and ancillary matters.⁴³ The Act goes ahead to state the criteria the Act must satisfy in order for it to be enforceable, one of them being that the parties must receive legal counsel before executing the prenuptial agreement.⁴⁴ This shall further be discussed in chapter 3.

The inclusion of Part VIIIA into the Family Law Act brought two major changes in the Australian Family Law regime. These are:

- I. The introduction and recognition of pre-nuptial (financial) agreements that can be entered into before marriage, during marriage and upon dissolution of a marriage.⁴⁵
- II. No court supervision or registration of the agreement. This role of overseeing the validity of the pre-nuptial agreements was shifted to the family lawyers.⁴⁶

2.5 The Republic of United States of America (USA)

United States of America has well developed jurisprudence on the subject matter of pre-nuptial agreements. Being a former colony of the United Kingdom, they shared in their reluctance to enforce pre-nuptial agreements. They understood pre-nuptial agreements to be a precursor to divorce. They felt like prenuptial agreements were like parties planning for their

³⁷ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

³⁸ Section 90B, *Family Law Act*, (2000).

³⁹ Section 90C, *Family Law Act*, (2000).

⁴⁰ Section 90D, *Family Law Act*, (2000).

⁴¹ Section 90B (2), 90C(2) and 90D(2), *Family Law Act*, (2000).

⁴³ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

⁴⁴ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

⁴⁵ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

⁴⁶ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

divorce and this considered to be legally improper. However, with time this has changed and parties are able to draft a pre-nuptial agreement and courts have held them to be enforceable. The United States is another example of a state that has good jurisprudence on the subject matter of pre-nuptial agreements and can serve as a great guide to states that wish to legislate on pre-nuptial agreements.

Before 1970, prenuptial agreements that outlined the disposition of property especially upon divorce were frowned upon and hence unenforceable in the USA. However pre-nuptial agreements detailing the property rights of a surviving spouse upon the death of the other partner were enforceable. Courts in the USA had frowned upon pre-nuptial agreements as spouses seemed to be contemplating divorce yet they felt marriages were legally binding and ought to last forever. The USA courts have put forth several reasons why they were reluctant to enforce prenuptial⁴⁷. They stated verbatim that:

The pre-nuptial agreement seemed as a contemplation for divorce, the agreement was contrary to the whole concept of marriage and hence legally improper, prenuptial agreements sabotaged and destroyed the dignity and sacredness of the marriage institution, that these agreements would bother the courts with ceaseless minor issues, it would leave dependent wives without income, rich spouse in the marriage would abandon their spouse and the most important it would cause spouses to stomach unfavourable marriage conditions due to fear of losing their property rights.⁴⁸ The Supreme Court of Alaska opined the same when they stated that, prenuptial agreements went contrary to the State's interest which is to preserve marriage and maintain financial security of both spouses.⁴⁹

Though pre-nuptial agreements faced a lot of scepticism, it was a new light that could not be dimmed. It was time for the court to change their paternalistic view of interpreting the law and give pre-nuptial agreements the legal recognition that they deserved. Therefore, in 1970, there was a ground breaking ruling in the case of *Posner v Posner*⁵⁰. In this case the wife brought a suit against her husband where she sought for divorce on the grounds of extreme cruelty by the husband. She also sought alimony to support the children and a decree that the ante-nuptial agreement between the parties was void.⁵¹ The court held that the ante-nuptial

⁴⁷ *Gould v Rafaeli*, 822 S.W.2d 494 (Mo. Ct. App.) (1991).

⁴⁸ *Gould v Rafaeli*, 822 S.W.2d 494 (Mo. Ct. App.) (1991).

⁴⁹ *Brooks v Brooks*, 733 P.2d 1044, 1048 (Alaska 1987).

⁵⁰ 233 So 2d 381 (Fla 1970).

⁵¹ *Posner v Posner*, 233 So 2d 381 (Fla 1970).

agreement was valid and enforceable.⁵² A new precedent had been set and the courts no longer held on to the traditional idea that such agreements were contrary to public policy. Therefore the Federal States went ahead to change their laws and currently every states allows at least some kind of divorce-focused pre-nuptial agreement to be enforced, though the standards for regulating such kind of agreements vary from state to state.⁵³

Since the United States of America is composed of fifty states there is need to have some form of uniformity in their laws especially on matters concerning prenuptial agreements. Therefore the National Conference of Commissioners on Uniform State Laws appointed a Drafting Committee composed of various famous personalities especially in the world of academia to draft the Uniform Premarital and Marital Agreements Act which was promulgated in 1983.⁵⁴

Therefore, as much as states have their independent legislation on the matter of pre-nuptial agreement, they must align their legislation to that of the Uniform Premarital and Marital Agreements.

2.6 Conclusion

The objective of this chapter is to analyse the laws on pre-nuptial agreements in different jurisdictions. We have seen that Kenya has made a step in recognising pre-marital agreement as outlined in the Matrimonial Property Act. However, the law is still under developed as it does not clearly stipulate what constitutes such an agreement. It does not state in what form that agreement should be in or what can be contained in it. Though the law has stated that parties can enter into an agreement determining their property rights within their marriage.⁵⁵

We have seen that South Africa has the community property regime which parties automatically subscribe to upon attainment of marriage. This regime outlines that parties hold their property separately even within their marriage. However, this regime has been challenged as being repressive since women who are dependent on their husbands seem to be facing the huge blow. It limits the wife from exerting rights on their husband's property upon dissolution of the marriage. Therefore, with the coming of ante-nuptial agreements parties are

⁵² *Posner v Posner*, 233 So 2d 381 (Fla 1970).

⁵³ Prefatory notes of the *Uniform Premarital and Marital Agreements Act* of 2012 page 1.

⁵⁴ Prefatory Note of the *Uniform Premarital and Marital Agreements Act* as discussed at its annual conference meeting in its one-hundred and twenty-first year (121st) in Nashville, Tennessee on 13th to 19th July, 2012.

⁵⁵ Section 6, *Matrimonial Property Act*, 2013.

able to determine their property rights and set their own terms and conditions from the onset. This development of their law is important and Kenya can borrow a leaf and implement the same in their laws.

The United States of America and Australia have similar progression of their law. Initially both these States were reluctant to enforce prenuptial agreements on the thought that they encourage divorce among couples. However, there was a shift in this opinion where courts allowed the enforcement of this agreement which further led to enactment of laws on the same. They saw that this agreement was helpful to couples as they were able to set their own terms and conditions as to the property ownership within the marriage and this served as a great help in reducing the impact of conflict when the marriage was about to be dissolved.⁵⁶

Therefore in response to the hypothesis, other jurisdictions such as South Africa, Australia and South America have invested their time to legislate laws on prenuptial agreements which fall in the docket of family law. Kenya has no excuse on this matter. Kenya has made the first step in recognising prenuptial agreements however they should go ahead and legislate further for instance on which clauses should constitute such an agreement and outline some terms and conditions that parties entering into such an agreement should adhere to.⁵⁷

The subsequent chapter shall analyse how courts have interpreted prenuptial agreements. It shall discuss both the procedural and substantive elements that the court considers when attempting to determine the validity and enforceability of a prenuptial agreement.

⁵⁶ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

⁵⁷ Refer to Chapter one.

CHAPTER THREE

CASE LAW ANALYSIS OF PRENUPTIAL AGREEMENT

3.1 Introduction

In Chapter two we have discussed the laws that govern prenuptial agreements in Kenya. We have also looked at laws in other jurisdictions such as Australia and the United States of America. These two States were chosen due to their well-developed jurisprudence on the subject matter of prenuptial agreements. ¹In addition to this the laws of South Africa were also discussed as this is a country close to Kenya in terms of territory, it also shares almost similar history, beliefs and culture and it has developing jurisprudence on the subject matter and Kenya can greatly benefit from adopting some of the laws that the above countries have legislated.

Chapter three seeks to analyse both the substantive and procedural requirements that a prenuptial agreement must satisfy in order for it to be rendered enforceable by the court of law. Being a type of contract, it must satisfy certain thresholds such as voluntariness of parties in entering into the contract.²

As the bride and groom stand at the altar, looking into each other's eyes they promise each other to "love and to cherish in good and bad times, till death separates us". Some go a step ahead to promise much more than is within the vows. So what happens that day when one of the parties willingly fully fails to honour their promise... the offended party obviously seeks to enforce the promise and at this point the law must take its course. However, are all promises enforceable in a court of law and if not which ones are enforceable?

Therefore this Chapter endeavours to analyse the form that prenuptial agreements should take, the clauses that are allowed to be contained in the agreement and how courts determine the enforceability of these agreements.

This chapter also attempts to satisfy the objective stated in chapter one of trying to identify how the courts have interpreted prenuptial agreements³. What the court looks at in order for it

¹ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

² Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

³ Refer to Chapter one.

to render the agreement as valid. Though the court decisions discussed below are from different jurisdictions such as Australia and the United States of America, they seem to agree on almost all the issues that are allowed to be contained in the agreement. For instance, they seem to agree that the custody of the children within the marriage cannot be determined within the prenuptial agreement.⁴

The cases discussed below can serve as a great source of jurisprudence for Kenya which is still in the process of developing laws to guide and regulate parties in the manner they should draft their prenuptial agreements.

A pre-nuptial agreement is treated with the same threshold as normal contracts. Where for a contract to be valid there must be entered voluntarily, capacity⁵ of the parties, must be supported by consideration, must be legal⁶and be consistent with public policy⁷. Therefore the court looks into this issues to determine whether the pre-nuptial agreement is enforceable.

In pre-nuptial agreements the court breaks the veil and attempts to flash back on the surrounding circumstances (both internal and external) of the parties when entering the agreement and the content of the said agreement. Therefore the court tests for both procedural fairness and substantive fairness of the agreement.

Procedural fairness demands that the parties enter into the agreement voluntarily and that each discloses to the other spouse the value of their assets. This is very important as the court deems a marriage relationship as a fiduciary⁸ one, the court hopes that the parties should always act in good faith. ⁹Procedural fairness test is procured by inquiring into the conduct of the parties, their status and mainly was it voluntary. It also delves deeper into whether the parties had prior experience or advice from legal counsel, disclosures of party's assets and income, and the time of signing of the agreement in relation to the wedding.

On the matter of substantive fairness, the court shall assess the couples' objectives, financial capability, physical and emotional status, prior obligations or commitments borne by each

⁴ J. A. Miller, "Preparing for a Broken Home", *New York Times, The New York Company*, 18 June, 2012.

⁵ Meaning it must be made by competent parties.

⁶ Meaning that it ought to comply with any applicable statute.

⁷ There are certain provisions that the court deems to be contrary to public policy such as clauses that waiver child support, custody or rights to visit the children.

⁸ Meaning that the spouses are held to standards of the highest good faith and fair dealing.

⁹ G. F. Brod, 'Premarital Agreements and Gender Justice', *6 Yale J. L. & Feminism* 229 (1994).

party, their contribution to the marriage and their financial needs. ¹⁰Substantive fairness test looks at what is the impact of enforcing the said agreement against the aggrieved party¹¹.

The courts have informed the requirements that a pre-nuptial agreement must satisfy for it to be valid and enforceable. Therefore, for a pre-nuptial agreement to be enforceable the following conditions must be attained:

- I. The parties must have entered the agreement voluntarily. Any form of duress or coercion affects the will of the party and hence such an agreement cannot be held to be valid.¹²
- II. The agreement must be in writing. Oral prenuptial agreements are generally unenforceable.
- III. The agreement should not have been unconscionable at the time of execution. This means that the agreement should not contain strange provisions such as issues relating to the children of the marriage especially on issues concerning custody.¹³
- IV. The agreement must not be unconscionable at the time of enforcement.¹⁴
- V. The agreement should contain fair and reasonable disclosure the character and value of property, financial obligations and income of both parties before the execution.¹⁵
- VI. The parties to the agreement must have reasonable time to consult with an independent lawyer on the matters of the agreement before execution.¹⁶

With the guidance of the above conditions, that a pre-nuptial agreement must adhere to, we shall have a look at the various cases that the courts have determined and assess where the courts have been consistent in deciding the matters in accordance with the conditions stipulated above.

¹⁰ P. Gainsley & S. Rhode, 'The Role of Substantive Fairness in Premarital Agreements'

¹¹ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007), <http://scholarship.law.wm.edu/wmjowl/vol13/iss2/2>.

¹² Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

¹³ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

¹⁴ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

¹⁵ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

¹⁶ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007).

3.2 The essence of Voluntariness

As discussed earlier the element of voluntariness is an essential factor when determining whether a pre-nuptial agreement is enforceable. Section 9 (1) of The Uniform Premarital and Marital Agreements Act states that premarital or marital agreement is unenforceable if a party against whom enforcement is sought proves: the party's consent to the agreement was involuntary or as a result of duress.¹⁷

*In re Marriage of Bonds*¹⁸, in California State, a foreign, unrepresented wife signed a pre-nuptial agreement on the eve of her wedding to a famous baseball player, Barry Bonds. In the pre-nuptial agreement she waived all her rights to community property. The couple later divorced after seven years of marriage which had produced two children. In court the wife challenged the voluntariness of the agreement. The court under the California Family Code 1615 (2000) ¹⁹could not enforce an agreement that was not entered into voluntarily however the wife was not able to discharge the burden and hence the agreement was said to be valid²⁰.

California legislators disapproved this decision and amended the said law by stating the criteria of identifying voluntariness as: 1) each party must be represented by independent counsel at the execution of the prenuptial agreement or 2) if a party wishes to waive their right to representation then such waiver must be executed²¹.

With this amendment there was a departure from the earlier decision in Bonds case. *In Re Marriage of Shirilla*²², in Montana State, Steve fell in love with Natalie and went to Russia where he brought her and her son back with him in the United States. He presented her with a pre-nuptial agreement whose content stated that they would each maintain their individual property and limited her rights to maintenance upon divorce²³. However Natalie could not understand English but still signed the agreement. Steve filed a divorce after five months of marriage and Natalie successfully challenged the voluntariness of the agreement. The courts stated that Natalie had involuntarily signed the agreement as she lacked the capacity due to her limited knowledge of English and therefore the agreement was unenforceable.²⁴

¹⁷ Section 9 (a) (1), *Uniform Premarital and Marital Agreements Act*, 2013, America Federal.

¹⁸ *In Re Marriage of Bonds*, 5 P.3d 815 (California 2000).

¹⁹ California Family Code § 1615 (2000).

²⁰ *In Re Marriage of Bonds*, 5 P.3d 815 (California 2000).

²¹ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", page 358.

²² *In re Marriage of Shirilla*, 89 P.3d 1, 3-4 (Mont. 2004).

²³ If the marriage ended before Natalie got a permanent visa then Steve would meet transportation expense back to Russia and maintenance of \$5,000 however if it ended after 2 years the maintenance would increase to \$7,500.

²⁴ *In re Marriage of Shirilla*, 89 P.3d 1, 3-4 (Mont. 2004).

The Trial court in New Hampshire was also faced with the question of determining voluntariness in the case *In re Yannalfo*²⁵ Gary and Janice bought a house some days before their marriage, where Gary contributed \$70,000 and Janice \$5,000. A day before their wedding, Garry's lawyer presented Janice with prenuptial agreement and stated that if she would not sign then Gary would not marry her. The agreement stated that upon divorce the house will be sold and Gary will take the first \$70,000 worth of equity, therefore without a choice she signed.²⁶

After twelve years of marriage and three children the couple divorced and Janice challenged the applicability of the agreement on the ground of duress and changed circumstances since execution for the reason; Gary had been fired from his job due to drug abuse and therefore she become the breadwinner of the family. Also he had become abusive, which had caused Janice to obtain restraining order against him.²⁷The court held that the circumstances surrounding the signing of the agreement amounted to 'subtle form of duress and the circumstances had so changed since the execution that to enforce it would be unfair.'²⁸

The Hampshire court went ahead to state that for a premarital agreement to be valid then it must attain the three standards of fairness:

- i. Should not be as a result of fraud, duress, mistake, misrepresentation or non-disclosure.
- ii. The agreement should not be unconscionable.
- iii. Facts or circumstances have not changed since execution of the agreement.²⁹

3.3 Disclosure of material facts

Pre-nuptial agreements are like any other contract and hence must also follow the principal of disclosure. Parties must disclose all material facts that are relevant to the contract. One of the material facts in a pre-nuptial agreement is disclosure of assets and their correct value. This matter has been a subject of many litigations as spouses have been seen to fail to disclose their assets so as to prevent the other spouse from laying claim on the property. The courts

²⁵ *In re Yannalfo* 794 A.2d 795, 796 (N.H. 2002).

²⁶ *In re Yannalfo* 794 A.2d 795, 796 (N.H. 2002).

²⁷ *In re Yannalfo* 794 A.2d 795, 796 (N.H. 2002).

²⁸ *In re Yannalfo* 794 A.2d 795, 796 (N.H. 2002).

²⁹ In the case *In re Yannalfo* 794 A.2d 795, 796 (N.H. 2002). Also the same pronouncements were made by Georgia Supreme Court in the case of *Alexander v Alexander*, 610 S.E.2d 48, 49 (Ga. 2005).

seem to opine that disclosure of material facts is an essential element to a contract and failure to do so may render the agreement unenforceable.³⁰

In the State of Georgia, the Supreme Court was faced with a similar situation in the case of *Alexander v Alexander*³¹ where the couple was planning to get married. Four days before their wedding, Jerome presented his soon to be wife Kimberly with a pre-nuptial agreement. He told Kimberly that if she failed to execute the agreement then he would not go through with the wedding and his parents would not allow them to marry without her signing. Therefore, in fear that Jerome would fail to marry her if she refused, she went ahead to sign the document even without legal consultation. Unknowingly to Kimberly, the agreement stipulated that parties had disclosed all material facts regarding to property and were attached as Exhibit A and Exhibit B but this in actual sense had been omitted. After six years of marriage the couple went to court to seek for divorce.³² Kimberly challenged the validity of the agreement on several grounds such as involuntariness however the most important being for failure to disclose his assets.

The Court held the pre-nuptial agreement was unenforceable as Jerome had failed to disclose material facts of his property such as the forty thousand dollar investment account that he had. Hence, without knowledge of such a material fact Kimberly could not intelligently enter into the agreement.³³

This matter of failure to disclose material facts in a pre-nuptial agreement has led to their unenforceability by the court. The trial court of Georgia was also faced with the same matter in question in the case of *Corbett v Corbett*³⁴ where Charles presented Eileen with a pre-nuptial agreement where among all things it purported to have made full disclosure of the assets of each spouse. After fifteen years of marriage Eileen sought dissolution of the marriage and asked the court to declare the agreement unenforceable. The court held that the husband's failure to disclose his income invalidated the agreement hence the court held the premarital agreement to be unenforceable.³⁵

³⁰ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", page 375.

³¹ *Alexander v Alexander*, 610 S.E.2d 48, 49 (Ga. 2005).

³² *Alexander v Alexander*, 610 S.E.2d 48, 49 (Ga. 2005).

³³ *Alexander v Alexander*, 610 S.E.2d 48, 49 (Ga. 2005).

³⁴ 628 S.E. 2d 585, (Ga 2006).

³⁵ *Corbett v Corbett*, 628 S.E. 2d 586, (Ga. 2006).

3.4 Unconscionable or Unfair Terms

There have been instances of unfair terms in the pre-nuptial agreements but this is prevalent in situations where one party is more advantageous than the other. Meaning one of the spouses is in possession of more assets than the other and hence due to the power of money he or she tends to call the shots. This is detrimental to the other party as they have low bargaining power and readily take the little that is given to them.

The Supreme Court of Maine was faced with such a matter in the case of *Hoag v Dick*³⁶ where Richard presented Terry with a pre-nuptial agreement that did not only stipulate their assets and division of the same upon marriage but it had a clause stating that if she instituted a divorce proceeding then she would not have a share in the husbands property; she would only receive six thousand dollars and she would be responsible for her own and her husband's legal fees.

The court held that the substance of the agreement was beyond unfair and unreasonable and hence the pre-nuptial agreement was declared invalid.³⁷ Therefore, Terry was granted one-hundred and fifty thousand-six hundred dollars as her share of marital property, spousal support of six hundred dollars a month for six years and her attorneys fee of seventeen thousand-five hundred dollars.³⁸

A court cannot validate an illegality, therefore any clause within an agreement that inhibits a party from seeking assistance from the court is invalid and even repudiates the whole agreement. Unfair clauses are particularly targeted towards the less economically privileged party; one whose bargaining power is minimal. This is very unfair to such spouses and coincidentally this parties happen to be women. Women are often financially or emotionally disadvantaged³⁹; in the process therefore, once presented with these agreements, they are left with no choice but to agree with the terms as they want to marry the man, they fear losing a great man, they fear that if they do not sign then this may be interpreted that they do not trust their soon to be husbands.

³⁶ 799 A.2d 391 (Me 2002).

³⁷ *Hoag V Dick*, 799 A.2d 391, (Me. 2002).

³⁸ *Hoag V Dick*, 799 A.2d 391, (Me. 2002).

³⁹ Allison A. Marston, 'Planning for Love: The Politics of Prenuptial Agreements' 4 *Stanford Law Review*, (1997), 887-917.

3.5 Consultation with an Independent attorney

For the pre-nuptial agreement to be held valid then parties must have received relevant counsel from an independent lawyer concerning the agreement. The party must be given reasonable time to consult on each and every clause before execution of the document. As you have already guessed, most spouses sign the agreement barely a week to the wedding and in others the agreement is presented to the other party on the day of the wedding for their execution. The court has held this to amount to duress as parties are not given time to assess the document, have no time to suggest amendments or even given a chance to reject it.

Therefore, you will find in cases where the court has ruled that the agreement lacked the element of voluntariness, then also the requirement of having a review from an independent counsel has also not been satisfied. This is the case in *Re marriage of Bonds*⁴⁰ where a foreign lady was presented with a pre-nuptial agreement on the eve of her wedding and had no choice but to sign the agreement even without reasonable consultation with an independent counsel. The court held the agreement to be unenforceable due to lack of voluntariness and lack of counsel from an independent lawyer who would have given her great legal advice on matters concerning the agreement.⁴¹

Therefore, parties must work to ensure that their prenuptial agreements adhere to the above requirements, failure to which the agreement will be rendered as invalid and unenforceable.

3.6 Conclusion

This chapter has discussed both procedural and substantive elements that a prenuptial agreement must satisfy in order for it to be valid and enforceable. It is not good enough for parties to simply enter into an agreement, they must adhere to laid down regulations in regards to the form of the agreement.

This chapter has outlined that for a pre-nuptial agreement to be valid parties must enter into it voluntarily. Any form of duress or coercion from the other party will render the agreement to be void. Therefore, voluntariness is a substantive element that must be satisfied for a prenuptial agreement to be valid.⁴²

⁴⁰ *In Re Marriage of Bonds*, 5 P.3d 815 (California 2000).

⁴¹ *In Re Marriage of Bonds*, 5 P.3d 815 (California 2000).

⁴² Section 9 (a) (1), *Uniform Premarital and Marital Agreements Act*, 2013, America Federal

This chapter has also outlined that the court will not uphold prenuptial agreements whose terms or content is unconscionable. This refers to the substance of the agreement. The court has attempted to declare the terms that can be in the prenuptial agreement such as clauses in regards to property rights in a marriage⁴³. At the same time they have also outlined some clauses that are unfair or should not be dictated by the prenuptial agreement; for instance clauses that pertain to the custody of children are really frowned upon by the court.⁴⁴

This chapter has also emphasized the importance of obtaining legal advice from an independent counsel.⁴⁵ A contract is a legal matter, a party without the necessary expertise ought to seek the service of an expert in the interpretation of contracts, this being a lawyer. In addition the lawyer ought to be an independent lawyer, one who has not participated in drafting of the contract and also one who has no direct or indirect conflict of interest in the matter.⁴⁶ The importance of this is that both parties are able to execute the agreement in full knowledge of what it entails and also they are able to be advised on which clause ought to be omitted and those to be included.

This chapter has demonstrated how courts interpret the law in regards to pre-nuptial contracts and how courts have increased the growth of jurisprudence on this subject matter. The subsequent chapter, chapter four, shall endeavour to determine the merits of prenuptial agreement and how they can benefit parties that enter into it.

⁴³ *Hoag V Dick*, 799 A.2d 391, (Me. 2002).

⁴⁴ Judith T. Younger, "Lover's Contracts in the Courts: Forsaking the Minimum Decencies", *13 Wm. & Mary J. Women & L.* 349 (2007)

⁴⁵ Meaning any other lawyer other than the one who drafted the agreement or one without any conflict of interest.

⁴⁶ *In re Marriage of Shirilla*, 89 P.3d 1, 3-4 (Mont. 2004).

CHAPTER FOUR

WHAT IS THE RELEVANCE OF PRENUPTIAL AGREEMENTS

4.1 Introduction

The previous chapters have discussed the substantive laws that govern prenuptial agreements. We have analysed the laws from Kenya, South Africa, Australia and even United States of America. These laws have formed the basis upon which we can confidently say that prenuptial agreements have been recognised by the States above and hence they are legal. Then we had a look into how the courts in the aforementioned jurisdictions have interpreted the law governing prenuptial agreements, what the agreement must constitute for it to be valid and enforceable. We have also seen that courts have developed the jurisprudence on prenuptial agreements both on substantive and procedural requirements.

Therefore, in this chapter we shall look into the relevance of parties having a prenuptial agreement. As already stated these agreements which determine property allocation within the marriage can be drafted before the marriage, within the marriage and even upon dissolution of a marriage.¹

In the Republic of Australia, the Federal Attorney General made a speech in the House of Representatives during the Second Reading of the Bill amending the Family Law Act of 1975 where he stated the benefits of binding financial agreements are:²

- I. Parties have greater control over their property. They are able to quarantine assets acquired before marriage, during marriage or upon dissolution of a marriage. This is very important especially for parties who were planning to enter a subsequent marriage as well as those wealthy people in society who needed to protect their businesses.
- II. Parties are proactive and are able to take initiatives to enter into agreements to order their own financial affairs.
- III. Reduced conflict upon the breakdown of a marriage. Since the parties had already put their finances in order there is reduced emotional and financial struggle.

¹ B. Fehlberg and B. Smith "Binding Pre-nuptial Agreements in Australia: The First Year", *International Journal of Law, Policy and the Family*, (2002) 16 (1): 127.

² House of Representatives Hansard 7705, Federal Attorney General's Second Reading of the Family Law Amendment Bill, (1999).

Pre-nuptial Agreements have come through a long journey, from the paternalistic view of being tools or avenues that encouraged or were a precursor to divorce, by the developed countries such as Australia. They have now become an opportunity for bargain. So long as both parties have equal bargaining power, then they are able to negotiate their finances and property ownership. This is very important as parties are able to iron out issues that may arise out of finances and are able to get married with little hedge. An author by the name Gitta Morris stated that

“Rather than demonstrating a lack of faith in the motives of the other party, pre-nuptial agreements are actually an act of good faith, it demonstrates that the absence of secrets between the parties. It is an act of eliminating as much as possible any likely future impediment to a marriage that may arise from uncertainties as to their respective financial obligations to each other.”³

The merits of entering into a pre-nuptial agreements are as follows:

Elimination of financial disputes⁴; before spouses can say “I do”, they have an opportunity to draft an agreement stating how they would like to allocate or share out their present and future property in the even a divorce occurs. Therefore, in the event that the divorce occurs, then this agreement will eliminate conflict over assets and finances. This agreement gives the couple a form of assurance that their property will be disposed according to their intention.

Therefore, if parties can take heed and draft pre-nuptial agreement, they are avoiding loads of conflict that accrue upon dissolution of a marriage and according to the proponents of pre-nuptial agreement, they may even reduce their chances of even a divorce. ⁵

Protection of parties with substantial wealth⁶: there are situation where one of the spouse has a well-established family business and seeks to protect this business. There is often pressure from the family members engaged in the business to keep ownership of the business within bloodlines. Therefore, a prenuptial agreement acts as the perfect tool to ensure that

³ G. Morris, Taking a Legal Approach to Marriage, New York Times, (February 10, 1991).

⁴ M.E. Sudi, “Prenuptial Agreements: Blessing or Curse.”

<http://salclaw.co.ke/prenuptialagreementsblessingorcurse/> (accessed on 1 June 2016).

⁵ A. Sullivan, “Demand for Prenuptial Agreement is on the Rise: Kiss me and Sign here, Darling.” (<http://www.ihl.com/articles/1997/02/08/impact.t.php>. (Accessed on 29 December, 2016).

⁶ M.E. Sudi, “Prenuptial Agreements: Blessing or Curse.”

<http://salclaw.co.ke/prenuptialagreementsblessingorcurse/> (accessed on 1 June 2016).

one's personal life (marriage) does not interfere with activities of the family business. I guess the saying that "Do not mix business with pleasure" truly applies here.

This matter was a subject of a case in United Kingdom, *Katrin Radmacher v Nicholas Granatino*⁷ where Katrin was a German heiress and run a multi-billion dollar family business. So upon marriage, her father asked her to draft a pre-nuptial agreement stating that her husband would not have a share in their family business and if she failed to do so he would disinherit her. Therefore, she obeyed and her husband Granatino executed the document. During the divorce proceeding Granatino asked the court to declare the agreement as invalid, however the court held that no conditions had been violated and hence the agreement was valid and enforceable.⁸

Therefore, pre-nuptial agreements can be used to protect family assets or make them immune from the claims of unintended heir.⁹

Party Initiatives¹⁰; when parties fail to enter into a pre-nuptial agreement then they leave the fate of their property on the court, upon dissolution of their marriage. They actually invite the court to order their private life. However when parties enter into a pre-nuptial agreement then they are taking a great initiative in ordering their lives. They are able to solve their own financial matters way before they get married.

Parties are able to take initiative in structuring fair and reasonable terms that are favourable for their situation and ordering the life and their present property and that which they shall acquire in the future.¹¹

Compliment the will; many a time parties have died without drafting a will. A will is a document where a party states his last intentions if he or she was to die. In cases where a

⁷ *Granatino v Granatino*, [2009] All ER (D) 31 (Jul).

⁸ *Granatino v Granatino*, [2009] All ER (D) 31 (Jul).

⁹ B. Greenstein, "Prenuptial Agreements: What they can and cannot accomplish". <http://www.nyssepa.org/cpajournal/old/13606725.htm-41k> (accessed on 23 December 2016).

¹⁰ M.E. Sudi, "Prenuptial Agreements: Blessing or Curse." <http://salcclaw.co.ke/prenuptialagreementsblessingorcurse/> (accessed on 1 June 2016).

¹¹ J. Morley, "Enforceable Pre-nuptial Agreement; The World View", <http://www.internationaldivorce.com/englandprenuptial> (accessed on 23 December, 2016).

party has died without drafting a will, then a pre-nuptial agreement may be used to shed light for the court of the intention of the deceased.¹²

There is no known case discussing this matter, however in the process of my research it is clear that a pre-nuptial agreement is a contract, therefore, so long as it has satisfied the necessary conditions and criteria of a contract, then it is admissible in a court of law. The court in its wisdom ought to use a pre-nuptial agreement to shed a light into the mind and intention of the deceased, when attempting to make a decision on property allocation of the deceased.

Protection against creditors¹³; in the event that one of the parties to the marriage had incurred debts before the marriage, the pre-nuptial agreement would act as a shield to the other party. The agreement would protect the assets of the debt free party from claim by the debtors. Therefore, even in the event of insolvency, creditors cannot lay claim on the assets of the debt free party.¹⁴

Protection of parties intending to re-marry¹⁵; upon dissolution of a marriage, children and former wife always feel threatened or unsure of whether their property is intact or will it be granted to the new family. In addition to this, some marriages are polygamous whereby the man has two wives and each wife has children. There are moments of conflict as to the ownership of property and ratio of property sharing.

In such a case a prenuptial agreement is an excellent tool to ensure that property is distributed fairly.¹⁶

¹² B. Greenstein, "Prenuptial Agreements: What they can and cannot accomplish".<http://www.nysscpa.org/cpajournal/old/13606725.htm-41k> (accessed on 23 December 2016).

¹³ Annalise J, "Is there a need for prenuptial agreements in Zambia?" Unpublished LLB dissertation, University of Zambia, 6 February, 2008.

¹⁴ B. Greenstein, "Prenuptial Agreements: What they can and cannot accomplish".<http://www.nysscpa.org/cpajournal/old/13606725.htm-41k> (accessed on 23 December 2016).

¹⁵ M.E. Sudi, "Prenuptial Agreements: Blessing or Curse."
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¹⁶ B. Greenstein, "Prenuptial Agreements: What they can and cannot accomplish".<http://www.nysscpa.org/cpajournal/old/13606725.htm-41k> (accessed on 23 December 2016).

Introduction of certainty¹⁷; every relationship requires some form of certainty where parties are in a position to know their fate and are able to predict what may happen upon the occurrence of events. Lord Diplock stated that legal certainty requires that the rules which bind a citizen should be ascertainable by him.¹⁸ Therefore, prenuptial agreements that are well drafted and reasonable give parties such predictability or certainty. Rather than leaving the court with the discretionary mandate of determining property allocation, parties can make their own terms in regards to the same.

Makes divorce less costly¹⁹; the process of divorce is said to be economically exhausting and time consuming. A lot of money and time is wasted in court trying to determine property allocation. However, if the parties had a pre-marital agreement or even a post-marital agreement where they have already outlined their terms and conditions on property allocation, then the process of divorce will be less costly and less time consuming.²⁰

4.2 Conclusion

The purpose of this chapter is to outline and analyse the merits of having a prenuptial agreement. We have seen from the previous chapter that states were reluctant to enforce prenuptial agreements as they thought they encouraged divorce; they felt that this agreement was like an exit strategy where parties were planning what would be the fate of their property upon dissolution of a marriage. However the attitude of states has changed as it has been outlined in chapter two and three where states now consider prenuptial agreements as valid and enforceable.

This chapter has succeeded in achieving the objective as outlined in chapter one which is to discuss the purpose and importance of pre-nuptial agreements and what role does it play in marriages and how have they fostered harmony in marriages. We have seen the benefits that accrue to parties once they contract a prenuptial agreement for instance parties are able to allocate proprietary rights in regards to the property acquired within the marriage. We have

¹⁷ M.E. Sudi, "Prenuptial Agreements: Blessing or Curse." <http://salclaw.co.ke/prenuptialagreementsblessingorcurse/> (accessed on 1 June 2016).

¹⁸ *Fothergill v Monarch Airlines Ltd*, [1981] AC 251.

¹⁹ M.E. Sudi, "Prenuptial Agreements: Blessing or Curse." <http://salclaw.co.ke/prenuptialagreementsblessingorcurse/> (accessed on 1 June 2016).

²⁰ B. Greenstein, "Prenuptial Agreements: What they can and cannot accomplish". <http://www.nyssepa.org/cpajournal/old/13606725.htm-41k> (accessed on 23 December 2016).

also seen that there is a close connection between a prenuptial agreement and harmony within a marriage. When parties create a prenuptial agreement then they are able to outline all their terms and conditions especially in regards to property hence if the parties ever decide to dissolve their marriage then there shall be less conflict as they had already determined their rights in the marriage

Therefore, prenuptial agreements are very beneficial to parties who are planning to enter into a marriage as they are able to set out the terms and conditions that shall guide them in their marriage as outlined in chapter three and hence there is a high likelihood that such a marriage will last longer unlike other marriages without a prenuptial agreement. Hence couples in Kenya ought to be encouraged to subscribe to drafting a prenuptial agreement as its benefits may ensure a better and long lasting marriage.

In the next chapter we shall attempt to conclude the subject matter of this research; which is prenuptial agreements. We shall examine whether the legal question has been successfully addressed, whether the hypothesis has successfully been answered and whether all the objectives of this research has been successfully addressed.

CHAPTER FIVE

CONCLUSION

5.1 Introduction

In chapter two, we have established that pre-nuptial agreements were frowned upon by society, especially by the clergy or religious groups and by the courts. They felt that it was like planning for a divorce yet a marriage was a binding relationship built on love and trust and therefore needed to be protected from breaking up. They could not understand the rationale behind it. They wondered how parties could plan for divorce and yet enter into the marriage; it beat the whole point of getting married. However, the States discussed such as Australia and United States of America changed their negative perception and began to recognise prenuptial agreements. In this same chapter we also determined that the Kenya laws in regards to the subject matter are quite undeveloped. Therefore, this posed as a positive challenge to Kenya that they need to develop their laws on the subject matter.

In chapter three we analysed how the courts have interpreted the laws on prenuptial agreements. We have seen that for the courts to render the agreement valid and enforceable; parties must enter the agreement voluntarily, the agreement must not consist of unconscionable terms, parties must obtain independent counsel within a reasonable time before executing the agreement, must be in writing and it must make full disclosure of all material things. We have also analysed cases from other jurisdiction such as South Africa, Australia and the United States of America who have undergone the process of validating prenuptial agreements. We have looked at how their courts have revolutionised in their interpretation of prenuptial agreements and how such jurisprudence is beneficial to Kenya's developing laws.

In chapter four, we discussed the benefits of having a prenuptial agreement. This is an attempt to convince the reader that prenuptial agreement are indeed beneficial as parties have a great opportunity to determine their property rights in regards to the property they already have and those they shall acquire within the marriage. One of the benefits discussed, and that is in line with the title of this paper is: prenuptial agreements can be a solution to the conflict that is prevalent once a marriage is about to be dissolved.

5.2 Restating the Legal Problem

The legal problem that invoked this study is whether there is a need to recognise and enforce prenuptial agreements in Kenya. Kenya, being the centre of this paper has very limited legislation of pre-nuptial agreement. The Matrimonial Property Act only provides that parties can enter into an agreement, determining their proprietary rights, before the marriage. This can be termed as the establishment clause as it establishes that pre-nuptial agreements are valid. However, the legislation is really at the birth stage when compared with the laws of Australia or the United States of America which were initially chosen for discussion in Chapter one as they have well developed jurisprudence on the subject matter of prenuptial agreements and Kenya would greatly benefit if they would use this jurisprudence to guide the formulation of their developing laws.

The Kenyan courts have also not been exposed to matters of prenuptial agreements as the Kenyan society has not adopted this kind of agreements. Therefore, obtaining substantial precedent is a great challenge. People entering into a marriage have not seen the need to enter into a pre-nuptial agreement hence the court being an institution that has to be moved to act, then has no jurisprudence on the subject matter.

The people of Kenya ought to be encouraged to enter this kind of agreements as they are able to lay their own terms and conditions in regards to their property rights. These agreements are also very important as they reduce the intensity of conflict that is experienced once a marriage has hit the rocks and sails in the waves of divorce. The advantageous of a pre-nuptial agreement have already been discussed in chapter four and its importance can only be overemphasized.

Therefore, there is great need to recognise and enforce prenuptial agreement especially in Kenya. These agreements as already stated can be entered into before marriage, during the marriage or even upon dissolution of the marriage. These agreements are essential for couples as they are able to determine property rights at the onset of their marriage and in some instances this agreement may be used by a probate court to shed light on the intention of the deceased in regards to its property.

Therefore, in response to the legal problem stated above, there is great need for parties to enter into prenuptial agreements as they are indeed a great tool to minimise conflicts between parties especially once a marriage turns sour.

5.3 Restating the Specific Objectives

The first objective as outlined in Chapter one is to discuss what laws have been legislated to regulate pre-nuptial agreements. These laws have been successfully discussed in Chapter two where Kenyan laws on the subject matter have been contrasted to those in Australia and United States of America who have well developed jurisprudence in terms of laws on the subject matter. In this Chapter we also contrasted Kenya to South Africa which is also an African country sharing almost similar beliefs and culture and we have seen that they too have a good developing jurisprudence on the subject matter of prenuptial agreements and hence Kenya may want to borrow a leaf from them.

The second objective as stated in Chapter one is to discuss and analyse the relevant case law in regards to prenuptial agreement in addition to also assess what can constitute a prenuptial agreement. This has been successfully performed in Chapter Three. Having looked at the substantive laws on prenuptial agreements from South Africa, Australia and United States of America we also had a look at their case law. This is in attempt to identify how the courts interpret the said law on prenuptial agreements. The courts seem to advocate for prenuptial agreements and hence deem them to be enforceable and valid. Therefore, Kenya can borrow from the jurisprudence of the aforementioned jurisdiction especially in determining the enforceability of prenuptial agreements as this will immensely guide Kenya in developing its own jurisprudence on the subject matter.

The third objective as outlined in Chapter one was to assess and ascertain the advantages or the benefits that accrue to parties by virtue of executing a prenuptial agreement. This objective has been successfully discussed in Chapter four where we have seen that it is very instrumental for parties to take initiative in ascertaining their property rights within the context of marriage.

Therefore the hypothesis has successfully been answered through-out this paper, that indeed there is a need for parties to execute prenuptial agreements in Kenya as they are indeed a hope to an end of conflict before marriage, within marriage and upon dissolution of a marriage on matters regarding proprietary rights.

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