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MUCH ADO ABOUT NOTHING

A CRITICAL ANALYSIS OF THE MATRIMONIAL PROPERTY IN KENYA

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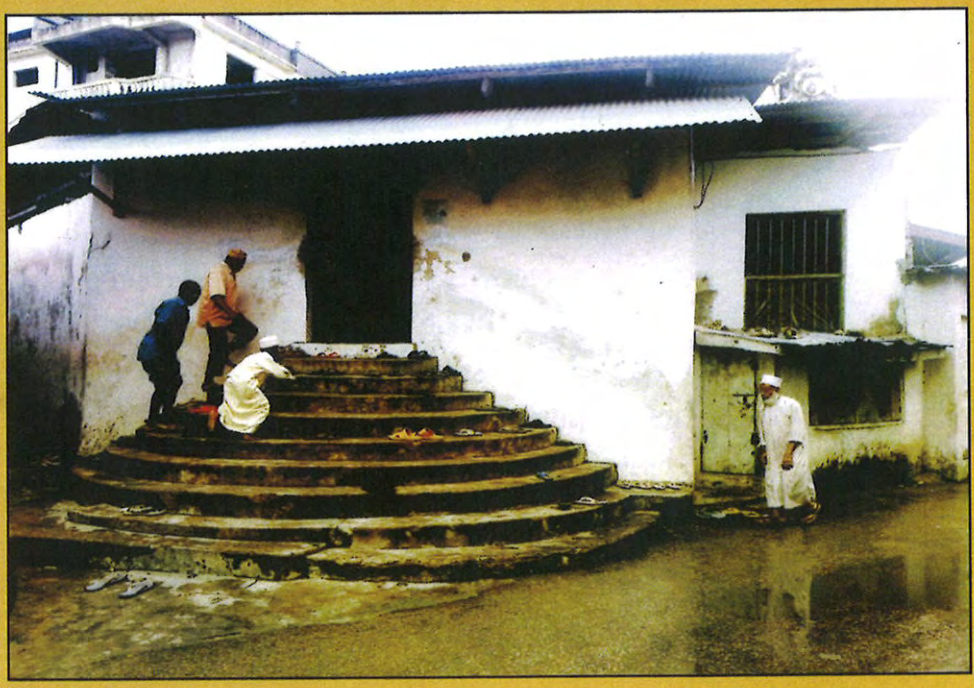

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MUCH ADO ABOUT NOTHING: A CRITICAL ANALYSIS OF THE MATRIMONIAL PROPERTY IN KENYA

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I. Introduction

Kenya's Constitution recognizes the family as the natural and fundamental unit of society which needs the protection of the State.[1] Despite this exhortation of the Constitution, issues pertaining to the family continue to

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[1] Article 45 of the Constitution of Kenya, 2010.

flood courts of law in need of resolution.[2] Newspapers are awash with family feuds over property.[3] Conflicts over property in families relate to succession/inheritance[4] and the division of matrimonial property pursuant to divorce.[5]

Matrimonial property refers to property that has been acquired by spouses to a marriage ostensibly for use by and for the benefit of the family.[6] It can be acquired by either party to the marriage or by both parties jointly. Contributions towards matrimonial property may be monetary or non-monetary. There are for instance, many spouses who are not formally employed, and their contribution is mainly in the form of labour in the home or caring for the family. This raises a problem in how the law deals with equitable distribution of property upon dissolution of the marriage.[7]

It is important to note that matrimonial property is rarely contested during the subsistence of a harmonious marriage but becomes a source of distress for families upon the entry of other parties into the marriage and after separation and divorce. The importance of this form of property cannot be over-stated considering that in many cases, it provides the only source of livelihood for family members. Instances of matrimonial property being disposed of without the knowledge and concurrence of all parties to a marriage and members of the family abound.[8] Historically, the 'equality clause' in the repealed Kenyan

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[2] See, WAFULA, Paul & Nyambega Gisesa, "Shs 3 Billion Ritho Family Estate Row Deepens As Wife's Body Found," *The Standard* (Kenya), 28th February, 2014. See <http://www.standardmedia.co.ke/Article/2000105685/sh3-billion-ritho-family-estate-row-deepens-as-wife-s-body-found/?pageNo=5 > accessed 19th November, 2016.

[3] E.g. NATION MEDIA GROUP, "Why Inheritance Disputes Are On the Rise," *Daily Nation* (Kenya), 2nd May, 2015. See <http://www.nation.co.ke/lifestyle/lifestyle/Why-inheritance-disputes-are--on-the-rise/1214-2704056-e5xut3/index.html > accessed 19th November, 2016. Also see MACHARIA, Wanjiru, "Naivasha Siblings Feud in Court over Property," *The Star Newspaper* (Kenya), 16th March, 2016. See <http://www.the-star.co.ke/news/2016/03/16/naivas-siblings-feud-in-court-over-property_c1313958 > accessed on 19th November, 2016.

[4] Ibid.

[5] Ibid.

[6] Section 2 of the Matrimonial Property Act, 2013.

[7] See FIDA KENYA, *Women's Land and Property Rights in Kenya*, Nairobi: FIDA Kenya, 2009.

[8] This was especially so given the common law doctrine of primogeniture whereby family wealth or property was concentrated in the hands of the eldest male member; a situation that worked unduly against women when such male members opted to dispose of such property. For instance, in *Esiroyo v. Esiroyo* [1973] EA 388, a father ejected his sons and their wives from his land and restrained them from trespassing on it as he was the sole registered proprietor on the title documents. The sons sought an order from the court to allow them to make use of the land on the basis of Luhya customary law. The court declined to grant such

Constitution exempted matters of adoption, marriage, divorce, and devolution of property at death from its purview.[9] These matters were governed by the customary law which accords men and women unequal rights.[10]

In Kenya, like in many other African countries, women's equal rights of marriage, work, ownership and inheritance of property are curtailed by traditions, customs and attitudes. This prompted the former Tanzanian President Julius K. Nyerere to opine that:

> ... It is time that women in traditional society were regarded as having a place in the community which was not only different but somewhat inferior ... By virtue of their sex they suffered inequalities ... This is certainly inconsistent with our concept of equality of all human beings ... If we wish our country to make full and quick progress, now, it is essential that our women live in terms of full equality with their fellow citizens who are men.[11]

Men wield greater power than women in the social, political and economic sectors.[12] The situation of women is exacerbated by the gender division of labour under which they assume multiple roles in the private sphere. Marxists explain women's inferior status by using class differentiation and distribution of private property.[13] In the middle savagery age, division was primitive and each sex had a role to play. According to Marxists, the oppression of women came with class division.[14] In Engels' opinion, emancipation of women would only be possible when they took part in production processes on a large social scale and domestic work no longer claimed anything but an insignificant part of their time.[15]

It is within this context that the Constitution of Kenya 2010 and the laws passed under it, sought to remedy the situation with regard to matrimonial

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orders, holding that the father's registration was free from any encumbrances and that rights under customary law could not be overriding. This decision codifies the doctrine of primogeniture. For a similar holding. See *Obiero v. Opiyo* [1972] EA 227.

[9] Section 82 (4) of the 1969 Constitution of Kenya.

[10] KAMERI-MBOTE, Patricia, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,* Nairobi: Women & Law in East Africa, 1995, p. 10.

[11] See, JAMES, R.W. and G.M. Fimbo, *Customary Land Law of Tanzania: A Source Book,* Dar es Salaam: East African Literature Bureau, 1973, p. 209.

[12] Ibid.

[13] See generally, ENGELS, Fredrick, *The Origin of the Family, Private Property, and the State,* New York: Pathfinder, 1972.

[14] Ibid.

[15] Ibid., Chapter IX.

property recognizing that property rights of spouses, especially women's, were not well protected and parties metaphorically sat precariously underneath the famous Sword of Damocles.[16]

We argue in this paper that the Constitution of Kenya 2010 made significant strides towards achieving gender equality and that the Kenya government sought to protect rights to matrimonial property for spouses by enacting implementing legislation - Matrimonial Property Act 2013 . However, the Act has watered down the provisions of the Constitution leaving spouses in the same position as they were before the 2010 Constitution. We further argue that customary norms under which men are considered superior to women in property matters have converged with patriarchal notions espoused in the old common law doctrine of coverture[17] reflected in the law and institutions dealing with marriage. This has resulted in the inequality of spouses in access to, control over and ownership of matrimonial property to this day. The paper specifically canvasses the efforts made towards the achievement of gender parity in the protection of matrimonial property through the enactment of the Matrimonial Property Act 2013 and the Marriage Act 2014, concluding that it is 'a tale of motion without movement' hence the title *much ado about nothing*.

The paper is divided into six parts. Part 1 is the introduction which sets out the background and main argument of the paper. Part 2 lays out the conceptual bases of matrimonial property by looking at the common law doctrine of coverture and its incidents and how it has been whittled down through legal reforms. It also discusses the issues of communal *Vis a Vis* separate ownership of property between spouses. Part 3 examines matrimonial property from a historical perspective with a view to shedding light on the current state of the law and the need for reform. We discuss legal pluralist approaches to matrimonial property in Kenya and their implications. We also discuss the English Married Women's Property Act of 1882 which was presented as a solution to plural approaches. This part also illustrates how in implementing this Act, the law appears to give rights to women with one hand while taking them away with the other, through an examination of jurisprudence from Kenyan courts before the 2010 Constitution. Part 4 examines the promise of

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[16] In Greek mythology as told by Cicero, Damocles was a King and a sword hang over his head suspended by a thread while he sat on his throne. This meant that for as long as he was King, seated on the throne, he ran the risk that the sword could fall on his neck thereby killing him. For more exposition on this, see Mary JAEGER, Mary, "Cicero and Archimedes' Tomb," Volume 92 *The Journal of Roman Studies*, 2002, p. 49 at 51f.

[17] The doctrine of coverture was to the effect that man and woman were one and that one person was the man (husband). The doctrine is more elaborately discussed in the next Section of this paper.

the Constitution analysing its equality and non-discrimination clauses. In this part, we also consider the jurisprudence that emanated from the Courts under this Constitution before the enactment of the Matrimonial Property Act 2013 and which provided a glimmer of hope in terms of achieving gender equity. Part 5 critically analyses the provisions of the Matrimonial Property Act 2013, related Land Law and the jurisprudence that has emanated from it, underscoring the tensions and encounters between the reality and rhetoric of equal rights to matrimonial property provided for in the Constitution and elaborated in the Matrimonial Property Act 2013. Part 6 concludes the paper.

II. The Conceptual Bases of Matrimonial Property

A. The Doctrine of Coverture and Its Incidents

The common law doctrine of coverture, traceable to England, holds that a wife has no legal standing or legal claim since her personhood and being was subsumed or incorporated within that of her husband.[18] The husband provided the cover to the wife and a couple was considered as one person in law, and this one person was the husband.[19] This doctrine of coverture, also known as the 'unity principle',[20] was appositely captured by William Blackstone, who holds that:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert* .. under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture ...[21]

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[18] A married woman was considered as 'civilly dead' according to the Seneca Declarations, under the legal doctrine of coverture. See *1848 Seneca Falls Declaration of Sentiments*, reprinted in HOFF, Joan, *Law, Gender & Injustice: A Legal History of U.S. Women,* New York: New York University Press, 1991, p. 383.

[19] BASCH, Norman, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth Century America," Volume 5 *Feminist Studies*, 1979, p. 346 at 347.

[20] The unity of man and wife was also justified on a biblical or ecclesiastical foundation based on Genesis 2:24.

[21] BLACKSTONE, William, *Commentaries on the Laws of England,* Oxford: Clarendon Press, 1769, p. 442.

This principle of coverture was not unique to ancient England but also manifested itself in ancient Roman law whereby women were considered to be under the wings of their husbands.[22] This notwithstanding, women from elite backgrounds could enjoy inherited property from their parents, a benefit that could not be enjoyed by those from non-privileged backgrounds.[23] The doctrine of coverture and its variants has been carried down both consciously and unconsciously through the laws despite societal evolution.[24] Indeed, the very concept of alimony, more commonly referred to as maintenance in some jurisdictions, still perpetuates the agenda of coverture, to the extent that it considers the money earned by a husband as his own, and the wife's settlement as a favour or discretionary.[25] This may however, be changing as women are also increasingly being required to pay maintenance to their unemployed husbands.[26]

So strict was the doctrine of coverture that women could barely participate in political life such as voting or even vying for elective positions.[27] In particular, in America, women were excluded from serving on juries on the ground that their sphere of influence was in the private within the home, as opposed to the public.[28]Additionally, marital rape was not considered since the husband and wife were one, and the law considered, as absurd as it may sound, that a husband could not rape himself.[29]Women could also not join some vocations

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[22] ROBINSON, Olivia, "The Status of Women in Roman Private Law," *Juridical Review*, 1987, p. 143 at 161.

[23] ibid.

[24] RIFKIN, Janet, "Toward a Theory of Law and Patriarchy," Volume 3 *Harvard Women's Law Journal*, 1980, p. 83. Rifkin argues that law has been used as an instrument of carrying over patriarchal systems into capitalism as it evolved to dominate the economic sphere; couching the various rules of exchange and property subsistent in modern day capitalistic society as casting a woman as the object of exchange rather than the subject.

[25] For an excellent account of this, see WILLIAMS, Joan, "Is Coverture Dead? Beyond a New Theory of Alimony," Volume 82 *Georgetown Law Journal*, 1994, pp. 2227–90.

[26] Section 77 of the Marriage Act, 2014 provides for maintenance by either spouse. Also see WILLIAMS, Geof, "More Men Get Alimony from their Ex-Wives," (Reuters, 24th December, 2013) <http://www.reuters.com/Article/us-divorce-alimony-men-idUSBRE9BN0AW20131224 > accessed 19th November, 2016.

[27] Women acquired voting rights in the 19th Century. See, DUBOIS, Ellen Carol, *Woman Suffrage and Women's Rights,* New York: New York University Press, 1998, pp. 174–6.

[28] See GROSSMAN, Joanna L., "Women's Jury Service: Right of Citizenship or Privilege of Difference?" Volume 46 *Stanford Law Review*, 1994, p. 1115.

[29] JACKSON, Linda, "Marital Rape: A Higher Standard Is in Order," Volume 1 *William & Mary Journal of Women and the Law*, 1994, pp. 183–216. For an argument that marital rape is an offshoot of the patriarchal system in the society that regards women as property of their husbands, e.g. RUSSELL, Diana E.H., *Rape in Marriage,* New York: MacMillan, 1982.

such as the legal profession since they could not enter into contracts without the permission of their husbands.[30] Even when they did, they were mostly restricted to non-public roles such as administration or research and in protected jobs such as in government.[31] Other reasons for denying women admission into the bar and law schools included the supposed timidity and delicate nature of their sex,[32] the fear that they would distract the males in the profession,[33] and that they could not cope with the demands of work and family life.[34]Indeed, it is proceeding out of the coverture doctrine that modern laws on privileged communications between spouses and against spouses testifying against each other in criminal proceedings emerged.[35] The manner in which the law has traditionally conceived a marital relationship has invariably influenced the various developments of the law, hence the perception that the law has been male or gendered.[36]

Some of the incidents[37] of the doctrine of coverture have been done away with in the law through legal reforms. This has been through concerted and vigorous efforts by advocates of gender equality and equity.[38] For instance, it

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[30] KANTER, Rosabeth Moss, "Reflections on Women and the Legal Profession: A Sociological Perspective," 1 *Harvard Women's Law Journal*, 1978, pp. 1–17.

[31] ibid.

[32] Ibid.

[33] Ibid.

[34] LAZAROU, Kathleen E., "Fettered Portias': Obstacles Facing Nineteenth-Century Women Lawyers," Volume 64 *Women Lawyers Journal*, 1978, pp. 21–30.

[35] The policy behind the common law rule of spousal privilege is to enhance spousal harmony and draws from the coverture doctrine that the two were spouses were essentially one. For more insights on this, see MOSER, M Pete, "Compellability of One Spouse to Testify Against the Other in Criminal Cases," Volume 15 Issue 1 *Maryland Law Review*, 1955, p. 16.

[36] See generally, SMART, Carol, *Feminism and the Power of Law,* New York: Routledge, 1989. For further insights on how the law views marriage and how this has informed the law and legal reforms, see REGAN, Milton C. Jr., *Alone Together: Law and the Meanings of Marriage,* New York: Oxford University Press, 1999. In chapter 7, the author analyses the issue of married women adopting the surname of their husbands, choosing to retain that of their parents or choosing another name altogether. This though, has been more a matter of custom than law. For a similar argument, see chapter 4 of ROSS, Susan Deller et al., *The Rights of Women: The Basic ACLU Guide to Women's Rights* (3rd Edition), Carbondale, Illinois: Southern Illinois University Press, 1993. Also see STANNARD, Una, *Married Women v. Husbands' Names: The Case for Wives Who Keep Their Own Name,*San Francisco: Germain Books, 1973.

[37] These incidents of coverture have been the focus of the foregoing part in this paper and include women suffrage rights, property ownership and career among others..

[38] See TURANO, Margaret Valentine, "Jane Austen, Charlotte Brontë, and the Marital Property Law," Volume 21 *Harvard Women's Law Journal*, 1998, pp. 179–226. The author recounts the works of female British literary writers; Jane Austen in *Emma* (published in

is not uncommon to find the offence of marital rape in statute books. [39] Similarly, while there have been hesitations by law enforcers such as the police and prosecutors to take up cases of domestic violence, on the basis that such are family matters that ought to be handled through reconciliation,[40] there are now laws criminalizing domestic violence.[41]

B. Communal *Vis a Vis* Separate Property Holding

There are two common systems of matrimonial property namely, community[42] and separate[43] property regimes.

Communal property holding treats matrimonial property as common property by dint of parties' married status.[44] Communal property holding in this context does not necessarily entail common legal ownership of all property. [45] Common holding of some of the property is sufficient. [46] In what may be termed as a universal community, parties in a marriage (spouses) usually share all the property that they own either together or separately.[47] Separate property on the other hand means that each of the spouses holds their property individually even within the context of marriage.[48] This property ownership regime arose from philosophical justifications for equal rights between spouses and with a view to preventing subjugation of any of the spouses, particularly women.[49] The apparent attractiveness of the separate property regime between spouses is specious, as the nature of a life jointly enjoyed

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1806) and Charlotte Bronte's *Jane Eyre* (published in 1848) when the coverture doctrine was prevalent, and how the writers created female characters that went against this characterization of coverture by being strong-willed and triumphant, yet desiring marriage.

[39] A majority of countries have since criminalized marital rape, including the UK, US, and South Korea. For a survey of countries that have proscribed marital rape, see PANICKER, Rithika & Parav Patel, "A Study of Marital Rape Laws in Different Countries," Volume 1 No. 3 *International Journal for Legal Developments and Allied Issues*, 2015, p. 232.

[40] See generally, LOUE, Sana, *Intimate Partner Violence: Societal, Medical, Legal and Individual Responses,* New York: Kluwer Academic/Plenum, 2001.

[41] For instance, Kenya recently passed the Prevention Against Domestic Violence Act, 2015 (Act No. 2 of 2015).

[42] Communal property regime is whereby property is owned by every member of the society.

[43] Separate property regime is whereby property is held individually.

[44] DE FUNIAK, William Quincy, *Cases and Material on Community Property,* Tucson: University of Arizona Press, 1971, p. 4.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] MILL, John Stuart, *The Subjection of Women* (5th Edition), London: Longman, 1883.

makes it difficult to neatly demarcate property boundaries. This is particularly complicated and at times manifestly unfair in instances where one of the spouses is less economically privileged.[50] One of the greatest problems presented by the separate property regime among spouses is indeed identifying who owns what property that is not personal property, in marriage.[51] Given that spouses rarely envision the possibility of divorce necessitating the separation of property, and since they mostly live within the context of a family relationship rather than a business-like union, there is usually no inventory of all property they acquire[52] and how it was acquired. This fact complicates the division of matrimonial property held under the separate property regime upon divorce.

III. Matrimonial Property from a Historical Perspective

A. The Problem with Legal Pluralism and Its Implications for Matrimonial Property

Most African countries that were colonized have plural legal systems.[53] Kenya is one of such countries.[54] The operative legal system includes statutory, customary, cultural and religious.[55] Legal pluralism denotes a situation in which more than one system or body of law operates within a legal system of a state.[56] Legal anthropologists construe legal pluralism as a system marked by different legal orders that exist in the same political space.[57] Beyond colonialism, legal pluralism in many African countries is nuanced by culture and religion with customary and religious laws mostly governing personal law

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[50] ANGELO, A.H. & W.R. Atkin, "A Conceptual and Structural Overview of the Matrimonial Property Act 1976," Volume 7 *New Zealand Universities Law Review*, 1977, p. 238.

[51] Ibid 239.

[52] Ibid 240.

[53] NDULO, Muna, "African Customary Law, Customs, and Women's Rights," Volume 18 No. 1 *Indiana Journal of Global Legal Studies*, 2011, p. 87; GEBEYE, Berihun Adugna, "Women's Rights and Legal Pluralism: A Case Study of the Ethiopian Somali Regional State," Volume 6 *Women in Society*, 2013, p. 5 at p. 6.

[54] KAMERI-MBOTE, Patricia, "The Land Has Its Owners!: Gender Issues in Land Tenure under Customary Law in Kenya," International Environmental Law Research Centre (IELRC) Working Paper, 2005-9, p. 4.

[55] Ibid 5.

[56] GRIFFITHS, John, "What is Legal Pluralism?" Volume 24 *Journal of Legal Pluralism & Unofficial Law*, 1986, p. 1 at 9.

[57] DE SOUSA SANTOS, Boaventura, "Law: A Map of Misreading: Toward a Postmodern Conception of Law," Volume 14 *Journal of Law & Society*, 1987, p. 279 at 293.

matters, and statute law governing all other areas of life.[58] The situation is complicated because there are many customary laws within one country each corresponding to different ethnic communities.[59] Most customary laws tend to discriminate against women as they are predicated on patriarchy.[60] In a plural legal space, women suffer inequality in personal law matters such as inheritance and entitlement matrimonial property as these are dealt with under the customary law. [61] In certain instances, statutory law buttresses the inequality by exempting personal law matters from its purview as was the case in Kenya before the promulgation of the 2010 Constitution.[62] It is important to note that legal pluralism predates colonialism but that colonialism introduced a hierarchy of norms through what may be termed as the 'classic form of legal pluralism'[63] marked by a government; a legislature that makes rules; a judiciary that applies those rules; and an executive that implements and enforces the same rules.[64] Many customary laws are unwritten, dynamic and have over time lost the institutional frameworks for enforcement.[65]

Besides the general problem of inequality between men and women under the customary law, a further complication arises where a marriage is contracted under more than one legal system which is not uncommon.[66] Many statutory marriages are preceded by customary law marriages.[67] Additionally, because marriage under African Customary law is a long drawn out process and not an event, it is not unusual for some processes to occur after the statutory marriage.[68] These marriages have different norms and implications making it difficult to determine what rules govern the dissolution of such marriages and how property is to be shared in the event of dissolution.[69] For instance,

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[58] KUENYEHIA, Akua, "Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa," Brigitte M. Bodenheimer Lecture 40 University of California Davis, 2006, p. 385 at 388.

[59] Ibid.

[60] OPPERMANN, Brenda, "The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States," Volume 17 *Hastings Women's Law Journal*, 2006, p. 65 at 66.

[61] Ibid.

[62] See Section 84 of the Constitution of Kenya 2010.

[63] KUENYEHIA, Akua, "Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa," op. cit., p. 388.

[64] Ibid.

[65] Ibid.

[66] Ibid 389.

[67] Ibid.

[68] Ibid 390.

[69] Ibid 391.

customary and some religious laws allow polygamy – marriage of the man to more than one women while statutory laws based on Christianity have historically only allowed monogamous unions. As early as the 1960s, proposals for reform of marriage laws had included the proposal to make all marriages potentially polygamous.[70] This was occasioned by the preponderance of situations where men contracted monogamous marriages and proceeded to marry other wives.[71] This happened despite the existence of penal[72] sanctions against bigamy (the act of going through a marriage ceremony while already married to another person). Polygamy has implications for holding of matrimonial property and its divestiture upon dissolution of marriage.[73] The Marriage Act 2014 provides for both monogamous[74] and polygamous unions.[75] Division of matrimonial property in polygamous situations is complex,[76] owing to rivalry and jealousy among family members.[77]

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[70] See, REPORT of the Commission on the Law of Marriage and Divorce 1967 <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Divorce-1968.pdf > accessed 19th November, 2016.

[71] Ibid 14, para 50.Also see, *Re Ogolla's Estate* [1978] KLR 18.

[72] See, Section 171 of the Penal Code, Cap 63 Laws of Kenya which criminalises bigamy.

[73] E.g. in *Re Ruenji's Estate* (High Court of Kenya, Miscellaneous Civil case No. 136 of 1975), the deceased had married one Loise under a statutory marriage and they had 13 children but later purported to marry two other women under Gikuyu customary law with whom he also had children. Upon dying intestate, the issue facing the court was whether the subsequent women married under customary law and their children could inherit lawfully. The court held that since the first marriage contracted was monogamous by statute, the deceased had no capacity to marry under custom and therefore the subsequent wives and children could not inherit.

[74] Section 6 (2) of the Marriage Act 2014.

[75] Section 6 (3) of the Marriage Act 2014.

[76] Succession disputes relating to wealthy polygamous families after the death of a patriarch in Kenya abound, and have been on the rise. Estimates indicate that estates worth in excess of 500 billion Kenya shillings are being fought for in the courts among family members, some involving prominent families of former cabinet ministers such as Mbiyu Koinange, Njenga Karume and Gerishon Kirima. See, OGEMBA, Paul & Maureen Kakah, "Families Fight to Control Shs. 500 Billion Wealth," *Daily Nation* (Kenya) 25th January, 2016 <http://www.nation.co.ke/news/Rich-families-in-court-battles-over-Sh500bn/1056-3047740-doki0cz/index.html > accessed 19th November, 2016.

[77] For a characterization of the challenges in polygamous settings, see NDULO, Muna, "The Changing Nature of Customary Marriage in Zambia," in BOWMAN, Cynthia Grant & Akua Kuenyehia (eds.), *Women and Law in Sub-Saharan Africa,* Accra: Sedco Publishing, 2003, pp. 33-35.

B. Law's Solution to the Problem: MWPA

In an effort to confront the problems presented by legal pluralism as highlighted above and to cure the injustices suffered particularly by women and their children upon the death of a husband, the Married Women's Property Act was passed in the United Kingdom (UK) in 1870. It established the principle of separate holding of property by women.[78] The Act laid the ground for a consideration of women as legally distinct individuals, contrary to the situation prevailing under the doctrine of coverture.[79] For instance, the Act allowed married women to regard the income they earned from their work as separate property and retain any land that they inherited from their family.[80] Amendments to the Act in the 1882 Act were more path-breaking as they amounted to formal recognition of women as legally independent or distinct and equal to their husbands. [81] It also made them responsible for their own debts. [82] This was a major step forward from the earlier 1870 Married Women's Property Act, as noted by Mary Lyndon Shanley, commenting on the 1870 statute:

> ...After two years of struggle feminists had gained a married women's property law but failed to win legislative recognition of the principle that a married woman had a right to a legal status independent of and equal to that of her husband.[83]

Kenya inherited the British laws including the Married Women's Property Act (MWPA) 1882 upon becoming a British protectorate in 1893, through the East Africa Order in Council.[84] The statute became the default regulatory regime for matrimonial property. It applied to all marriages in Kenya, statutory or customary.[85] Section 1 of the MWPA provided that a married woman was capable of holding, acquiring and disposing by will any real or personal property, as her separate property, in the same manner as if she were an unmarried woman. In addition, married women had express claims to separate

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[78] Ibid.

[79] Ibid.

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] SHANLEY, Mary Lyndon, *Feminism, Marriage, and the Law in Victorian England, 1850-1895,* Princeton: Princeton University Press, 1989, p. 77.

[84] KAMERI-MBOTE, Patricia, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,* Nairobi: Women & Law in East Africa, 1995, p. 8.

[85] Ibid.

property acquired during or after marriage that was presumably registered in their own name.[86] This was essentially a paradigmatic shift from the former legal position where a married woman was deprived of any legal identity and was considered as civilly dead. One of the commonest provisions of the MWPA was Section 17 of the Act, which provided that in any question between husband and wife as to title or possession of property, either party could apply by way of summons or otherwise to a judge of the High Court, who would make such order with respect to the property in dispute. This Section was invoked severally by litigants, and in particular by married women who were divorced and were seeking a share of the matrimonial property. [87] The judicial construction of the provisions of the MWPA presented mixed but dismal results in terms of delivering property rights for married women. For instance, in *Echaria v. Echaria*,[88] the court held that a married woman had to prove financial contribution in order to get a share of the matrimonial property upon divorce. Given the injustice and harshness visited on married women who mainly performed unpaid household chores, the court in *Kivuitu v. Kivuitu*[89] had earlier remarked *obiter* that contribution needed not be financial contribution in the following words:

> I can find nothing ... which would force me to the conclusion that only monetary contributions must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by.[90]

While the main purpose of the MWPA was to provide a legal framework to enable married women to acquire separate property, outside the cover of their husbands, the statute neither provided a definition of what constitutes matrimonial property nor availed any guidance as to division of such property. There were many instances of women and children being disinherited when male members of households or husbands opted to dispose of the matrimonial property with the concurrence of the courts. This was the position in *Jacinta*

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[86] Section 17 MWPA 1882.

[87] See e.g. *Essa v. Essa* 1995 LLR 384 CA; *Nderitu v. Nderitu*, Civil Appeal No. 74 of 203 of 1997 (Unreported), *Kamore v. Kamore* 1998 LLR 714 CA; *Muthembwa v. Muthembwa*, Civil Appeal No. 74 of 2001 and *Mereka v. Mereka*, Civil Appeal No. 236 of 2001 (Unreported).

[88] Civil Appeal 75 of 2001, (2007) eKLR (C.A.) Cf. *Makunda v. Makunda* (2006), Civil Suit 5 of 2002, eKLR (H.C)

[89] Civil Appeal 26 of 1985.

[90] [1991] eKLR CA 259, 558.

Wanjiku Kamau v. Isaac Kamau Mungai[91] where the Court emphasized that the husband was under no legal obligation to seek the consent of the wife before disposing of the land that was used as matrimonial property, so long as it was registered solely in the husband's name. [92] Though the wife worked to maintain the land, she was only awarded 0.25 acre of the land to enable her fend for herself and the eight children. A similar holding regarding the interest of a married woman was made in *Margaret Mumbi Kagiri v. Kagiri Wamairwe & 3 Others.*[93]

More cases litigated under the MWPA are discussed below to problematise the different court interpretations of the Act some of which made the protection intended for spouses ineffective.

C. Giving with one Hand and Taking with the Other Hand: Jurisprudence on Matrimonial Property before the Constitution of Kenya 2010

In order to grasp the changing legal landscape with respect to women's rights over matrimonial property, it is critical to review the jurisprudence from the courts in the pre-2010 Constitution period. Decisions relating to the sharing of matrimonial property upon the dissolution of marriage were in the main, as mentioned above, decided in accordance with the provisions of the Married Women's Property Act 1882. The case of *I v. I*[94] was the first Kenyan case to apply the MWPA 1882 since it was considered a statute of general application in England on 12 August 1897 and applied in priority to customary law. Five years later, the High Court of Kenya considered the case of *Karanja v. Karanja.*[95] In this case, the parties acquired several properties during the course of their marriage which were all registered in the name of the husband. One of the properties was acquired through money that had been supplied by the wife while the other properties had been procured through her direct and indirect contribution. The Court held that the MWPA was applicable to Kenya and customary law was subject to any written law, effectively adopting the decision in *I v. I.* The Court also held that even absent power to transfer property, it had power to grant declaration of ownership of property under the MWPA. In addition, it stated that the absence of an agreement or intention that the contributing spouse shares beneficially in the property did and could not exclude the imputation of such an intention.

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[91] Civil Appeal 59 of 2001 (2006) 59 K.L.R. 9.

[92] Ibid 14.

[93] (2007) 181 K.L.R. 8 (C.A.K).

[94] [1971] EA 278.

[95] [1976] KLR 307.

Kivuitu v. Kivuitu was the first decision by the Kenyan Court of Appeal where the issue of non-monetary contribution of a typical Kenyan housewife was considered. The issue was whether such contribution was at the same level with direct contribution of a salaried wife. In the court's view, to decide whether the wife had an interest in the matrimonial home by merely looking at whether the wife made any financial contribution was too narrow a compass for determination of the issues.[96]

In *Njuguna v. Njuguna*, [97]a husband acquired a rural property during the course of marriage. It was not clear to the court on evidence, how the couple had arranged their financial affairs and marriage but there was evidence that the husband had been unemployed for over a year. There was further evidence that the wife had made some financial contributions towards the acquisition of the property. In an application seeking a share of the matrimonial property, the court held that the wife had satisfied it of her direct and indirect contributions to the property, and following *Karanja v. Karanja*, declared that the property was jointly owned and that therefore each of the spouses had an equal share to the property. Further, in *Essa v. Essa,*[98] the court first considered whether the MWPA was applicable to Kenyan Muslims despite the existence of the Quran which elaborated principles regarding property acquired during coverture. The Court held that the MWPA applied to Muslims like it did to all other Kenyans and rejected the application of Islamic law principles.

The case of *Nderitu v. Nderitu*[99] is significant because it constitutes the first important line of cases by the Court of Appeal that sought to achieve equity in distribution of property between spouses. In this case, the husband was able to buy properties from income obtained from clothing businesses the couple run together. The marriage broke down and the wife petitioned for divorce in addition to applying to the court under the MWPA for an order that the properties were jointly owned and that she had an equal share to the property. The wife argued that she had contributed financially to the acquisition of the properties while the husband dismissed such contribution. The trial judge awarded the wife 50% of the matrimonial home and 30% share of all the other properties on account of her non-monetary contribution such as taking care of the children. Dissatisfied with the share, the wife lodged an appeal at the Court of Appeal on the grounds that the trial judge erred in law in not awarding her 50% share of all properties. The Court of Appeal held that given that there was evidence that the wife had been engaged full time in running the

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[96] [1991) 2 KAR 241, 244.

[97] [1982] LLR 823.

[98] [1995] LLR 384 CA.

[99] [1997] LLR 606 CA.

business; the trial judge had erred in awarding her only 30% share of the properties. It stated that in the absence of a clearly declared decision the court has no powers to determine how much contribution was made by each party but was instead supposed to decide the matter in equal shares. In the circumstances, the court awarded 50% share of all properties to the wife. The significance of this case lies in the fact that the concept of non-monetary contribution which had been remarked on *obiter* in the Kivuitu case was adopted and approved by the appellate court.

In the case of *Kamore v. Kamore*[100] the Court considered the principle or doctrine of trust. It held that there was a need to show evidence of contribution by a spouse and thus departed from *Nderitu.*[101] The Court held that it could not make a finding of a resulting trust in favour of the wife without evidence of either express or implied intention of the donor. It further noted that there was need to demonstrate contribution for a share of matrimonial property to vest, and that Section 17 of the MWPA gave no power to the court to pass any proprietary interest from one spouse to another.[102] The case of *Muthembwa v. Muthembwa*[103] deserves a mention because it considered the question of whether a spouse could acquire an interest in property acquired by the other spouse separately where the claiming spouse had made improvements on the property. The Court held that a wife did not need to give detailed evidence of her contribution since upon proof of substantial contribution, the court would order for equal sharing.[104] It further stated that by carrying out the duties of a wife and mother, there was a presumption that she made substantial contribution to the acquisition of the property and she would thus get an equal share.

In *Kimani v. Kimani,*[105] the parties had undergone a Christian marriage and blessed with two children but later lived separately after strains in their relationship. After alleged beating, the wife left the matrimonial home for good and later filed for divorce and within the pendency of the divorce proceedings, brought an application for a share of property. During trial, the husband was able to prove that he contributed to the purchase of the property alone. Justice Kuloba, unconvinced that the wife made any financial contribution towards the acquisition of the property held that contribution must be proved on evidence. The trial judge went on to state that a wife was

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[100] [2000] 1 EA 80.

[101] [2000] 1 EA 80, 81, 85.

[102] Ibid.

[103] [2001] LLR 3496 CA.

[104] Ibid.

[105] H.C.C.C No. 1610 of 1995 (O.S.).

an automatic asset and each wife would be considered on the basis of her individual worth. In particular, the judge equated the behaviour of the wife wanting to share in the matrimonial property as riding on the husband's back with her hands in his pocket. This decision was reversed by the Court of Appeal on the basis that the trial judge was biased generally against women and remitted to another trial judge for retrial.

We conducted an assessment of the pre-2010 Constitution jurisprudence through select cases that we perceive to be of jurisprudential moment, with a view to highlighting the then state of the law, particularly with regard to spousal rights on matrimonial property. The running thread in those cases is that the law was left in an unsatisfactory state with some decisions developing jurisprudence towards equitable sharing of property and invoking the doctrine of resulting trust, while others insisted on proof of financial contribution. The conflicting decisions from the then highest court in the land, the Court of Appeal, which appeared to give no deference to earlier decisions from the same court, were not only bad for predictability and stability which is necessary in the law, but also left spousal proprietary interests at the whims of a judge's discretion. Reform in matrimonial property law was prompted by the need to settle the law, given the vulnerability of spouses particularly women. The Constitution of Kenya in 2010 was promulgated to address this and other issues raised by Kenyans.

IV. The Promise: Constitution of Kenya 2010

The Constitution of Kenya 2010 heralded a new era as it re-envisioned the governance charter by revamping fundamental rights and freedoms and providing for far reaching institutional reforms. It expanded the purview of and made provision for affirmative action and social justice. Most significantly, it secured spousal proprietary rights, both before, during and after marriage and the rights of widows in the event of death of their spouses. We examine the salient provisions of the Constitution that imbue equality, and provide for the protection of matrimonial property in this Section, with a view to demonstrating the promise.

A. Equality and Non-Discrimination

Article 10 of the Constitution of Kenya 2010 provides for national values and principles of governance that bind all State organs and state officers including the courts and judicial officers. These values and principles include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. State organs are enjoined by the Constitution to take all these values into account whenever they

interpret or apply the Constitution.[106] Given that it is the courts that are charged with the function of applying and interpreting the Constitution, it follows that they need to ensure that they create a jurisprudence that resonates with these principles. The parliament is also to take them into account in enacting laws while the executive needs to consider them when making or implementing public policy decisions in accordance with Article 10(1).

Article 27 of the Constitution deals with equality and non-discrimination, and it provides that every person is equal before the law and has right to equal protection and equal benefit of the law.[107] Article 27 (3) is to the effect that both women and men have the right to equal treatment in the economic, social and political spheres while Article 27 (4) is emphatic that the State shall not discriminate directly or indirectly against any person on any of the grounds enumerated which include sex, marital status, and pregnancy. Article 27 (6) enjoins the State to pursue and adopt affirmative action measures through legislative interventions to redress inequalities. The import of these provisions is that spouses, be they men or women, must not be discriminated against by the courts or any other state organ during the sharing of matrimonial property by virtue of their sex, marital status or any other ground. Article 45 of the Constitution which deals with the family is also important for equality question between spouses particularly with regard to the sharing of matrimonial property. Article 45 (1) begins by recognizing that the family is the natural and fundamental unit of society and the necessary basis of social order which is to enjoy the recognition and protection of the State. The provision is couched in mandatory terms meaning that there is to be no derogation by the State from recognizing and protecting the family as a unit. Article 45 (3) is the most relevant with respect to matrimonial property as it provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This provision implies that irrespective of the contribution of any of the spouses in marriage, equality is presumed with respect to any and all matrimonial property acquired by the spouses, not having regard to how much each spouse had contributed in the process.

Article 2 (5) and (6) of the Constitution which provides that treaties ratified by Kenya form part of the law under the Constitution, are also important as far as the equality and the non-discrimination questions are concerned. Kenya has ratified various international instruments providing for gender equality, the most important being the Convention on Elimination of Discrimination against Women (CEDAW). Indeed, in the case in *Mary Rono v. Jane Rono*

[106] Article 10 of the Constitution of Kenya 2010.

[107] Article 27 of the Constitution of Kenya embodies the non-discrimination clause.

and William Rono[108] the Court relied on international instruments to nullify discriminatory customary practices of the Nandi community which favoured sons in inheritance matters while discriminating against daughters.

B. Protection of Matrimonial Property

Of all properties available to families in Kenya, land deserves special mention because of the huge dependence on it as a means of livelihood. The importance of land in Kenya is demonstrated by its coverage in the Constitution with a whole chapter, to wit, Chapter 5, is devoted to issues relating to land. Article 60 (1) of the Constitution provides for principles that shall guide the management and use of land to include equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property in land, among others. It is in furtherance of the critical place occupied by land that Article 68 c (iii) of the Constitution provides that the Parliament shall enact a law to regulate the recognition and protection of matrimonial property and matrimonial home during and on the termination of the marriage. Further, Article 68 (c)vi provides that the Parliament shall enact a law that protects dependants of deceased persons holding any interests in land, including interests of spouses actually occupying the land. The mischief sought to be cured by these twin provisions was that presented by the unsatisfactory state of the law as developed by courts, the failure of the MWPA to adequately provide protection and the instances of disinheritance especially of women. Pursuant to these constitutional provisions, the Parliament enacted the Matrimonial Property Act in 2013 after a protracted battle, provisions of which we shall critically analyse below.

C. Ray of Hope: Jurisprudence between 2010 and 2013

The period between the promulgation of the Constitution in 2010 and the enactment of the Matrimonial Property Act 2013 was marked by path breaking jurisprudence on gender parity in matrimonial property cases. Since the legislation on matrimonial property contemplated under Article 68 of the Constitution was yet to be enacted, the courts relied on the equality and non-discrimination provisions in the Constitution to determine the issues brought to them. Significantly, the courts construed Article 45 of the Constitution as prescribing equal shares (50-50) of matrimonial property between spouses upon divorce, irrespective of their contributions. We examine the jurisprudence that emerged in this period, through a number of select cases.

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[108] [2008] 1 KLR (G&F) 803.

In *ZWN v. PNN*,[109] the applicant moved the court by way of summons seeking that the court declare particular properties enumerated therein were held in her trust by the respondent, and a further declaration that they be settled for her benefit in a manner that deemed fair and just to the court. The applicant argued that the properties were acquired through their joint efforts and that most of the properties were registered in the name of the respondent. While agreeing to share the properties equally between the spouses, the High Court had this to say regarding the new constitutional dispensation and prevailing jurisprudence:

> This court notes and appreciates that the principle of law set by the Court in *Echaria v. Echaria* stems from provisions of the legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property have primacy over the principle of law enunciated by the decision in *Echaria v. Echaria* which stems from and ordinary legislation.[110]

In the case of *J.A.O v. N.A,* [111] the plaintiff and the defendant had contracted a marriage under the African Christian Marriage and Divorce Act[112] but later filed for and was granted orders for judicial separation. The plaintiff brought an application by way of originating summons vide Section 17 of the MWPA for orders that the property acquired during the pendency of their marriage but registered in the name of the defendant were owned equally and should thus be shared. The remarks of the Court in this case are worth quoting at length for our purposes:

> When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in the form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property... There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the

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[109] [2012] eKLR.

[110] Ibid.

[111] [2013] eKLR.

[112] Cap 151 Laws of Kenya.

> principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.[113]

The ray of hope jurisprudence espoused by the courts[114] regarding the import of Article 45 (3) of the Constitution was also in effect in *CMN v. AWM.*[115] In this case, the plaintiff has sought a declaration that he was the sole and absolute owner of the suit property as he had built it using his finances without any financial assistance from the defendant. The defendant had deserted the plaintiff and married another man and the plaintiff had been responsible for raising their four children. The defendant claimed that they purchased the suit property through their joint efforts and that it was registered in their joint names. While agreeing with the plaintiff based on the evidence that he was the only one who contributed financially to the purchase of the suit property, the High Court stated:

> The legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the property which matters ...the legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property [matrimonial house] equally between the Plaintiff [husband] and the Defendant [wife].[116]

The Court of Appeal had occasion to provide judicial construction and guidance on the import of the Constitution on division of matrimonial property in *Agnes Nanjala William v. Jacob Petrus Nicola Vander Goes.*[117] In this case, the Court of Appeal held that both spouses were entitled to an equal share of property by dint of Article 45 (3) of the Constitution which provided for equality of spouses before, during and after marriage. The appellate court remarked thus of Article 45 (3) of the Constitution:

> This Article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably

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[113] [2013] eKLR 14, 15.

[114] Also see *M.C. N v. A.W.M.,* Exh No. 208 of 2012 where the Court applied the principle of equality.

[115] [2013] eKLR.

[116] Ibid., Para 15.

[117] Civil Appeal No. 127 of 2011 (Unreported).

> 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. (*sic*)[118]

V. Encounters between Reality and Rhetoric

Achieving gender equality in a patriarchal society is a function of many factors, both legal and extra-legal because patriarchy, being a socio-legal phenomenon, must be tackled from both a legal and social perspective. An analysis of the current legal landscape as well as the prevailing attitudes and realities indicate that Kenyans have not fully embraced gender equality,[119] and that there is still reluctance to give full effect to provisions of spousal equality with respect to matrimonial property. While the enactment of the Matrimonial Property Act 2013 was a step towards this end, a critical analysis indicates that it significantly eroded the gains and the promise held by the Constitution. An analysis of emerging jurisprudence under the Act further reinforces our assertion and lends credence to our argument that the constitutional provisions on gender equality and non-discrimination represent a clear encounter between lived realities and the rhetoric espoused in the robust constitutional provisions. The two are diametrically opposed as experience in different contexts illustrates.[120]

A. Matrimonial Property Act (MPA) 2013

One of the drawbacks with the MPA in terms of ensuring spousal equality is in its definition of what constitutes matrimonial property. Section 2 of the Act defines matrimonial property to exclude assets, including family land, unless jointly acquired. In particular, Section 6 (1) c of the Act defines matrimonial

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[118] Ibid 21.

[119] See e.g. KABIRA, Wanjiku Mukabi & Patricia Kameri Mbote, "Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise," in ODOTE, Collins & Linda Musumba (eds.), *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence,* Rome and Nairobi: International Development Law Organization (IDLO) and Judiciary Training Institute (JTI), 2016, pp. 177-214.

[120] See e.g. Ibid.

property to subsume any moveable and immoveable property jointly owned and acquired during the subsistence of the marriage. While this provision appears to be fair to a spouse who acquires property before marriage, it ignores the critical issue that one gender has historically been marginalized in terms of property holding and inheritance. Men have traditionally been heirs of property through inheritance, a fact evidenced by the abysmally low number of women holding title to land.[121] By retaining this provision, the statute ignores this dynamic and serves to perpetuate the *status quo*. In addition, given that women in marriage, to a large extent perform unpaid work, it may become difficult for them to jointly acquire property with their spouses. The impact of this provision is that even family land that is acquired and registered in the husband's name is not considered as matrimonial property to be shared upon dissolution of marriage, but is regarded as separate property belonging to the husband alone.

The requirement[122] for proof of joint ownership and titling of land is inimical to the interests of women. It is instructive to note that this skewed definition of matrimonial property was not included in earlier versions of the Bill that became the Act.[123] Earlier drafts defined matrimonial property to include any property acquired by any of the spouses during marriage. The Act entrenches inequalities by dictating the equitable sharing of burdens or liabilities between spouses that are incurred during marriage, yet rejecting a general presumption of equal ownership of property.[124] The asymmetry created by the law in this regard is detrimental to concepts of equality that the law sought to achieve, and is against the spirit of equality and non-discrimination in the Constitution.

Secondly, the requirement by the Act that direct contribution in the acquisition of property be proved in order for a spouse to share in such property also entrenches inequalities. The relevant provision, that is Section 7, is to the effect that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. This provision codifies discrimination against women since women are the ones who disproportionately shoulder housekeeping and care-giving roles, which are unpaid and non-monetized. The indirect contribution through such roles which are critical for the survival of the family does not vest any rights

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[121] According to the latest statistics, only around 5 % of women in Kenya are jointly registered as land owners with their spouses while only 1 % of women have titles to land alone. See FEDERATION OF WOMEN LAWYERS (FIDA) KENYA, *Women's Land And Property Rights In Kenya*, FIDA Kenya website (accessed 16th October, 2016).

[122] Section 2 and 6 (1) c of the Matrimonial Property Act, 2013.

[123] See Sections 2 and 7 of the Matrimonial Property Bill published in July 2013.

[124] Section 10 (3) a of the Matrimonial Property Act 2013.

over matrimonial property. It is important to point out that Section 6 (3) of the Act provides for prenuptial agreements where spouses are at liberty to determine their respective property rights prior to entering into marriage. This promotes a separate property regime for spouses. Section 14 b of the Act however, creates a presumption of equal ownership of property in marriage in the event that the property is acquired in the joint names of the spouses. The practice of joint holding of property is not common and hence for most spouses in instances where property is registered in the name of only one spouse, Section 7, which is to the effect that matrimonial property vests according to the respective contributions of the spouses and not in equal shares is the operative provision.

Interestingly, Section 2 of the Act defines contribution to include both direct and indirect contribution. However, indirect contribution is difficult to establish because it comprises activities performed in the private reproductive sphere and is not monetized. The discussion of the legislators on indirect contribution equated women's work in the domestic sphere to domestic house-help work which is poorly remunerated.[125] Further, even where women contribute directly to the acquisition of property, it is not unusual for their names to be omitted in the title document.[126]

Section 12 of the Act requires spousal consent before any dealing with matrimonial property including disposition. While this is laudable, as currently framed, it is grossly inadequate for a number of reasons. To begin with, a reading of Section 12 (1) of the Act suggests that spousal consent is only required within the context of monogamous, as opposed to polygamous marriages, yet the power dynamics are more complicated in the latter case. As currently couched, in a polygamous setting, a spouse can dispose of matrimonial property without seeking the consent of the other spouses. This concern is not idle, considering the fact that polygamy in the Kenyan society is still a reality, and especially now with the express recognition of potentially polygamous marriages in the Marriage Act 2014. Indeed, according to the 2014 Demographic and Health Survey, about 14 % of women in rural Kenya are in polygamous unions with the numbers rising in particular regions such as Nyanza and North Eastern. Another shortcoming of this provision on spousal consent is that it leaves the imbalances in power structures and the asymmetries inherent in relationships of this kind intact. The law presumes that consent, when sought will be freely given without coercion, vitiation of will or other social pressures that are the norm in such family settings and

[125] WANAMBISI, John, "Kenya: 50-50 Sharing of Marital Property? No Way!" (*All African News*, 12th November, 2013) <http://allafrica.com/stories/201311130085.html > accessed 19th November, 2016.

[126] FIDA KENYA, *Women's Land and Property Rights in Kenya*, op. cit.

particularly in patriarchal societies. Indeed a spouse, particularly a woman may be unwilling to consent to a transaction or a disposition relating to matrimonial property but end up consenting due to societal pressures and the fear of being labelled rebellious and disrespectful to the husband.[127] Another factor that must be taken into account is the disparities in education levels between men and women,[128] which may contribute to uninformed consent.

In addressing matrimonial property, it is useful to look at the types of marriage that are recognized by law.[129] The Marriage Act 2014 does not recognise informal marriages, also known as cohabitation or more popularly, the 'come we stay marriages'. Parties to marriages have no rights to their property held by their partners upon the demise of one of them. The import of this provision becomes clear when one considers the number of couples who cohabit without getting formally married.[130] Indeed, owing to costs or other reasons, parties may opt to live together before formalizing their unions, and such cohabitation may last for a long time during which either party or both acquire property and children are born. Sections 11, 42 and 44 of the Marriage Act 2014, require the registration of all types of marriages whether traditional, customary or Christian. This should be done within a period of three (3) years from May 2014. The Cabinet Secretary may extend this period. Given the lack of legal awareness particularly in rural areas where the predominant form of marriage is customary, it is unlikely that even after any extensions; registration will be achieved in good time. In the absence of registration, such unions may not be regarded as marriages and as such, spouses run the risk of being denied their property rights. The law needs to take into account such realities and social circumstances, and as an instrument of social engineering, it must facilitate the registration of informal and customary unions to protect the rights of spouses who will otherwise remain in the shadow of the law.[131]

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[127] HARRINGTON, C. & T. Chopra, *Arguing Traditions: Denying Kenya's Women Access to Land Rights, Justice for the Poor Research Report,* Washington, DC: The World Bank, 2010, p. 15.

[128] According to the 2014 Demographic and Health Survey in Kenya, only an estimated 54 % of married women in Kenya take part in decisions regarding major acquisitions within a family. See KENYA NATIONAL BUREAU OF STATISTICS et al, December, 2015, Kenya Demographic and Health Survey 2014, p. xxiv, at http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf (accessed 16th October, 2016).

[129] Section 6 of the Marriage Act, 2014 recognises 5 types of marriage.

[130] CHIGITI, John, "Cohabitation and the Law," *The Star Newspaper* (Kenya) 22nd August, 2012. See <http://www.the-star.co.ke/news/2012/08/22/cohabitation-and-the-law_c668362> accessed 19th November, 2016.

[131] Ibid.

B. Land Laws (Amendment) Act 2016

We would be remiss if we do not canvass amendments to the land laws, vide the Land Laws (Amendment) Act, 2016[132] which have important provisions that touch on and fundamentally affect spousal rights under the MPA 2013. One such provision is the definition of matrimonial property under the amended law. It alters the provision in Section 2 of the Land Registration Act (LRA) 2012 which defined matrimonial property to include any interest in land or lease that is acquired by a spouse or spouses during the subsistence of marriage. This definition, though only applicable to land, has wider implications as it does not demand joint acquisition of property for it to be considered matrimonial property so long as it is acquired during a marriage. There is however, potential for conflict between these various provisions of the various laws as to what definition should be given deference in the event of conflict when deciding on sharing of matrimonial property.

Moreover, Section 11 of the Land Laws (Amendment) Act amends Section 28 of the LRA by deleting paragraphs (a) and (f) which provide for spousal rights over matrimonial property as overriding interests in registered land. This takes us back to the situation where spouses can sell land that is part of matrimonial property without protection of the rights of the other spouse particularly where that is done without consultations. While arguments may be made that concerns about their deletion are overblown, given that there is still requirement for spousal consent, regard must be had to spousal rights particularly in rural areas where extant spousal interests are barely registered. For such spouses, the retention of spousal rights over matrimonial property as overriding interests in registered land are important safeguards to guard against wanton alienation of such property without the prior consent of the spouse. Questions must then be raised as to whether the amendment is in consonance with Article 60 of the Constitution which provides for equality of spouses and elimination of gender discrimination in matters of land. It must also be read together with Section 12 of the MPA 2013 which provides for spousal consent only in monogamous unions.

Section 31 of the Amendment Act also deletes the entire Section 93 of the LRA, part of which provides that a spouse who contributes through labour to the separately held land of the other spouse gains an interest in such land and such interest shall be regarded by law as one that is registered. In its stead, the Amendment Act provides that contrary to any other written law, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both or all spouses, such property shall be deemed to be

[132] Act No. 28 of 2016.

matrimonial property and dealt with in accordance with the Matrimonial Property Act. The problem with the amendment law is that it does not expressly set out how such an interest may come about, a position that was clearer in the amended Section of the LRA which provided that labour contribution sufficed.

By deleting the provisions of Section 93 of the LRA in their entirety, which we consider as more robust in terms of ensuring spousal equality, the amendment law also eliminated the presumption of co-ownership and use of both spouses of property in joint tenancy formerly provided for in Section 93 (1) (a) between spouses. Joint tenancy among spouses is important in ensuring that none of the spouses is disinherited upon the death of either of them as the property held jointly usually devolves to the surviving spouse under the doctrine of survivorship - *jus accrescendi*.[133]

Moreover, the same amendment deletes Section 93 (4) of the LRA which voided a transaction whereby a spouse had misled the lender or a purchaser that consent had been acquired from the other spouse. This leaves a non-consenting spouse dissatisfied with the disposition with the only option of challenging the same in court. Yet, court actions are fraught with many challenges including the fact that rights may have vested on an innocent third party purchaser for value without notice,[134] the legal costs and the uncertainties mainly associated with court challenges.[135] This is of course assuming that the non-consenting spouse is fortunate enough to discover the fraudulent transaction, if at all, and act in good time. In our view, this provision essentially claws back on the equality provisions afforded in the law; and situates the issue of women's land tenure security on quick sand.

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[133] See the doctrine of survivorship explained in *Isabel Chelangat v. Samuel Tiro* (2012) eKLR thus: "Joint tenancy carries with it the right of survivorship and "four unities." The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence."

[134] See, *Nationwide Finance Co. Ltd v. Meck Industries Ltd* (2005) eKLR where the court held that the applicant was a bona fide and innocent purchaser for value without notice during a public auction. In such instances, when rights have accrued, there can be no orders divesting such person from ownership. Also see, *Mwai Limited & 2 Others v. Municipal Council of Mombasa & 5 Others* [2015] eKLR para 51.

[135] Some of the legal costs include court filing fees and legal fees for advocates which can be prohibitively high. In addition, a court decision can go either away depending on how one's case is argued and presented in court, thus imbuing a particular level of uncertainty.

C. Jurisprudence on Matrimonial Property Post 2013

An assessment of emerging jurisprudence regarding the interpretation of the provisions of the MPA 2013 indicates that there has been a marked erosion of spousal equality rights after its enactment. Courts have held that before making an application for division of matrimonial property, there must be proof of divorce or dissolution of marriage.[136] In *M.J.S.D v. P.K.D*,[137] the Court was of the view that Section 7 of the MPA required parties to have divorced before asking for a division of the matrimonial property while Section 17 of the Act was merely for seeking declaratory orders as to the rights. This reasoning was also adopted in *P.W.M. v. E.M.*[138] and in *MNW v. WNM & 3 Others*.[139]

Further, while the courts seem to appreciate that *Echaria* is no longer good law, especially with the Act defining contribution to include both monetary and non-monetary efforts, they have not come out clearly on this issue. In *VWN v. FN*,[140] the Court had this to say of the new law:

> In light of Article 45 (3) [of the Constitution] and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution, *Echaria* [*supra*] is no longer good law.

On the other hand, in *SNK v. MSK & Others*,[141] the Court of Appeal, while adjudicating a dispute from a High Court decision made in 2005 and noting that there is a new law (MPA 2013), held that the determination of the appeal could not be premised upon a law that was not in existence at the time of the decision of the trial court. As a result, the appellate court reduced the respondent's share of the matrimonial property from 50% to 25%. In *VWN v. FN*,[142] the Court of Appeal reversed the decision of the High Court which had distributed matrimonial property equally between spouses and awarded it on a 70% and 30%. The division of matrimonial property according to the level of

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[136] See *RNR v. AAR* [2014] eKLR/ Civil Suit 49 of 2011 (O.S). Also of interest and underlining the position of the courts that an application for division of matrimonial property can only be made after divorce/dissolution of marriage are the decisions in *Peter Ndungu Njenga v. Sophia Watiri Ndungu*, Civil Appeal No. 2 of 2000 and *MNW v. WNM & 3 Others*, HCCC No. 46 of 2012.

[137] Civil Suit No. 18 of 2014.

[138] Civil Suit No. 1 of 2013.

[139] High Court Civil Case No. 46 of 2012.

[140] Application No. Sup 3 of 2014.

[141] Civil Appeal No. 139 of 2010.

[142] Civil Appeal No. 3 of 2014.

contribution was also given effect in *FS v. EZ.*[143] In this case, the applicant had filed an originating summons seeking a declaration that the immoveable property she had set out be regarded as matrimonial property and thus shared equally. She also sought that the respondent provide details of other properties and foreign bank accounts and shares, properties which should be valued and disposed of and the net proceeds shared equally between them. The judge noted that the applicant who was a housewife made non-monetary contribution and was thus entitled to a share in the matrimonial property. The court however, held that the respondent who met all the financial requirements of the purchases was entitled to a bigger share of the properties. The Court's reasoning is worth quoting:

> My interpretation of Article 45 of the Constitution is that it does not call for 50:50 sharing of matrimonial properties after a marriage is 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 can repeat the same process with another spouse and enrich himself or herself without making any monetary contribution ... I do find that since the respondent made the entire monetary contribution, he should get a bigger share than that of the applicant ...[144]

The impact of the MPA 2013 on the division of matrimonial property upon dissolution of marriage appears to have been foreseen by Justice Tuiyot in *UMM v. IMM*[145] where he remarked thus of the MPA 2013:

> The provisions of that Statute ameliorate the harshness that was associated with *Echaria* (supra). Statute now recognizes the non- monetary contribution of a spouse. It however does not go as far as what the Court of Appeal had suggested in *Nanjala William* where it argued that Article 45(3) was perhaps "a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends." As far as I can see it, the provisions of Sections 2, 6 and 7 of the Matrimonial Property Act (2013) flesh out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of

[143] Matrimonial Cause No. 16 of 2014.

[144] Ibid 3, 4.

[145] Civil Suit No. 39 of 2012.

> Article 45 (3) ... I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The practice is the bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).[146]

Sadly, the views of the courts reiterate the position before the promulgation of the Constitution. It is noteworthy that the MPA 2013 has not been challenged for unconstitutionality. However, when one considers the nature of the Kenyan society and the prevailing gender stereotypes, this is hardly surprising.

VI. Conclusion

From the foregoing, it is evident that the Constitution of Kenya 2010 contains far reaching provisions on gender equality and spousal entitlement to matrimonial property. The jurisprudence from the courts between its promulgation and the enactment of the MPA 2013 was a radical departure from the pre-2010 jurisprudence which was capped by *Echaria* in which the Court of Appeal lamented about the absence of an endogenous law on matrimonial property.[147] The MPA is, for this reason, a significant achievement in terms of clarifying the law on matrimonial property in Kenya. However, discussions on the MPA illustrate that it has eroded the gains provided for under the Constitution. An analysis of the provisions of the Act and the emerging jurisprudence resulting from its interpretation and implementation by the courts indicates that we have simply had 'motion without much movement'. The patriarchal structures, norms, and attitudes

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146 Ibid para 21.

147 Civil Appeal 75 of 2001 (2007) eKLR (CA) 20. The judges of the appeal stated: '...there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our law reform agenda to keep the country shackled to a 125-year-old foreign legislation which the mother country found wanting more than 30 years ago.'

inherent in Kenyan society found their way into the MPA 2013 and have served to reinforce the legal and social norms that have traditionally mitigated efforts towards gender equality generally and spousal equality particularly. This paper, as the title suggests, demonstrates that the change anticipated pursuant to the promulgation of the 2010 Constitution and enactment of laws under it such as the MPA and land laws, the excitement amounts to 'much ado about nothing'. Indeed not much has changed from the pre-2010 era.

This calls for a review of the MPA and its amendment to ensure that property acquired by either spouse during and for the purposes of marriage is included in the definition of matrimonial property. There is also a need to amend the Act to create a presumption of equal ownership of property as opposed to predicating the same on the contribution of each spouse, considering the gender asymmetries in land holding and education and the gender division of labour. There is also a need to extend the requirement of spousal consent in dealing with matrimonial property to polygamous marriages. Linked to this is the need to ensure that there are appropriate safeguards in place to facilitate the procurement of spousal consent is procured in a proper manner so that power imbalances and dynamics in a family setting are not abused.

With respect to the Marriage Act 2014, we recommend that it be amended to recognize and provide for 'come we stay' or informal marriages. To actualize the requirement for the registration of all marriages, civic education should be mounted to popularize it and the registration itself made simple and accessible. There are also other ways of answering the question as to whether an informal marriage took place such as by way of testimony in court as has always been done in the past in the case of customary marriages.[148] This was the Court's position in *PMS v. MS*[149] whereby the applicant sought a declaration that the properties acquired jointly with the respondent during their marriage and which were then held only being held by the respondent be declared matrimonial property. The court found that, owing to their long cohabitation and general repute, the two were married under the common law doctrine of presumption of marriage since this presumption was not controverted by way of evidence. The court held that all the properties that had been proved to have been jointly acquired were matrimonial property, and thus were to be shared equally in line with the constitutional requirement of equality between spouses. Finally, the constitutionality of the provisions of the MPA and the Land Laws (Amendment) Act 2016 can be questioned. Legal practitioners who are interested in and keen on constitutionalism and spousal

[148] For instance, see *Mary Njoki v. John Kinyanjui Mutheru* [1985] eKLR); *T v. W* [2008] IKLR (G & F).

[149] Civil Suit No. 3 of 2014.

equality should test the constitutionality of some of the provisions of these laws in the courts. This will check the tendency of the legislature and the executive to override constitutional provisions at will, thus creating a culture of fidelity to the Constitution.

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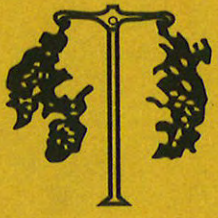

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