

**PRIVATE ORDERING AGREEMENTS IN KENYAN MATRIMONIAL
PROPERTY LAW**

BY

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DEDICATION

I dedicate this research project first to my parents Mrs. Elizabeth Atieno Koga and Prof. Joseph Ouma Rasowo. Their guidance and upbringing made me know the value of education. They have remained my main source of inspiration and reflection.

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ABSTRACT

Matrimonial property agreements are formal agreements signed by spouses that classify the ownership interest of any property. The agreements are divided into three categories namely prenuptial, postnuptial and separation agreements. The practical and emotional implications of these agreements differ and the development of the law that relates to each are divergent. In Kenya, the provision for matrimonial property agreements is invoked under Articles 68(c), 45(3) 27(4) of the Constitution, 2010 as read with sections 6 (3) of the Matrimonial Property Act, 2013. This therefore means that private ordered family agreements are enforceable in Kenya. Privately ordered agreements improve on communication, efficiency, and protection of separate property between spouses. The agreements also meet the demands of spouses satisfactorily. The challenge with the Kenyan legislation is that the law has only made provision for prenuptial agreements but has no mechanisms in place to adequately protect the rights of spouses to equal rights in matrimonial property as envisioned in Article 45(3). There is therefore a need to recognize all the forms of matrimonial property agreements to ensure equality of spouses. The research sets out three objectives and the first is to assess the viability of the use of matrimonial property agreements in division of matrimonial property. The second objective is to find out whether matrimonial property agreements promote fairness, efficiency and effectiveness in property division whereas the third objective is to draw best practice on use of matrimonial agreements from other jurisdictions. The research is guided by the feminism and contract theories. This research has used secondary sources of data for the reasons that the data is easily available and have a pre-established level of reliability and validity. The case study design that was used provided an indepth exploration of matrimonial property law in Kenya that was triangulated using different secondary sources of data and thus increased the liability and validity of the findings of the study. The data that was gathered was analyzed using thematic analysis that was based on the objectives of the study which enabled the researcher to answer the research questions and remain in the context of the research title. This research is based on the hypothesis that matrimonial property agreements are practical when it comes to division of matrimonial property and that they aid the courts in distribution of matrimonial property in a just and equitable manner. The study tests this hypothesis and proves that matrimonial property agreements can be a practical method of division of matrimonial property. The researcher recommends that there is need for recognition of postnuptial and settlement agreements to avoid ambiguity and ensure equality of spouses. The second recommendation is that there is need for development of guidelines to enforce matrimonial property agreements and there is also need for introduction of administrative mechanisms to supplement judicial process of resolving matrimonial property disputes that arise as a result of use of private ordered agreements. The fourth recommendation is that there is need for public education programs on the provisions on section 6 of Matrimonial Property Act.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
ABSTRACT.....	v
TABLE OF CONTENTS.....	vi
CHAPTER ONE	1
INTRODUCTION TO THE STUDY	1
1.0 Introduction.....	1
1.1 Definition of the Marital Agreements.....	3
1.1.1 Premarital Agreements	3
1.1.2 Postnuptial agreements.....	4
1.1.3 Separation Agreements	5
1.2 Theoretical framework.....	6
1.2.1 Feminism theory.....	6
1.2.2 Contractarian Theory.....	9
1.3 Relevance of the study	10
1.4 Literature Review.....	10
1.5 Problem Statement	17
1.6 Research Questions.....	17
1.7 Research objectives.....	18
1.8 Research Hypothesis	18
1.9 Research methodology.....	18
1.10 Limitation of the study.....	20
1.11 Overview of the chapters	20
CHAPTER TWO	22
THE DEVELOPMENT OF MATRIMONIAL PROPERTY LAW IN KENYA 22	
2.0 Introduction.....	22
2.1 Historical Background of Matrimonial Property Law	23
2.1.1 Precolonial Period	23
2.2 Judicial Development on division of matrimonial property	29
2.3 English Courts’ Interpretation of Section 17 of the Married Women’s Property Act of 1882	30

2.4 Kenyan Courts’ Interpretation of Section 17 of the Married Women’s Property Act	31
2.5 The Current legal framework on matrimonial property.....	35
2.5.1 The Constitution of Kenya 2010	35
2.5.2 Matrimonial Property Act No 49 of 2013(MPA).....	36
2.6 The Regional and International Framework on protection of women’s right to matrimonial property	41
2.7 The State’s obligation towards governance of private ordering in the family.....	42
2.8 Conclusion	44
CHAPTER THREE	46
THE PRACTICABILITY OF ENFORCING MATRIMONIAL PROPERTY AGREEMENTS IN KENYA	46
3.0 Introduction.....	46
3.1 The Status of the Matrimonial Property Agreements in Kenya.....	47
3.2 Justification For The Enforcement Of Private Ordering.....	50
3.3 Justifications on Limits by the State on Private Ordering Arrangements Public Policy	52
3.4 Misconceptions About Matrimonial Property Agreements	55
3.5 Human rights issues brought out by enforcement of matrimonial property agreements	56
3.6 Conclusion	62
CHAPTER FOUR.....	64
A COMPARATIVE STUDY OF MATRIMONIAL PROPERTY AGREEMENTS IN OTHER JURISDICTIONS	64
4.0 Introduction.....	64
4.1 Marital Agreements In South Africa.....	64
4.1.1 Marriage out of community of property without the accrual system	65
4.1.2 Marriage out of community of property with the accrual system	66
4.2 Content of the ante nuptial agreement	67
4.3 Divorce Settlement Agreements	70
4.4 The Use of Marital agreements in England	71
4.5 Separation Agreements in England.....	72
4.6 Antenuptial and Postnuptial agreements in England	73
4.7 The comparison between the Kenyan and South African systems	77

4.8 The Differences between the Kenyan and South African systems	79
4.9 The comparison between the Kenyan and England system.....	79
4.10 Challenges of ante nuptial agreements	82
4.11 Lessons that can be borrowed From South Africa And England.....	82
4.12 Conclusion	83
CHAPTER FIVE	84
FINDINGS CONCLUSION AND RECCOMMENDATIONS	84
5.0 Introduction.....	84
5.1 Summary of Previous Chapters	84
5.2 The Findings	85
5.3 Recommendations.....	87
5.4 Conclusion	92
REFERENCES	94
Journals/Articles.....	94
Books.....	97
Case Law	97
Legislation.....	98
Kenyan legislation	98
South African legislation.....	99
International instruments.....	99

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

Marriage¹ marks an important stage of life. It is a contract between two adults who consent to share their lives and form a family.² Some of the main reasons as to why people enter into marriage is to have children and companionship.³ The bill of rights protects individual liberties of family members and as such allows them to interact as they wish in domestic matters.⁴

For a marriage to be successful, both spouses need to invest in their marital assets and relationship.⁵ On the contrary in most cases couples enter into marriages without thinking through the terms of their marriage.⁶ This leaves spouses at vulnerable positions because apart from the legal benefits that come with marriage⁷ there are also unpredictable situations that come up in the course of marriage.⁸ They include infidelity, financial exploitation, challenge of child upbringing, spousal mistrust and even divorce.⁹ Intending spouses need to ask themselves questions like how their assets

¹ In Kenya, marriage has been defined as the voluntary union of heterosexual partners be it in monogamous or polygamous unions that must be registered in accordance with the Marriage Act. This definition is found in section 3 of the Marriage Act No 4 of 2014; and Article 45(2) of the Kenyan Constitution 2010 which provides that adults of opposite sex have the right to procure marriages

² Bell, D. (1997). Defining marriage and legitimacy. *Current Anthropology*, 38(2), 237-253.

³ Nsereko D, 'The Nature And Function Of Marriage Gifts In Customary African Marriages' (1975) 23 *The American Journal of Comparative Law*

⁴ (Constitution of Kenya, art. 36 and 45)

⁵ Rainer, H. (2007). Should we write prenuptial contracts?. *European Economic Review*, 51(2), 337-363.

⁶ Doherty, M. C. (2016). Romantic Premarital Agreements: Solving the Planning Issues Without the D Word. *J. Am. Acad. Matrimonial Law.*, 29, 35.

⁷ Examples of legal benefits that come with marriage include ; marital tax deductions, social security benefits, health insurance benefits, leave benefits for employed spouses

⁸ Petherbridge, L. (2005). *When Your Marriage Dies: Answers to Questions about Separation and Divorce*. David C Cook.

⁹ Supra n8

would be divided in the event of marriage breakdown in order to determine each parties investment incentive.¹⁰

It is for the reasons above that spouses need to have a legal backup to protect their interests.¹¹In Kenya section 17 of the Matrimonial Property Act of 2013(MPA) as read with part XII of the Marriage Act of 2014 provide the courts of law with the procedure to follow in making property adjustment and maintenance orders.¹² These orders may include transfer of property ownership from one spouse to another or children,¹³ orders directing property to be sold and proceeds directed to a particular party¹⁴, and order the payment and sharing of pension rights¹⁵ to ensure the continued maintenance towards former spouses and children in some jurisdictions.¹⁶

In an effort to cure uncertainty regarding property ownership in marriage the MPA provides a regime of matrimonial property ownership that allows spouses to dictate legal terms to govern them.¹⁷ It is referred to as private ordering.¹⁸Private ordering comes in when spouses seek state recognition to enforce agreements they make on their own. ¹⁹These agreements may be in the form of marital, premarital, separation, child maintenance, surrogacy and co-parenting agreements. ²⁰

¹⁰ Lavner, J. A., Karney, B. R., & Bradbury, T. N. (2013). Newlyweds' optimistic forecasts of their marriage: For better or for worse?. *Journal of Family Psychology*, 27(4), 531.

¹¹ Hunter, N. D. (2014). Marriage, law and gender: A feminist inquiry. In *Sex Wars* (pp. 105-118). Routledge.

¹² The MPA provides the procedure to be followed during determination of property rights amongst spouses whereas the Part XII of the Marriage Act spells out how maintenance orders are to be handled by the courts of law.

¹³ (AC v JAC & 3 others, 2005)

¹⁴ (AKM v NNN, 2015)

¹⁵ Staves, S. (2013). *Married Women's Separate Property in England, 1660–1833*. Harvard University Press.

¹⁶ Stephen Cretney, *The Family and the Law-Status or Contract* (Child& Fam LQ, 15,403 2003)

¹⁷ (Matrimonial Property Act, Section 6(3).)

¹⁸ Alexander, G. S. (1997). The New Marriage Contract and the limits of private ordering. *Ind. LJ*, 73, 503.

¹⁹ Supra n18

²⁰ Bix, B. H. (2010). Private Ordering and Family Law. *J. Am. Acad. Matrimonial Law.*, 23, 249.

This research will solely concentrate on premarital, marital and separation agreements. The thesis will discuss these agreements with a view of ascertaining their practicability in the Kenyan context. The thesis will also critique the existing legislation on the subject and suggest on areas for improvement.

1.1 Definition of the Marital Agreements

1.1.1 Premarital Agreements

Premarital agreements are entered into prior to a marriage by the persons intending to marry.²¹ They are also referred to as prenuptial agreements. These agreements cover characterization of property during marriage and financial claims that a spouse may have over the other spouse's property upon death, divorce or dissolution of marriage, support, and wealth distribution.²² The agreements steer clear from child maintenance/support, probate matters, and grounds for divorce.²³

Prenuptial agreements are now legal in Kenya.²⁴ This was made possible by the enactment of the MPA.²⁵ Spouses can now determine their property rights before marriage and do away with the embroilment of property in case of future divorce.²⁶

Historically, premarital agreements were unenforceable for a long period of time and were viewed with a lot of suspicion.²⁷ The justification was that first, spouses had no right to alter marriage statutes²⁸ and secondly was that premarital agreements

²¹ Belcher, D. I., & Pomeroy, L. O. (2002). A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements. *Real Prop. Prob. & Tr. J.*, 37, 1.

²² Supra n21

²³ Supra n21

²⁴ (Matrimonial Property Act, Section 6(3).)

²⁵ *ibid*

²⁶ O'Hara, E. A., & Ribstein, L. E. (2000). From politics to efficiency in choice of law. *The University of Chicago Law Review*, 1151-1232.

²⁷ Bix, B. (2012). Agreements in Family Law. *Minnesota Legal Studies Research Paper*, 12-43.

²⁸ Gaspar Lera, S. (2012). Premarital Agreements in English Law. *InDret*, 3.

encouraged divorce in the sense that one spouse had to waive their rights thereby making divorce cheap for the non-waiving party.²⁹

1.1.2 Postnuptial agreements

These types of agreements are drawn by spouses after contracting marriage but not before the spouses separate.³⁰ They are similar to prenuptial agreements but they are entered into after solemnizing a marriage.³¹

Postnuptial agreements seek to fill in gaps that are left unanswered in prenuptial agreements.³² The concept of postnuptial contracts is straightforward. These contracts determine the peculiar spousal obligations and rights of each spouse in case of a divorce.³³

Parties making the agreements must specifically as possible define the property to which it does or does not apply.³⁴ Spouses' responsibilities and rights are determined in the agreement and this includes how spouses are to divide their property and money in case death or divorce.³⁵ Full disclosure of property by both parties is of importance when making postnuptial agreements.³⁶ This helps the spouses know what they are giving up.³⁷ Failure to disclose may render the agreement unenforceable for fraud or breach of fiduciary duty.³⁸ These agreements must be acknowledged and executed with

²⁹ Bix, B. H. (2002). Choice of Law and Marriage: A Proposal. *Family Law Quarterly*, 36(2), 255-271.

³⁰ Williams, S. H. (2007). Postnuptial agreements. *Wis. L. Rev.*, 827.

³¹ Supra n30

³² Mosberg, M. A., & Kindregan, P. (2018). Ten Practice Tips for Postnuptial Agreements: Drafting Considerations and Formalities. *Family Law Quarterly*, 52(2), 277-301.

³³ Supra n32

³⁴ Supra n 28

³⁵ Standler, R. B. (2009). Prenuptial and Postnuptial Contract law in the Usa.

³⁶ Ravdin, L. J. (2017). How to avoid Malpractice in the Negotiation and Drafting of Premarital and Postmarital agreements. *Family Advocate*, 40(2), 34-37.

³⁷ Supra n 36

³⁸ Supra n 36

the required formality for a record to be made on property deed.³⁹ Postnuptial contracts must consider issues such as the definition of separate property, defining marital property, establishing spousal maintenance, establishing support for children of prior marriages, establishing pre-marriage debts, and establishing child support and custody.

40

The challenge of post nuptial agreements is that upon marriage the property of both spouses is presumptively held as community property thereby entitling each spouse to an equal share.⁴¹ The unequal division of matrimonial property normally raises concerns of fraud or undue influence especially in the event that the spouses engage the same advocate.⁴²

1.1.3 Separation Agreements

Marriages may end by way of divorce or civil annulments.⁴³ Dissolution of marriages should be as a result of responsible joint decisions by spouses.⁴⁴ Marital settlement agreements dictate how certain terms of the divorce are to be allocated and they cover property division, debt division, child custody, support and visitation and spousal support are normally created during the divorce process and made legal upon the issuance of a divorce decree which references the settlement agreement.⁴⁵

The advantages of separation agreements are that parties can fashion an agreement that suits their particular preferences and life plans.⁴⁶ In this case then the agreements are

³⁹ Mosberg, M. A., & Kindregan, P. (2018). Ten Practice Tips for Postnuptial Agreements: Drafting Considerations and Formalities. *Family Law Quarterly*, 52(2), 277-301.

⁴⁰ Supra n 39

⁴¹ Supra n 28

⁴² Supra n 28

⁴³ Clark, H. H. (1955). Separation Agreements. *Rocky Mtn. L. Rev.*, 28, 149.

⁴⁴ Sharp, S. B. (1984). Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom. *University of Pennsylvania Law Review*, 132(6), 1399-1460.

⁴⁵ Supra n 44

⁴⁶ Peaslee, R. J. (1901). Separation Agreements Under the English Law. *Harv. L. Rev.*, 15, 638.

more durable because the parties are less likely viewed as losing parties in the agreement unlike court imposed solutions.⁴⁷ Separation agreements also give closure and finality upon marriage breakdown.⁴⁸

1.2 Theoretical framework

1.2.1 Feminism theory

“We all fight over what the label ‘feminism’ means but for me it’s about empowerment. It’s not about being more powerful than men – it’s about having equal rights with protection, support, justice. It’s not a badge like a fashion item.” Annie Lennox

Feminism is a theory that aims to understand the nature of gender inequality in society.⁴⁹ Gender inequality is allowing different people to have access to different opportunities on the basis of their sex.⁵⁰ Feminist theorists point out that the indifferent treatment causes patriarchy which is the main cause of women’s oppression.⁵¹ Shulamith Firestone, Gerda Lerner and Alison Jaggar all propagated that patriarchy is caused by the biological differences between men and women.⁵² They all believed that women needed to gain control of their bodies especially their sexual and reproductive functions in order to overcome patriarchy.⁵³ E.A Archanpong discusses about equality from the standing of a feminist approach as associated with matrimonial law in the

⁴⁷ Supra n 44

⁴⁸ Supra n 35

⁴⁹ Honderich, T. (Ed.). (2005). *The Oxford companion to philosophy*. OUP Oxford.

⁵⁰ Andermahr, S. (1997). *A glossary of feminist theory*. Bloomsbury Academic

⁵¹ Sibiya, E. (1990). *Thoughts of an African woman*. Skotaville Publishers

⁵² Lerner, G. (1986). *The creation of patriarchy* (Vol. 1). Oxford University Press, USA.

⁵³ Ibid; Therefore, feminism is a political movement with the goal of changing relations in terms of gender that oppress the woman. With this in mind, jurisprudence explains and critiques the law for the benefit and on behalf of the woman. The core feminist theories include; liberal feminism-addresses equal rights and choices by individuals. Radical feminism theory discusses different approaches used by men to control the reproductive capacities and sexuality of women to suit the needs of the men. The Marxist feminism theory shows a relationship between the oppression of women to capitalist labour exploitation and analyzes the payment and lack of payment of women as associated with capitalist economy.

Western African country, Ghana⁵⁴ and points out the need for adopting the doctrine of gender equality in dividing matrimonial property.

For purposes of this research, the liberal feminism theory will be adopted. This is because the school of thought emphasizes on the importance of individual freedom, equality, and legal rights for women. Proponents of this theory believe that women and men should have the same rights and states have the responsibility of ensuring that these rights are protected. In Kenya, this has been made possible by Article 21 of the Constitution 2010. The theory further proposes that enacted policies and legislation should support work and life balance between women and men and advocate for a range of measures that promote gender equality and affirmative action programs.

The Kenyan woman has undergone a lot of historical injustices in almost all spheres of life due to existence of patriarchal laws.⁵⁵ In regards to marriage women contribute towards the success and growth of their families both directly and indirectly.⁵⁶ This fact has been overlooked when it comes to securing ownership rights over matrimonial property.⁵⁷ In such instances, the woman has been subjected to a harsh judicial system to secure property rights and have on many occasions been left with nothing.⁵⁸

⁵⁴ Archampong, E. A. (2007). Matrimonial property division at marriage breakdown: The way forward. *KNUST LJ*, 4, 78.

⁵⁵ Gatwiri, G. J., & Mumbi, K. A. (2016). Silence as power: Women bargaining with patriarchy in Kenya. *Social Alternatives*, 35(1), 13.

⁵⁶ Fry, R. (2010). Women, men and the new economics of marriage.

⁵⁷ Walsh, J., Jefferson, L. R., & Saunders, J. (2003). *KENYA DOUBLE STANDARDS: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5). Human Rights Watch.

⁵⁸ Mucai-Kattambo, V. W., Kabebere-Macharia, J., & Kameri-Mbote, P. (1995). Law and the Status of Women in Kenya.

The liberal feminist theory advocates for equality of rights between spouses.⁵⁹ Equality of spouses in marriage is also provided for in various pieces of legislation.⁶⁰ The principle of equality provides that spouses can acquire, hold and dispose property.⁶¹

The use of marital agreements assists women to have control over their individual property and make sure that the husbands have no ownership stake of their individual property.⁶² These agreements also protect women's interests in relation to matrimonial property ownership, where they may be positioned at a disadvantage by the law.⁶³

This thesis will use the liberal feminist approach to discuss the benefits of using matrimonial property agreements with the view of promoting equality amongst spouses.⁶⁴ The feminist theoretical approaches have influenced the concepts of gender equality, therefore, their adoption in the current thesis is to facilitate and promote equality. The feminist school of thought looks deeper into law, describing the different conflicts and interests that shape legal standards.⁶⁵

It is important to point out that in Kenya, most family law statutes have breached the equality principles.⁶⁶ The trend of inequality by law goes as back as the precolonial period to date.⁶⁷ The uproar of equality of the sexes (men and women) in regards to property division and rights equality is a key concern of feminists.

⁵⁹ Cornell, D. (1998). *At the heart of freedom: Feminism, sex, and equality*. Princeton University Press.

⁶⁰ Constitution of Kenya 2010

⁶¹ Matrimonial Property Act. Section 4(a). There are two perspectives in which the concept of equality is interpreted. The first is that spouses are allowed to have ownership of separate property within the marriage and secondly, the spouses share equally in the matrimonial property

⁶² Ndikwe, A. W. (2017). *The Use of marital property agreements for the division of matrimonial property upon divorce in Kenya* (Doctoral dissertation, Strathmore University).

⁶³ Supra n 62

⁶⁴ MacKinnon, C. A. (1989). *Toward a feminist theory of the state*. Harvard University Press.

⁶⁵ Chamallas, M. (2002). The backlash against feminist legal theory. *Superson ve Cudd (der.)*, *Theorizing Backlash içinde*, 67-86.

⁶⁶ (FIDA vs AG & Another, 2018)

⁶⁷ Kamweru, E. (2002). Gender gaps in our constitutions: women's concerns in selected African countries. Heinrich Boell Foundation

The Kenyan constitution 2010, brought about a win in the field of feminism since it acknowledged and recommended the implementation of equal rights between the women and men.⁶⁸ Therefore, it can be concluded that the constitution of Kenya 2010 was in part informed by the feminism approach since it did more such as the emancipation of the women from insubordination.⁶⁹

1.2.2 Contractarian Theory

When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of law cannot divest those rights. John Marshall

The contract theory involves understanding individuals and constructs of an organization and designing legal agreements.⁷⁰ The theory assesses how different parties with different and conflicting interests develop informal and formal contracts.⁷¹ The theory is guided by economic behaviour and financial principles since different parties are motivated differently to either perform or not-perform specific actions.⁷² All contracts must have the elements of offer, acceptance, consideration, and intention to create legal obligation.⁷³ Contracts that are made between individuals are binding and enforceable provided that they do not violate public policy or are designed following coercion/fraud.⁷⁴

In regards to matrimonial property agreements, section 4 of the MPA guarantees spouses the right to freely enter into contractual agreements.⁷⁵ Contractual agreements in family law include premarital, postnuptial, separation and child maintenance

⁶⁸ Maingi, G. (2015). *The Kenyan constitutional reform process: A case study on the work of FIDA Kenya in securing women's rights*. African Women's Development Fund

⁶⁹ Supra n 68

⁷⁰ Collins, H. (2003). *The law of contract*. Cambridge University Press.

⁷¹ Supra n 70

⁷² White, A. M. (2009). Behavior and Contract. *Law & Ineq.*, 27, 135.

⁷³ Burton, S. J. (2009). *Elements of contract interpretation*. Oxford University Press.

⁷⁴ Supra n 73

⁷⁵ (Matrimonial Property Act, Section 4(b).)

agreements.⁷⁶ The Constitution promotes this principle by providing for freedom from discrimination.⁷⁷

When creating matrimonial property agreements, spouses should adhere to the principle of autonomy.⁷⁸ Although parties are bound contractually, it has been argued that their different needs to be an overarching protection according to the law that is extended by legislations or courts so as to attain fairness.⁷⁹ Additionally, any contract signed under a mistake or under duress can be disregarded and replaced by interventions to establish and promote good faith in contractual agreements.⁸⁰ This study aimed at advocating for fairness following the concepts of the contractual theory which are attained when autonomy of a party is respected and the legislative and court jurisprudence are used to ensure the principle of good faith is invoked when dealing with private contractual agreements.

1.3 Relevance of the study

This research will demonstrate the benefits of adoption of private ordering in regulation of matrimonial property affairs as an avenue for promotion of human rights in family law. Private ordering is efficient and effective thus ensuring that those who use it get exactly what they want without breaking any laws.

1.4 Literature Review

The paradigms of family law continue to evolve and new regimes have come up to regulate marriages.⁸¹ As early as the 1970s scholars had begun commenting on the philosophical shift in marriage from a status of pre-informed to the use of a

⁷⁶ Bix, B. H. (2010). Private Ordering and Family Law. *J. Am. Acad. Matrimonial Law.*, 23, 249.

⁷⁷ (Constitution of Kenya, art. 27.)

⁷⁸ Heiss, H. (2009). *Party autonomy* (pp. 1-16). sellier european law publishers.

⁷⁹ Hunter, H. (2017). *Modern Law of Contracts*. Singapore Management University

⁸⁰ Klijnsma, J. (2015). Contract law as fairness. *Ratio Juris*, 28(1), 68-88.

⁸¹ N. Lowe, N. (2004). *Family Law in the Twentieth Century: A History*.

customizable contract and this is as a result of the fact that traditional nuclear families relinquished ground to other alternative structures of family. Critics started to develop the contract theory to argue that spouses need to play a central role in determining the terms of partnership/marriage.⁸² The argument was that contractual tool could facilitate in the creation of new synthesis of public and private concern of structure and freedom, of formality and flexibility to lend legitimacy and dignity to today's different types of intimate agreements.

Enforcement of marital agreements and autonomy of parties to such agreements have largely been a contentious subject and the courts of law were for a long time hesitant to enforce marital agreements with the belief that they were against public policy and that they were made in contemplation for divorce.⁸³

The elements of a valid marital agreement are the parties' capacities and voluntariness to enter together into a marriage, a contract and have the document in written form. Signing marital agreements in Europe is accepted all over the continent and has experienced little resistance as compared to the English and American Courts. The common comprehension of the contract does not apply to commercial contracts, but often than not covers the marriage as well. From the period of enlightenment, marriage has been viewed by legal researchers and scholars as a contract that is governed by formalities and rules.⁸⁴

⁸² Shultz, M. M. (1982). Contractual ordering of marriage: A new model for state policy. *Calif. L. Rev.*, 70, 204.

⁸³ Marston, A. A. (1997). Planning for love: the politics of prenuptial agreements. *Stanford Law Review*, 887-916.

⁸⁴ Sanders, A. (2010). Private autonomy and marital property agreements. *International and Comparative Law Quarterly*, 571-603.

Scholars argue that parties ought to be permitted to make decisions among themselves on the way to divide duties and rights in contracts pertaining personal relations.⁸⁵ With regards to marital contracts, the principle is applied to argue the influence of marriage on property need to be primarily determined by the parties' intentions. The intention must be captured on the marital agreement.

Marital agreements in England experienced opposition by the courts. With regards to cases prior 2012 the jurisprudence revealed that the courts opposed marital agreements. However, an attitude changes by the judicial system was observed when the fault-based system of divorce was cast aside.⁸⁶ In an article by Anne Sanders, it was indicated that the understanding of marriage by the English as creating a status and a contract as the tool for transaction has derailed the introduction of marital agreements that are enforceable by the law. This position held by the English courts has changed with the *Radmacher v. Granatino* case as a landmark that revealed a change in judicial attitudes with regards to marital contracts entered into by the parties who held that the prenuptial agreement parties are to be held to their bargains in case of a divorce provided that the agreement was entered voluntarily and both parties clearly understand the implication of the contract.⁸⁷

It has also been argued marital agreements can be used by economically superior spouses to oppress the inferior economical spouses. Signing a matrimonial agreement demands that the couple waives their legal claim to any property provided for by the

⁸⁵ Supra n 84

⁸⁶ Supra note 5

⁸⁷ the key points in that arose from the case were that; agreements were freely entered into and that the emotional state of the parties was considered prior to signing the agreement, that parties must have full appreciation of the implications of the agreement; there should be financial disclosure and independent legal advice

matrimonial property laws. This debate has resulted in the rights of women being unmet particularly in relation to matrimonial property.⁸⁸

Contrary to the above, Ertman explains that the spouses in a marriage are either primary wage earners or primary home makers. Primary wage earners contribute to the family from an economical and financial aspect while primary home makers contribute to the family by undertaking home welfare activities. Ms Ertman suggests that marital agreements can be an effective tool of remunerating the primary homemakers for contributing to the family and protecting their rights to matrimonial property in the event of a divorce. This is because the primary home makers are disadvantaged to loss in the event of a divorce as they are not economically secure.⁸⁹

In the context of private ordering in family law, freedom of expression helps family members obtain self-fulfillment and promotes participation of all members in decision-making. It also helps to establish a reasonable balance between change and stability.⁹⁰ The development of a rich body of international law was also a major achievement in the 20th Century and family law was a major beneficiary to these set of laws which advocate for the promotion and protection of the family.⁹¹ These laws give recognition to the family as a core societal unity and advocates for its protection and assistance from the state in order to enable the family assume its responsibility within society.⁹²

⁸⁸ Ndikwe, A. W. (2017). *The Use of marital property agreements for the division of matrimonial property upon divorce in Kenya* (Doctoral dissertation, Strathmore University).

⁸⁹ Ertman, M. M. (1998). Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements. *Tex. L. Rev.*, 77, 17.

⁹⁰ O'Flaherty, M. (2012). Freedom of expression: article 19 of the international covenant on civil and political rights and the human rights committee's general comment no 34. *Human Rights Law Review*, 12(4), 627-654.

⁹¹ Stark, B., & Heaton, J. (2019). *Routledge Handbook of International Family Law*. Routledge.

⁹² Supra n 90

Prenuptial agreements have often than not been vilified in society and some people have argued that the reaction is curious and irrational because prenuptial agreements are legal documents that seek to supplant state written contracts that govern how assets are to be shared at the dissolution of a marriage. Proponents of this regime presume that the use of prenuptial agreements improves communication between spouses on important issues that need to be addressed before marriage.⁹³

It has been said that prenuptial agreements provide protection to elderly persons who decide to enter into marriages. This is because elderly persons have greater chances of possessing accumulated separate assets. A marriage that occurs later in life may be referred to a second marriage and children from the previous marriage(s) may exist. In addition, several issues associated with estate planning, health care and other identical issues must be considered.⁹⁴

It has also been argued out that for a marriage to be successful both spouses should contribute/invest towards the acquisition of matrimonial assets.⁹⁵

Another writer argues out that ends may influence beginnings. He believes that in today's society most marriages have a higher chance of ending in divorce and hence, there ought to be a change in the rules and regulations in dissolving marriages which can affect the marriage rules and the expectations and intentions of those hoping to enter into marriages.⁹⁶

⁹³ Supra Note 22

⁹⁴ Katz, P. A., & Clayman, A. (1999). When your elderly clients marry: Prenuptial agreements and other considerations. *J. Am. Acad. Matrimonial Law.*, 16, 445.

⁹⁵ Rainer, H. (2007). Should we write prenuptial contracts?. *European Economic Review*, 51(2), 337-363.

⁹⁶ LeRoy, A. F. (1986). Weitzman, " The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America"(Book Review). *Social Science Quarterly*, 67(3), 663.

Further to the above mentioned, it has also been noted that upon dissolution of marriage, spouses are expected to divide all of the matrimonial assets with reference to the division rule imposed by the jurisdiction they reside in. However, growth in ownership of assets and increased rate of divorce has led to a high demand for married couples to seek out-state imposed rules that govern marital assets allocation in the event of a split/divorce.⁹⁷

Notably, a great debate on the role of prenuptial agreements still exists despite its increased practical relevance in marriages. Prenuptial agreements advocates acknowledge the advantages of these agreements in terms of the advantages in contractual autonomy and certainty on the grounds of heterogeneous marital situations. Critics however, recommend that prenuptial agreements often increase the chances for divorce by encouraging spouses to consider different divorce settlement terms. Further, they note that engaging in prenuptial bargain sends negative signals that the expectations of the initiator on divorce are high.⁹⁸

One of the key objections against prenuptial agreements is the concept that in a community where distribution of power is in a systemic asymmetric way, marriage contracts are prone to reinforce these asymmetries. This assumption presupposes that prenuptial contracts can hurt one party in case of divorce on the grounds of his/her poor bargaining power during the bargaining of the contract.⁹⁹

Other arguments against the use of prenuptial agreements is that the regime works towards the benefit of the rich, the selfish, and the mercenaries. They reiterate that prenuptial agreements are signed disproportionately and have the capacity to hurt one

⁹⁷McKnight, J. W. (1989). Defining Property Subject to Division at Divorce. *Fam. LQ*, 23, 193

⁹⁸Spier, K. E. (1992). Incomplete contracts and signalling. *The RAND Journal of Economics*, 432-443.

⁹⁹McLellan, D. (1996). Contract Marriage-The War forward or Dead End. *JL & Soc'y*, 23, 234

party of the marriage.¹⁰⁰ To rectify this problem a solution is proposed which involves not limiting the enforcement of the prenuptial agreements but aims to ensure that the individual parties have a full understanding of their rights and have an opportunity to offer negotiations on the terms of the agreement. Therefore, the courts ought to require each individual party to entering a prenuptial agreement to consult and independent advocate before signing the contract.¹⁰¹

One misconception fiancés often have is that they are optimistic that they will be happy after marriage. They are not able to predicting issues that may arise in the future within the marriage. As such, spouses rarely sign a prenuptial agreement. However, postnuptial agreements do not suffer from such practical shortcomings. Different from fiancés, spouses have an experience of marriage. They do not need to speculate, but are in a position to design a contract that addressed the problems faced.¹⁰² This is because postnuptial agreements give spouses the opportunity to tailor make agreements that best address their needs.

Other scholars support the use of private ordering and point out that it allows individuals to structure their lives in a manner that meets their idiosyncratic visions of what kind of marriage they so wish. In this regard spouses are able to decide on whether/whom to marry, whether to be parents, how and when to have children and end up combining the answers to make a life plan. While addressing the use of private ordering, a writer also points out that private ordered agreements in family law are inconsistent and incoherent to the laid down family law statutes as the agreements seek to address the demands of

¹⁰⁰ Supra note 4

¹⁰¹ Waggoner, L. W. (1994). Marital property rights in transition. *Mo. L. Rev.*, 59, 21.

¹⁰² Mahar, H. (2003). *Why are there so few prenuptial agreements?*. Harvard Law School, John M. Olin Center for Law, Economics, and Business.

all spouses and allows room for few restrictions on how spouses can regulate their affairs thereby promoting efficiency.¹⁰³

The study argued that marital property agreements are effective tools in promoting equality and fairness on the grounds of the parties and advocates for the right of spouses to sign marital agreements in Kenya that can be upheld in the court of law.

1.5 Problem Statement

Private ordered family agreements are enforceable in Kenyan family law. This has been made possible by section 6 of the Matrimonial Property Act. Privately ordered agreements improve on communication, efficiency, and protection of separate property between spouses. The agreements also meet the demands of spouses satisfactorily. The challenge with the Kenyan legislation is that the law has only made provision for prenuptial agreements but has no mechanisms in place to effectively protect spouses right to equal share of matrimonial property as provided by Article 45(3). There is therefore a need to recognize all the forms of marital property agreements i.e. postnuptial agreements and settlement agreements to ensure equality of spouses.

1.6 Research Questions

This study was guided by the following questions

1. Is private ordering an effective and fair way of addressing division of matrimonial property in Kenya?
2. How effective is the practice of private ordering in family law in South Africa and England?
3. Are there any best practices that Kenya can borrow from other jurisdictions?

¹⁰³ Hahlo, H. R. (1973). Matrimonial Property Regimes: Yesterday, Today and Tomorrow. *Osgoode Hall LJ*, 11, 455.

1.7 Research objectives

This research will be guided by the following objectives;

1. To assess the viability of the use of marital property agreements in division of matrimonial property
2. To find out whether marital property agreements are fair, efficient and effective
3. To draw best practice on use of marital agreements from other jurisdictions.

1.8 Research Hypothesis

Marital agreements (prenuptial agreements, postnuptial agreements, settlement agreements) are practical in regards to division of matrimonial property. They aid the courts of law in distributing matrimonial property justly and equitably.

1.9 Research methodology

To enable the researcher answer the research questions it is important that the research methodology that is chosen meets the intended purpose. It is often difficult to categorize a thesis, particularly one on the subject of law under any specific headings, as many works of this type involve the use of hybrid methods.¹⁰⁴ Research methodology details the researchers approach to how they intend to resolve research problem with the aim of ensuring reliability and validity while ensuring that the research objectives are met.¹⁰⁵ This research used a combination of doctrinal and quantitative empirical research methodology.

¹⁰⁴ Salter, M., & Mason, J. (2007). *Writing law dissertations: An introduction and guide to the conduct of legal research*. Pearson Education.

¹⁰⁵ Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: doctrinal legal research. *Deakin law review*, 17(1), 83-119.

The doctrinal approach is used to systematize and clarify the law by making an analysis of authoritative literature that is gathered from primary and secondary sources. For purposes of this research the text was gathered from case law, books, journals, internet resources, acts of parliament and international legislation.¹⁰⁶ The doctrinal approach uses legal reasoning to evaluate legal rules, schools of thoughts and recommendations to help develop further jurisprudence.¹⁰⁷ For the purposes of this research, the doctrinal research methodology was used to analyze whether the lack of legal provision to address postnuptial and separation agreements in Kenya affect equality between spouses in marriage.

This research has also used the quantitative empirical research methodology. This methodology is an interdisciplinary version of legal research which relies heavily on social science and encompasses research based on observation from collected data.¹⁰⁸

The researcher used qualitative methodology to analyze the legal and institutional frameworks of privately ordered matrimonial property agreements in Kenya. The researcher relied on conventions protocols and treaties ratified by Kenya by dint of Article 2(5) and (6) of the Constitution of Kenya that have made provision for matrimonial property agreements and equality between spouses. The author also used domestic legislation and decided case law.

The researcher opted to use recently published peer reviewed articles from relevant journals and published books in the field of private ordered arrangements in family law.

Since the research questions focused on the effectiveness of using matrimonial property

¹⁰⁶ This is because secondary data is easily available and may have already been used in previous literature, hence making it easier to undertake further research. Essentially, this implies that the validity and reliability of the research instrument is already pre-established and is also cost effective and time saving.

¹⁰⁷ MD, P. (2019). Legal Research-Descriptive Analysis on Doctrinal Methodology. *International Journal of Management, Technology and Social Sciences (IJMTS)*, 4(2), 95-103.

¹⁰⁸ Supra n 104

agreements to determine property ownership and bearing in mind that this area of research is relatively new in Kenya, the research material that was used was mainly based on articles because books tend to become outdated fast within this field, whereas articles generally are updated regularly because they are published at a rate that is incomparable to that of books. This research also relied on reports and studies from various organizations that have helped develop jurisprudence in private ordering arrangements in family law.

1.10 Limitation of the study

There are quite a number of private ordering agreements in family law but they are likely not to be enforced in Kenya because of their technicalities and lack of appropriate legislation to govern their enforceability. This research therefore, will only focus on premarital, postnuptial and separation agreements. This is because they are more representative of private ordering agreements in family law that is likely to be adopted and used in the Kenyan context.

1.11 Overview of the chapters

Chapter One will introduce the work. The chapter will act as the study proposal. The chapter covered the introduction of the study.

Chapter two assessed the legal framework of matrimonial property in Kenya. The chapter assessed the international and national legal systems that provide for gender equality. The chapter covers existing laws and the repealed laws to as to provide a framework of the rights of women over the years. Also, the chapter highlights the interpretation of the laws by the judicial systems with regards to matrimonial property rights. Different cases were assessed to identify the influence of different decisions on legislation. The aim of the chapter was to identify different injustices by the courts and

their influence on women over the years, especially in courts that were largely dominated by men. This helped in the contextualization of matrimonial property law in Kenya and provide a deeper understanding on the role played by marital contracts in dividing matrimonial property.

Chapter Three will critique the enforcement of matrimonial property agreements in Kenya with a view of ascertaining their viability and identifying any loopholes.

Chapter four will discuss the comparative study of legislation from South Africa and England. The chapter will also discuss the lessons learnt and best practice that Kenya could borrow.

Chapter Five will discuss the conclusions and recommendations. In particular the chapter drew conclusion by indicating whether or not the study objectives were met, the problem statement was resolved and whether the set study hypothesis were proved or disapproved.

CHAPTER TWO

THE DEVELOPMENT OF MATRIMONIAL PROPERTY LAW IN KENYA

2.0 Introduction

This chapter will discuss the development of matrimonial property laws in Kenya. The discussion will focus on the precolonial, colonial and postcolonial period to the 2010 constitution promulgation and following legislations. The precolonial period was the period prior to Kenya becoming a protectorate of British and the applicable law then was the African customary laws. Common law was introduced in the colonial era as a formal legal system. Lastly, in the post-colonial era, a combination of African customs and statutory common law were used as the legal system.

The chapter covers the laws that were used in Kenya prior and after colonization. These laws included formal legislation and customary practices that were established by the colonial government. The chapter also highlights the statutes interpretation by the judicial system and how the courts made decisions that were biased against women as a result of the patriarchal system in Kenya. The present laws are also discussed and how they intend to protect the women against social injustices by providing for equal protection in accordance to the law, the right of property ownership, and protection from customary rules that violate the constitution of Kenya 2010. Lastly, the chapter identifies the existing loopholes that expose women to a biased culture where they are perceived as subordinate to the man.

Jurisprudence from a historical point of view is credited as a core paradigm that informs and guides legal reforms. The chapter assessed marital contractual agreements as indicated by objective one of the study by providing an understanding to the policy and legal issues faced by spouses who opt to use matrimonial property agreements in Kenya.

2.1 Historical Background of Matrimonial Property Law

2.1.1 Precolonial Period

During the precolonial era in Kenya, land was considered to be a great asset together with livestock, the number of children and wives that one had.¹⁰⁹ Women were considered as property that was owned by men.¹¹⁰ Women were perceived as subordinate to the man and this distinction between the sexes was used in the allocation of gender roles in society. The women were allocated duties including washing, doing domestic chores and cooking while the duties of the men included non-domestic duties such as providing for the family, decision making among others.¹¹¹

As the man was regarded as the family head, he held the title of land on behalf of his family.¹¹² According to the customary law, a woman was not entitled to any piece of land.¹¹³ In majority of the communities, land was possessed by the man, however in other cultures, it was communally owned.¹¹⁴ The patriarchal system treated the women as subordinate to the men since they did not have rights over land.

ii. The Colonial Period

In the colonial period, bias against women with regards to the possession, control and management of property was profound as a result of the colonial rule and customary laws which were biased against the woman.¹¹⁵ During the colonial period, the bias

¹⁰⁹Karanja, P. W. (1991). Women's land ownership rights in Kenya. *Third World Legal Stud.*, 109.

¹¹⁰ Supra n 104

¹¹¹ Supra n 104

¹¹² Ojienda, T. O. (2013). *Conveyancing: principles and practice*. LawAfrica Publ.

¹¹³ Supra n 107

¹¹⁴ Supra n 107

¹¹⁵ Sirma, V. J. (2014). *Lending on the Security of Matrimonial Property in Kenya: the issue of spousal Consent* (Doctoral dissertation, University of Nairobi).

against women was intense, since while the customary laws discriminated against the women, the colonial rule reinforced the inequality of women in society.¹¹⁶

During the start of the British administration, Kenya was crowned a colony, where all land was considered as belonging to the colonial rule.¹¹⁷ Acquiring land was only possible through the English land tenure and the Crown Land Ordinance¹¹⁸ The Kenya Land Commission was appointed in 1932 and it was mandated with the responsibility to allocate land to Kenyan citizens and the British as required by the colonial rule.¹¹⁹ A policy of individualization was also introduced that transformed land from shared to individual ownership.¹²⁰ This was done through registration. With regards to Kenyan women, they were prohibited to own any land as the men possessed the land on their behalf. In 1882, the Married Women's Property Act (MWPA) was imposed by the colonialist to address the bias on land ownership by the Kenyan courts; the Act was meant to provide an opportunity for married women to have access to matrimonial property.

The MWPA was a statute by the United Kingdom that was applicable in Kenya under the Section 3(1)(c) Judicature Act Cap 8.¹²¹ The Act contained one technical clause in section 17 that was used to regulate division of matrimonial property. Section 17 made provision for women to have separate property. This was an improvement from the principle of coverture which had applied to women prior to the enactment of the

¹¹⁶ Y P Ghai & JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from colonial times to the Present*, Footprints (1970).

¹¹⁷ Holdsworth, W.S., *A Historical Introduction to the Land Law*, Oxford (1972) 22.

¹¹⁸ Crown Land Ordinance, 1915

¹¹⁹ Jemaiyo Chabeda-Barthe, "How European Concepts of Marriage and Land Ownership Excluded Women in Kenya from Accessing and Owning Property" in *Archives of Rural History, Institutional Encounters: European Property Rights in Colonial Contexts*, 27.

¹²⁰ Claris Ogaanga et. al., *Women's Land and Property Rights in Kenya- Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation*. Georgetown University

¹²¹ It gave statutes of general application authority and provided that subject thereto and so far as those written laws do not extend or apply, the substance of the common law....

MWPA.¹²² The law was discriminatory and deprived married women an equal share to matrimonial property. The law also denied women the capacity to enter into contracts of any form.

Under the common law, the inter-spousal property rights were a function of the conjugal unity doctrine.¹²³ It was grounded on the perception that once married a husband and the wife became one.¹²⁴ The concept was born from the interpretation from the Bible that a marriage is a holy state that was ordained by God.¹²⁵ As such, in the law's eye, a husband and wife became one person upon marriage. Additionally, in the matrimonial unity, it was believed that the wife was represented by the husband.

Therefore, husband and wife became one person in the eye of the law upon marriage. It was believed that if husband and wife were one, that one was obviously the husband.¹²⁶

iii. Post-independence Period

Upon attainment of independence Kenya continued to use the colonial policy of individualization through registration.¹²⁷ There were also several legislations that failed to secure women's rights. They included; the Registered Land Act, and the Married Women Property Act.

¹²² The coverture principle is a common law legal doctrine where upon marriage, the obligations and legal rights of a woman were subsumed by the husband. Coverture is where the legal identity of the wife were absorbed by the husband.

¹²³ Ojienda, T. O. (2013). *Conveyancing: principles and practice*. LawAfrica Publ.

¹²⁴ Supra n 118

¹²⁵ Genesis 2:24, Mathew 19:5, Mark 10:8

¹²⁶ McCrone, K. E. (1984). Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England, by Lee Holcombe. *Canadian Journal of History*, 19(1), 120-122.

¹²⁷ Supra n 121

a. The Registered Land Act¹²⁸

The Act provided that the first individual to register title to a specific piece of land, was the absolute owner of the land and its privileges and rights that accompanied the piece of land.¹²⁹ In the patriarchal context, the men who were the head of the house were registered as sole owners of land.¹³⁰

b. Married Women Property Act (MWPA)

This Act was introduced in Kenya following the statute application in England on 12th August 1897.¹³¹ Section 17 of the MWPA addressed the issue of the division of matrimonial property and stated the following:

With regards to question raised between the husband and wife to the possession or title of property, either party can apply summons to a judge of the High Courtthe judge may make an order with regards to the disputed property and costs of following applications as the judge may deem fit....¹³²

The MWPA was a statute by the United Kingdom that was applicable in Kenya under the Section 3(1)(c) Judicature Act Cap 8.¹³³ The MWPA did not describe matrimonial property and neither did it provide a guideline on how to equitably divide matrimonial property. This resulted in different interpretations by the judicial system as will be discussed in this chapter.

c. The Independence Constitution

The constitution as drafted during independence was insensitive to issues concerning gender equality.¹³⁴ Although chapter II of the constitution provided for the fundamental

¹²⁸ (The Registered Land Act, repealed)

¹²⁹ (Registered Land Act, section 27)

¹³⁰ Sirma, V. J. (2014). *Lending on the Security of Matrimonial Property in Kenya: the issue of spousal Consent* (Doctoral dissertation, University of Nairobi).

¹³¹ (Judicature Act, section 3).

¹³²(Married Women Property Act, section 17)

¹³³ It gave statutes of general application authority and provided that subject thereto and so far as those written laws do not extend or apply, the substance of the common law....

¹³⁴ Murunga, G. R., & Nasong'o, S. W. (Eds.). (2007). *Kenya: The struggle for democracy*. Zed Books.

freedoms and rights of each and every individual whether male or female whose enjoyment was guaranteed by section 14 but there was section that focused on the discrimination of women.¹³⁵

Section 26 of the independence constitution provided that no law was to discriminate either on itself or its effects. For the purpose of section 26 (3) discrimination was defined as giving special treatment to different people on the grounds of their tribe, age, place of residence or origin, race and political opinion but did not provide for discrimination on the basis of gender.¹³⁶

d. Marriage and Divorce laws

At the time there existed different laws that governed issues on marriage and divorce resulting in a lot of confusion and the inability to protect the rights of women with regards to matrimonial property. These laws left women with nothing upon divorce.¹³⁷ Often the women were chased away and could only take with them the clothes they wore at the time.¹³⁸

The laws in existence at the time included the Marriage Act,¹³⁹ the African Christian Marriage and Divorce Act,¹⁴⁰ the Mohammedan Marriage, Divorce, and Succession Act,¹⁴¹ the Hindu Marriage and Divorce Act,¹⁴² and the Matrimonial Causes Act.

¹³⁵ Supra n 129

¹³⁶ Kameri-Mbote, P. (2004). The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya, 2002: Have the Hens Finally Come Home to Roost for Kenyan Women? *University of Nairobi Law Journal* (1) 2004, available at <http://www.ielrc.org/content/a0408.pdf>.

¹³⁷ Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 34.

¹³⁸ Supra n 132

¹³⁹ (The Marriage Act, repealed).

¹⁴⁰ (The African Christian Marriage and Divorce Act, repealed).

¹⁴¹ (Mohammedan Marriage, Divorce and Succession Act, repealed)

¹⁴² (Hindu Marriage and Divorce Act, repealed).

The government attempted to address the issue by taking an initial step in promoting equality of men and women and consolidating different laws pertaining to family law.¹⁴³ In 1967 the president appointed commissions with a mandate of reviewing the law on marriage, divorce and succession. Their tasks were inter alia to make laws that would promote equality among the men and women in relation to property rights upon divorce.¹⁴⁴

The Parliament however rejected the 1985 proposed Marriage bill that sought to provide equal rights among spouses in relation to children custody, divorce and matrimonial property division.¹⁴⁵ The bill failed in Parliament due to a number of reasons among which included; objections to adultery being considered as an actionable civil wrong, independence of proceeding during divorce, objection to interfere with the right of the man to chastise his wife, and objection to a wife having the right to object to her husband's marriage to a second wife.¹⁴⁶ This implied that patriarchal laws were still in play.

The Matrimonial Causes Act sought to amend and consolidate all laws that were related to matrimonial causes. The use of marital agreements was first recognized in Kenya through the Matrimonial Causes Act which allowed courts to consider prenuptial and postnuptial agreements signed by spouses whenever the issue of division of matrimonial property arose.¹⁴⁷

¹⁴³ Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 34.

¹⁴⁴ Baraza, N. (2009). Family law reforms in Kenya: an overview.

¹⁴⁵ *Supra* n 139

¹⁴⁶ Kameri-Mbote, P. (2004). The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya, 2002: Have the Hens Finally Come Home to Roost for Kenyan Women? *University of Nairobi Law Journal* (1) 2004 available at <http://www.ielrc.org/content/a0408.pdf>

¹⁴⁷ (Matrimonial Causes Act. Section 28.)

Despite the Matrimonial Causes Act providing a basis for divorce, it did not provide any legislative guide to the right of individual spouses in relation to the division of matrimonial property.¹⁴⁸ As a result of such gaps in divorce law, women could only depend on judicial discretion which often led to adverse determinations of the women's contribution towards matrimonial property.¹⁴⁹

2.2 Judicial Development on division of matrimonial property

As a jurisdiction of common law, the courts of Kenya depended on the decisions by the English courts to design their jurisprudence on matrimonial property division. In the case of *I v I*, a precedent for the application of English MWPA of 1882 in Kenya was set.¹⁵⁰ It was held by the court that MWPA could be used in Kenya as a general statute as provided for by the Judicature Act Section 3.¹⁵¹

The MWPA provided for the right of a woman to own property as an individual separate from the husband.¹⁵² The Act also gave the court the power to take into consideration the shares of individual party to the property in case of a divorce.¹⁵³

The application of the MWPA was uneven. Some of the judges used the MWPA to solve disputes that arose during marriage while other judges made its application during the divorce.¹⁵⁴ On the other hand, other judges insisted that parties had to present the intention of dissolving the marriage such as filing for divorce in the court of law.

¹⁴⁸ (The Matrimonial Causes Act, repealed)

¹⁴⁹ Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*, 15.

¹⁵⁰ (*I v I*, 1971)

¹⁵¹ (Judicature Act, section 3)

¹⁵² (Married Women Property Act, section 1).

¹⁵³ (Married Women Property Act, section 17).

¹⁵⁴ Jennifer Smith et al, 'Women's Land and Property Rights in Kenya – Moving Forward into a new era of Equality: A Human Rights Report and Proposed Legislation, *Georgetown Journal of International Law*.

The courts often made use of customary laws to make rulings. This hindered the attainment of women's rights since customary laws favoured the men since it required for the women to be completely subordinate to the man following marriage. This was evident in *Otieno v Otieno & Another*.¹⁵⁵ Following Article 82(4)(b) of the constitution any institution that discriminated against such practices was rejected by the courts of law, since the Article called for the use of customary law even in situations where the ruling would be biased or discriminatory.¹⁵⁶

2.3 English Courts' Interpretation of Section 17 of the Married Women's Property Act of 1882

i. Pettitt v Pettitt¹⁵⁷

This was among the first cases in the England courts that dealt with family law in an attempt to make clarifications with regards to spouses property.¹⁵⁸ The wife in the case had made a purchase of a property and the husband contributed by decorating the property. The issue that needed to be handled was whether the contributions by the husband translated to his interest in the property. The courts held that the husband did not have any entitlement to the property simply because at his free time he took up to decorate the property, an undertaking that is normal for all husbands.

It was also stated by the House of Lords that in section 17 of the Act it only provided a procedural provision that did not grant the court the entitlement to distinguish the current party's proprietary rights. In addition, the marriage status did not result in co-ownership of property and the term *family property* could not be used as it was devoid

¹⁵⁵ (*Otieno v Ougo and Another*, 1982-1988)

¹⁵⁶ Sirma, V. J. (2014). *Lending on the Security of Matrimonial Property in Kenya: the issue of spousal Consent* (Doctoral dissertation, University of Nairobi).

¹⁵⁷ (*Pettitt v Pettitt*, 1969)

¹⁵⁸ Ojienda, T. O. (2013). *Conveyancing: principles and practice*. LawAfrica Publ.

of legal status unless in situations where in referred to separately owned property by individual spouses.

ii. Gissing v Gissing¹⁵⁹

The husband in the case had made a purchase of a matrimonial home that was registered in his name. No agreement existed on the approach to share the beneficial interest of the home. The wife contributed to the home by financing to some of the furniture and make home improvements. The issue presented to the court was to establish whether or not the wife had entitlement to the home.

It was held by the court that no agreement existed between the wife and husband on the matrimonial home; therefore, a ruling on whether the wife had a beneficial interest would rely solely on the law of trust.

The court ruled that the law did not distinguish between the positing where one spouse made a direct contribution to property by purchasing it and where an indirect contribution was made.¹⁶⁰

Considering the law of trust, the share of contributing spouse was found proportionate to the contribution whether direct or indirect.

2.4 Kenyan Courts' Interpretation of Section 17 of the Married Women's Property Act

In the case of *Karanja v Karanja*¹⁶¹ the principles used in *Pettitt* and *Gissing* were first applied. The spouses had purchased a number of properties within the course of their marriage and the name of the husband was used in registering all of the property. One

¹⁵⁹ (*Gissing v Gissing*, 1971)

¹⁶⁰ Ojienda, T. O. (2013). *Conveyancing: principles and practice*. LawAfrica Publ.

¹⁶¹ (*Karanja v Karanja*, 1976)

property was solely purchased using the wife's money while the rest of the property were acquired through her direct and indirect contributions. The issue presented before the court was whether or not customary law was applicable in disqualifying any imputation of trust to favour married women and in particular one who is under a salaried employment.

The court ruled that in the cases where property was jointly acquired, it was regarded to be owned by both spouses jointly irrespective of the name used to register the property. Hence, the husband in the case held the properties in trust for his wife and himself in the proportions of one to two respectively.

In the case of *Njuguna V Njuguna*¹⁶² the husband was not employed at a specific time within the marriage for more than one year. During that time, the wife contributed financially to all matrimonial property. When applying for the determination of her legal share in the property, the courts held that the wife had contributed both directly and indirectly to the property. Therefore, the court declared that the property was to be shared equally to the couple.

In *Kivuitu v Kivuitu*¹⁶³ the cases assessed whether non-monetary contribution by a housewife in Kenya falls into indirect financial contribution of a wife in salaried employment. In the case, the husband had travelled abroad to left the wife to obtain a different matrimonial home since the husband was not satisfied with the security of the property they chose previously.

¹⁶² (*Njuguna v Njuguna*, 1986)

¹⁶³ (*Kivuitu v Kivuitu*, 1991)

The new property deposit was paid for by the wife using money she obtained from her husband's property together with a third party. The balance was paid by the husband from his salary and the registration of the property was done using both names.

During the divorce, the wife applied to the courts that the matrimonial home needed to be sold and the proceeds be distributed equally among them. It was held by the court of appeal that the registration of the property was made using both spouses' names implying that both parties owned equal shares of the property. Additionally, section 17 did not grant a right to make a sale rather only determined and declared the share of the wife in the property.

The decision by the court of appeal was followed with the *Essa v Essa*¹⁶⁴ case where it was stated that in situations where property is purchased within the marriage and registration made using joint names of the parties, the law assumes that the property is equally shared between the spouses. The courts also stated that simply the fact that the marriage did not grant an individual spouse an interest in the property over the other, where property is purchased prior to the marriage and registration made using a single name of a spouse.

In the case of *Nderitu v Nderitu*¹⁶⁵, the court held that the contribution by the wife often than not was a form of backup service on a domestic level instead of a direct contribution that involved finances. Therefore, a judge making a ruling based on section 17 needs to consider the type of contribution prior to determining the interest of the wife in the assets being considered.

¹⁶⁴ (*Essa v Essa*, 1995)

¹⁶⁵ (*Nderitu v Nderitu*, 1997).

For a decade, it appeared as if the law was clear. A wife was not allowed to give her contribution since once a substantial contribution was acknowledged by the court then equal division of property followed. A presumption existed that by undertaking her duties as a mother and wife, she contributed substantially to the property.

The progressive standard was later disregarded in the case of *Echaria v Echaria*¹⁶⁶ in the court of Appeal which negated the ground Kenyan women gained following the decision on the *Kivuitu* case. In the case, the property was purchased by the husband using cash and loan during the marriage. Following the divorce, the wife petitioned for a 50% claim of the property following section 17 of MWPA. It was held by the trial court that the property was to be divided equally between the spouses. This resulted in the husband making an appeal.

The court of Appeal did not support the assumption that a general principle of equality that can be applied in all disputes concerning property had been created in the *Kivuitu* case. In addition, the courts stated that for courts to use non-monetary contribution, parliament needed to pass a legislation that provided for non-monetary contribution. After assessing the circumstances of the case, the court held that the beneficial interest of the wife in the property was at 25% while that of the husband stood at 75%.

The narrow interpretation of the constituents of contribution limited women in Kenya from accessing any type of matrimonial property. In the decision made, the court identified its limitation in promoting the rights of women and called for the parliament to rectify the law and provide a better clarification to the division of matrimonial property.

¹⁶⁶ (*Echaria v Echaria*, 2001).

While referring to the MWPA, the court noted the non-existence of any sign that parliament intended to enact the required legislation with regards to matrimonial property. In making the ruling the trial judge stated that it was unfortunate that the Kenya's Law Reform Agenda had kept the state shackled to a 125 year old legislation that was foreign and was found to be questionable more than three decades ago.¹⁶⁷

2.5 The Current legal framework on matrimonial property

2.5.1 The Constitution of Kenya 2010

The constitution emerged as a new dawn for Kenyan women.¹⁶⁸ Officers of the state are guided by the principles and values of governance namely; social justice, equality, protection and non-discrimination of the marginalized people, inclusivity and human dignity.¹⁶⁹ This demands that decision makers and legislators promotes and protect both men and women equality.¹⁷⁰

Customary laws are not validated by the constitution to the extent that they are deemed inconsistent with such provisions.¹⁷¹ This is a progressive step as most disputes related to land and personal issues including marriage and divorce that were resolved by a council of elders who majorly composed of only men.¹⁷²

The starting point of issues on matrimonial property as highlighted in Article 40(1)(b) offers for the right for property ownership in any region of the country as an individual or an association with other people. Article 40(2)(b) as read with Article 27(4), provides that the Parliament shall not enact any laws that allow any person or the state to restrict

¹⁶⁷ (Echaria v Echaria, 2007).

¹⁶⁸ Maingi, G. (2015). The Kenyan constitutional reform process: A case study on the work of FIDA Kenya in securing women's rights.

¹⁶⁹ (Constitution of Kenya ,Article 10)

¹⁷⁰ Supra n 164

¹⁷¹ Article 2 (4), Constitution of Kenya, (2010)

¹⁷² Supra n 166

or limit an individual's enjoyment of individual property on the grounds of marital status.

Further, Article 68(c) posits that the parliament shall pass a legislation regulating the recognition and protection of matrimonial property and in particular, matrimonial home in case of a divorce. Article 45(3) of the Kenyan constitution states that the parties of a marriage have the same rights during the marriage and even during a divorce. Further Article 27 provides for equality of all persons in Kenya and protection from discrimination¹⁷³.

Therefore, the parliament is required to pass a legislation regulating the recognition and protection of matrimonial property and in particular, matrimonial home in case of a divorce.¹⁷⁴ It is in this spirit that the Marriage Act, the Matrimonial Property Act, the Land Act and the Land Registration Act were enacted and have been discussed below.

2.5.2 Matrimonial Property Act No 49 of 2013(MPA)

Prenuptial agreements are cost effective and efficient means for spouses to address, prior to entering into a marriage, issues on property rights that may arise during death, divorce or separation.

Prenuptial agreements establish spouses' financial and property rights in the event of a divorce and are governed by the 2013 Matrimonial Property Act No. 49 that describes matrimonial property to be any property jointly owned by spouses or property owned by the spouses within the marriage.¹⁷⁵ These include the matrimonial home and household items found within the home. The MPA has provisions that govern division of

¹⁷³(Constitution of Kenya. art. 27(1), (2), (3), (4), (5), (6), (7), (8).)

¹⁷⁴(Constitution of Kenya, Article 68(iii)).

¹⁷⁵ (Matrimonial Property Act. Section 6(1).)

matrimonial property including prenuptial agreements¹⁷⁶ recognition of monetary and non-monetary contribution,¹⁷⁷ definition of what constitutes matrimonial property¹⁷⁸ recognition of separate property ownership among other provisions.¹⁷⁹

Assets that are acquired prior to the marriage are not considered as matrimonial property and cannot form part of the premarital agreements.¹⁸⁰ Most prenuptial agreements expressly advocate for separate property ownership but have clear provisions as to when property is to be termed as matrimonial thus allowing parties to an equal share. There have been instances when spouses who have signed prenuptial agreements still claim a share in the property of the other spouses. In *MBK v MB*¹⁸¹ the plaintiff argued that he understood the contents of the prenuptial agreement he signed to mean that all the property acquired after the marriage had been solemnized were to be owned jointly. The prenuptial agreement in this case clearly stated that any property acquired by either of the parties before the said intended marriage belonged to that party and would remain the sole property of that party. It was held that one of the properties was separate property as it had been purchased by the defendant before the marriage had been contracted and that the second property had been purchased after the marriage had been contracted but the plaintiff could not claim a share in the property as there was no evidence of his contribution towards the purchase of the property.¹⁸²

Section 6(3) provides parties who intend to marry the right to draw prenuptial agreements to determine their property rights if they so wish. Section 6(4) provides that

¹⁷⁶ (Matrimonial Property Act. Section 6(3).)

¹⁷⁷ (Matrimonial Property Act. Section 2.)

¹⁷⁸ (Matrimonial Property Act. Section 6(1).)

¹⁷⁹ (Matrimonial Property Act. Section 13.)

¹⁸⁰ Supra n 174

¹⁸¹ (*MBK v MB*, 2016)

¹⁸² In making the judgment reliance was placed on sections 6(3), 7, 9, 12(1) and 14 of the Matrimonial Property Act. Amongst the issues for determination were whether the houses in question formed part of the matrimonial property and if they could be divided equally.

in the event that a spouse would wish to nullify a prenuptial agreement that was made as a result of coercion /fraud/ manifest injustice they have to invoke the intervention of the courts. In *CYC vs KSY* the respondent did not dispute the existence of a post nuptial agreement but claimed among other things that she had been coerced into signing the agreement and therefore the postnuptial agreement was illegal.¹⁸³

Section 4 (b) and (c) affirms the validity of prenuptial agreements by providing that parties in a marriage are free to enter into contracts and sue in their own capacity

The MPA has not defined premarital agreements but has established that parties intending to marry can enter into such agreements if they so wish before getting married.¹⁸⁴

In Kenya, the MPA provides that in case there is no premarital agreement, matrimonial property ownership vests in the couple with reference to their individual contributions towards the acquisition of the property¹⁸⁵. The Act does not mention any other premarital agreements.

The Act fails to provide for settlement and postnuptial agreements. The omission prevents the realization of equality between the spouses¹⁸⁶ because these prenuptial

¹⁸³(*CYC v KSY*,2014) The parties had a post nuptial agreement whose terms were that; the respondent would be paid a sum equivalent to USD 320,000.00 as full and final settlement of maintenance and support; out of the amount the respondent was to provide for the upkeep and education of their children and lastly was that the respondent was to leave Kenya immediately for Korea with the children and settle there permanently

The petitioner averred that the respondent was paid the money and that she went back to Korea and came back to Kenya which was contrary to the agreement.

¹⁸⁴ (Matrimonial Property Act. Section 6(3).)

¹⁸⁵ (Matrimonial Property Act. Section 7.)

¹⁸⁶ (Constitution Kenya. art. 45(3).)

agreements may be used unfairly to prevent one spouse from acquiring interest in matrimonial property.¹⁸⁷

So far, the challenge with safeguarding the rights of spouses who opt for private ordering arrangements to govern their marriage is that despite the existence of legislation providing for marital agreements no extra efforts have been undertaken to implement the same. There hardly seems to be reports, resources, systems, procedures and structures in relation to the implementation.

i. The Marriage Act¹⁸⁸

The statute became enforceable in 2014 and was enacted for the consolidation of different laws associated with marriage and divorce and for connected reasons. According to the Act, marriage is a voluntary union between parties and it can either be monogamous or polygamous and registered as laid out by the Act.¹⁸⁹ Further, the Act restates Article 45(3) of the Kenyan constitution by explaining that the parties entering in a marriage have equal obligations and rights during and after their marriage following separation or a divorce.¹⁹⁰

ii. The Land Act¹⁹¹

According to the Act, marriage can either be of customary, civil or religious nature and the matrimonial home is defined to mean any property that is owned or leased by one or both spouses and is occupied by the couple as their family home.¹⁹² For any action

¹⁸⁷Carter, E. R. (2019). Are Premarital Agreements Really Unfair?: An Empirical Study. *Hofstra L. Rev.*, 48, 387.

¹⁸⁸ (Marriage Act, 2014)

¹⁸⁹(Marriage Act, Section 3(1).

¹⁹⁰ (Constitution of Kenya, Article 45)

¹⁹¹ (The Land Act No 6 of 2012).

¹⁹² (Land Act, section 2).

to be taken with regards to matrimonial property, spousal consent must be sought.¹⁹³

ii. The Land Registration Act (LRA)¹⁹⁴

The LRA entails a protection for spouses rights to land by providing for joint tenancy¹⁹⁵ and including a joint tenancy presumption for any land that is purchased or co-owned by both spouses¹⁹⁶ granting each spouse a legal interest in the land that may be held under the name of one spouse where the other partner contributed to the ownership of land through non-monetary factors¹⁹⁷ and requiring consent from the other spouse for the disposition of any dwelling or land.¹⁹⁸

The law acknowledges joint tenancies and tenancies-in-common, with joint tenancies between the couple.¹⁹⁹ A spouse that is surviving has an entitlement to the property entirety²⁰⁰ and the Land Act²⁰¹ grants that in case of the death of a joint tenant, the name of the tenant is removed from the register after the provision of a death certificate.²⁰²

Property that is purchased within the marriage for use by both spouses is assumed to be part of joint tenancy, however, this presumption can be disregarded if evidence is presented that the ownership of the property was meant for an individual only in the marriage.²⁰³

¹⁹³ (Land Act, section 79(3))

¹⁹⁴ (Land Registration Act No.3 of 2012).

¹⁹⁵ (Land Registration Act, section 91(8))

¹⁹⁶ (Land Registration Act, section 93(1))

¹⁹⁷ (Land Registration Act, section 93(2))

¹⁹⁸ (Land Registration Act, section 93(3))

¹⁹⁹ (Land Registration Act, section 91(8))

²⁰⁰ (Land Registration Act, Section 60 and 91(4))

²⁰¹ (Land Act, section 49)

²⁰² (Land Registration Act, section 60)

²⁰³Section 14(b), Matrimonial Property Act (2013).

2.6 The Regional and International Framework on protection of women's right to matrimonial property

According to Article 2(6) of the constitution that provides that any convention or treaty that is ratified by Kenya becomes part of law. Therefore, by virtue of the provision, the following instruments are applicable in Kenya:

i. African Charter on Human and Peoples' Rights²⁰⁴

Each individual has an entitlement to enjoy the freedoms and rights acknowledged and guaranteed by the charter without bias of ethnicity, religion, race, language, sex, political opinion, social origin or any other status.²⁰⁵ In addition, each individual in the eyes of the law is equal and has the right to be protected by the law.²⁰⁶ Kenya, as a state party has the mandate to protect the rights of both genders with regards to the possession, management and control of land.

Also, Kenya has the responsibility to end all types of discrimination against women so as to protect the women's and children rights as indicated by international conventions and declarations.²⁰⁷

ii. East Africa Community Treaty²⁰⁸

The treaty acknowledges that gender equality is a fundamental principle that governs the EAC.²⁰⁹ Also, it recognizes that the protection and promotion of human rights according to the African Charter provisions, thus vetoing any form of gender discrimination in matters pertaining property and land.

²⁰⁴ African Charter on Humans and Peoples Rights, entered into force on 21 October 1986.

²⁰⁵ Article 2, African Charter on Humans and Peoples Rights

²⁰⁶ Article 3, African Charter on Humans and Peoples Rights

²⁰⁷ Article 18, African Charter on Humans and Peoples Rights

²⁰⁸ East Africa Community Treaty, (1999)

²⁰⁹ Article 6(d), East African Treaty (1999).

iii. **Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)**²¹⁰

Exclusively, CEDAW focuses on protecting and promoting the rights of women..²¹¹ At times it is described as the international bill for women's rights since it offers a detailed coverage of the rights of women in private and public contexts by combining all treaties and conventions that promote and protect women's rights.²¹² States have the mandate to ensure equality between the men and women with regards to agrarian and land reform.²¹³ The Constitution of Kenya has echoed the provisions.²¹⁴

iv. **The Universal Declaration of Human Rights (UDHR)**²¹⁵

The UDHR provides for equality rights and protection.²¹⁶ The Convention also provides all individuals the right to own property.²¹⁷ States have the responsibility to ensure that all the men and women have equal rights to any property within their jurisdiction.

2.7 The State's obligation towards governance of private ordering in the family

The State has the responsibility to protect, observe, promote, respect and fulfill the fundamental freedoms and rights that are assured by the bill of rights.²¹⁸ The responsibility to observe implies to monitor the rights implementation; respect implies no interference by the State to the enjoyment of individual rights; protect implies that

²¹⁰ Convention on the Elimination of All Forms of Discrimination Against women, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979).

²¹¹ Byrnes, A. C., & Freeman, M. (2012). The impact of the CEDAW convention: Paths to equality. *UNSW Law Research Paper*, (2012-7).

²¹² Federation of Women Lawyers Training Handbook.

²¹³ Article 14, Convention on the Elimination of All Forms of Discrimination Against women, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), entered into force 3 Sept. 1981, G.A. Supp. (No. 46).

²¹⁴ (Constitution of Kenya, Article 27)

²¹⁵ Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

²¹⁶ Article 7, Universal Declaration of Human Rights.

²¹⁷ Article 17, Universal Declaration of Human Rights

²¹⁸ (Constitution of Kenya. art.21.)

the State will not violate the third party rights; promote implies that the State will advance and encourage the attainment of these rights. The duty to fulfill means that the State has the obligation to implement correct administrative, budgetary, legislative, judiciary and other measures necessary in realizing human rights.²¹⁹

The State is obligated by the Constitution to realize the implementation of fundamental rights and freedoms by ensuring that first, the policy, legislative and other measures that include standard setting to attain the continuous realization of social and economic rights.²²⁰ Progressive realization is premised on the fact that States may not have sufficient resources to immediately realize the economic, social and cultural rights but may do so over time in the long term. Secondly the State has the mandate to place the burden of all state organs and that of the public officials²²¹ whereas the third responsibility is the implementation of the legislation by the state to achieve its obligation with regards to fundamental freedoms and human rights.²²²

In an effort to effectively implement statutory provisions and policies the state has to adhere to the concept of systems, concept of minimum core content and the concept of resources. Rights can only be realized through the establishment of functional systems that promote universal accessibility especially for the low income earning families. The state in this case has a duty to provide for its citizens progressively because economic and social rights cannot be guaranteed at once. The enjoyment of these rights may improve over a period of time and the government should ensure that they have plans, policies and budgets in place to ensure successful achievement of rights. The state

219 Westendorp, I. (Ed.). (1998). *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights: Proceedings of the Workshop of Experts Organised by the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, USA) and the Maastricht Centre for Human Rights of Maastricht University 22-26 January 1997*. SIM.

²²⁰(Constitution of Kenya. art. 21(2).)

²²¹(Constitution of Kenya. art. 21(3).)

²²²(Constitution of Kenya. art. 21(4).)

should also ensure that it performs the minimum core obligations towards its citizens and should provide evidence that it is taking steps towards universal realization of guaranteed rights failing which its citizens may suffer violation of rights. In a bid to ensure compliance the state has set up bodies like the National Gender and Equality Commission which is tasked with promoting equality and non discrimination. These bodies work with civil society organizations with the overall objective of ensuring that guaranteed rights are realized in the family.

2.8 Conclusion

Assessing Kenya's development of laws with regards to the purchase, possession and management of matrimonial property, the core factors that resulted in women's disempowerment are matters of customary practices and law, inheritance, marriage inequalities and the process to adjudicate, consolidate and register land. However, overtime, these laws have changed significantly to realize the rights of women.

However, in accordance to the study limitation, women are still left to depend on a wide and open range of interpretation as to what is due for them in cases of divorce or a separation. The MPA explains that property ought to be divided on the basis of each party's contribution. Notably, because contribution also covers non-monetary inputs including child care and companionship, the interpretation is left wide for the courts to quantify these non-monetary inputs into a monetary scale to calculate the share of the party. Therefore, the women are at the mercy of the judges, majority of whom are of the male gender within a patriarchal system in the courts.

It is worth noting that the Marriage Act and the Constitution provision on equality prior, within and after marriage remains unclear if the division is on a 50/50 share or on the basis of each spouse's contribution. In regards to matrimonial property agreements, the

law is still unfair as it only provides for prenuptial agreements. The law ought not to provide acknowledgement of settlements and post-nuptial agreements in order to remove any ambiguity or complexity on their validity so as to attain spousal equality.

CHAPTER THREE

THE PRACTICABILITY OF ENFORCING MATRIMONIAL PROPERTY

AGREEMENTS IN KENYA

Agreements make law
Legal Maxim

3.0 Introduction

This chapter will explore the position of matrimonial property agreements in Kenya. In doing so, the chapter will critique of section 6(e) of the Matrimonial Property Act. This will lay the foundation for discussing the next section which will be on justifications of enforcing private ordered agreements and the reasons why states limit the use of the same agreements. This will be followed by a discussion on the misconceptions people have about prenuptial agreements. The last part of the chapter will discuss the human rights issues brought out by enforcement of matrimonial property agreements in Kenya with a view of ascertaining their practicability.

It is important to point out that legislation on matrimonial property agreements in Kenya is relatively new and not common.²²³ Owing to this the jurisprudence on the subject is scanty.²²⁴ This notwithstanding it is important to point out that most states recognize the validity of premarital agreements.²²⁵ People often assume that it is easy to get divorce courts to ignore a prenuptial agreements but that is a myth.²²⁶ It is true that prenuptial agreements do get challenged often, but they hardly ever get thrown out of court.²²⁷ In regards to postnuptial agreements some states have clear rules while other

²²³ Murungi, L. N. (2015). Consolidating family law in Kenya. *Eur. JL Reform*, 17, 317.

²²⁴ Supra n 218

²²⁵ Atwood, B. A., & Bix, B. H. (2012). A New Uniform Law for Premarital and Marital Agreements. *Family Law Quarterly*, 46(3), 313-344.

²²⁶ Supra n 221

²²⁷ Supra n 221

states have vague laws and court precedents.²²⁸ This means that postnuptial agreements are still on shakier grounds.²²⁹ As such chapter three will borrow heavily from other jurisdictions to further the discussion.

3.1 The Status of the Matrimonial Property Agreements in Kenya

The MPA, 2013 has only made provision for creation of prenuptial agreements and the grounds under which the agreements may be deemed invalid.²³⁰ There is no mention of postnuptial and separation agreements in the Act.

The Act provides that the prenuptial contracts ought to be signed by spouses on a voluntary basis. This is stressed in section 6(4) that the parties involved in a prenuptial contract have the right to go to the courts to dismiss the agreement on the basis that the contract involved coercion, fraud or it was unjust.²³¹ However, the MPA does not offer opinion on the level of coercion or fraud or what renders the contract unjust thus creating loopholes.

In the above instance, the courts refer to common law principles and other laws to fill in the gaps.²³² The jurisprudence of Kenya has largely been influenced by England.²³³ It is a common phenomenon for courts in Kenya to refer and apply cases from England, especially to fill legislative gaps where specific matters have been given force recently in Kenya and are yet to be addressed by the courts in depth.²³⁴ This is the case with the MPA provisions of prenuptial contracts.

²²⁸ McDonald, T., & Levit, N. (2013). Advanced Property Issues in Family Law: An Annotated Bibliography. *J. Am. Acad. Matrimonial Law.*, 26, 481.

²²⁹ Supra n 233

²³⁰ (Matrimonial Property Act, Section 6 (3)&(4))

²³¹ (Matrimonial Property Act, section 6(4))

²³² Ojwang, J. B. (2017). The Constitution and the Common Law, in Common Clause: The Kenya Case. *E. Afr. LJ*, 72.

²³³ Supra n 227

²³⁴ Supra n 227

In *Radacher v Granatino* the courts provided the first judgment of significance on the prenuptial contract status.²³⁵ The judgment by the United Kingdom Supreme Court identified some factors that increase the chances of a binding prenuptial agreement to be; the agreement needs to be voluntary; both parties need to understand the consequences of the agreement; and the agreement must not be unfair considering the prevailing circumstances.²³⁶

Prior to entering into any prenuptial agreement, it is essential that the individual parties seek and independent legal advice.²³⁷ This helps in establishing the full understanding of each spouse on the contract terms prior to entering the agreement.²³⁸ This step is particularly important in instances where questions and warnings were raised during the preliminary period.²³⁹ For example, in the *DB v PB*²⁴⁰ case, the assertion by the wife of misrepresentation failed since it was acknowledged that she had sought independent legal advice in the United States where she was advised not to sign the contract. The emotion of a person during the agreement deliberation and signing are also essential in determining whether the person voluntarily entered into the agreement or he/she was coerced.²⁴¹

The courts must consider the maturity and age of the individual and determine whether either or both of the parties involved were married or were in a long-term relationship prior.²⁴²

²³⁵ (*Radmacher v Granatino*, 2010)

²³⁶ *Supra* n 230

²³⁷ Schembri, N. R. (2003). Prenuptial agreements and the significance of independent counsel. . *John's J. Legal Comment.*, 17, 313.

²³⁸ *Supra* n 232

²³⁹ Nasheri, H. (1998). Prenuptial agreements in the United States: a need for closer control?. *International Journal of Law, Policy and the Family*, 12(3), 307-322.

²⁴⁰ (*DB v PB*, 2016)

²⁴¹ *Supra* n 235

²⁴² Fields, J. E. (2008). Forbidden Provisions in Prenuptial Agreements: Legal and Practical Consideration for the Matrimonial Lawyer. *J. Am. Acad. Matrimonial Law.*, 21, 413.

Timing is also critical consideration for parties who intend to sign prenuptial agreements.²⁴³ This is because it may at times be assumed that signing of the prenuptial agreements immediately prior to the marriage presents a high risk that one party will be perceived to have been coerced by the other.²⁴⁴

The parties need to fully appreciate the consequences of the prenuptial agreements.²⁴⁵ This is accomplished by disclosing financial agreements prior to signing the agreement to ensure that both parties clearly understand the claim they potentially have to give up.²⁴⁶ With reference to this point, in the *Y v Y*²⁴⁷ case the courts did not grant effect to a French-style prenuptial agreement that was signed by the couple residing in London who entered into the agreements two days to the wedding. The courts held that although the wife understood the function of the agreement, she lacked an understanding of the financial implications in case of a divorce.

The agreement ought to be fair and just making considerations of the current situation. A great debate exists on the concept of fairness.²⁴⁸ The courts in England have a discretion in financial remedy proceedings and the minimum goal to make sure that the needs of the individual spouses are met and in particular the spouse with an inferior economic status and the children.²⁴⁹ In general, the longer the existence of the marriage, the lower the chances of upholding a prenuptial agreement especially, if significant changes have been made. In *WW v HW*²⁵⁰ the court held the prenuptial agreement to be

²⁴³ Marston, A. A. (1997). Planning for love: the politics of prenuptial agreements. *Stanford Law Review*, 887-916.

²⁴⁴ *Supra* n 238

²⁴⁵ Deble, G., & Rhode, S. (2006). Prenuptial Agreements in the United States. *IAML LJ*, 1, 1-2.

²⁴⁶ Mackay, A. (2003). Who Gets a Better Deal: Women and Prenuptial Agreements in Australia and the USA. *UW Sydney L. Rev.*, 7, 109.

²⁴⁷ (*Y v Y*, 2014)

²⁴⁸ Anuar, K. K. (2017). Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate. *Oxford U. Undergraduate LJ*, 45.

²⁴⁹ Lowe, N. N. (2008). Prenuptial agreements: the English position. *InDret*, 1.

²⁵⁰ (*WW v HW*, 2015)

very significant and further found it fair to hold the husband to the agreement unless the needs of the husband suggested different results.

3.2 Justification For The Enforcement Of Private Ordering

Persons who intend to marry choose to enter into domestic agreements because first, they often need assurance that their partner's (especially the richer partner) are purely entering into the marriage for love.²⁵¹

Secondly, these private ordering agreements safeguard the best interests of children from other relationships where a partner would wish to keep certain property for those children.²⁵²

The other reason why some people prefer private arrangements is because a party may wish to protect himself from the marriage statutory rules regarding matrimonial property division and spousal support.²⁵³

The benefit of private ordering in family law include:

a. Parties know exactly what they want

The advantage of premarital contracts is that they better reflect the intentions of the spouses hence making them complacent with the arrangements they make.²⁵⁴ This is because individuals know best what they want. On a general level private ordering supports the value of liberty. According to John Stuart Mill, as long as people in their private capacities refrain from harming others as they go about their lives, they should

²⁵¹ Ryznar, M., & Stepien-Sporek, A. (2009). To have and to hold, for Richer or Richer: premarital agreements in the comparative context. *Chap. L. Rev.*, 13, 27.

²⁵² Moore, M. M. (1983). The Enforceability of Premarital Agreements Contingent Upon Divorce. *Ohio NUL Rev.*, 10, 11.

²⁵³ Bix, B. (1998). Bargaining in the shadow of love: the enforcement of premarital agreements and how we think about marriage. *Wm. & Mary L. Rev.*, 40, 145.

²⁵⁴ Bix, B. H. (2001). Premarital agreements in the ALI Principles of Family Dissolution. *Duke J. Gender L. & Pol'y*, 8, 231.

be allowed the freedom to carry on at their own costs.²⁵⁵ Private ordering allows spouses to choose whether or whom to marry and whether to have children or not without state interference.

b. Autonomy

The autonomy of individuals is essential in liberal democracies.²⁵⁶ It enables people to participate in societal setting and to exercise their democratic rights while fulfilling their obligations.²⁵⁷ The basic principle behind autonomy is not just doing the right thing but also the fact that the things done are as a result of personal choices.²⁵⁸ Spouses are able to work out their own deals with respect to marital and child support agreements instead of relying on state imposed regimes.

c. Efficiency

Trebilcock & Keshvani describe marriage as a joint economic venture between freely consenting partners.²⁵⁹ Since spouses know best about their preferences, the use of private ordering enables them to procure services that give them value.²⁶⁰ This is because they are able to point out specifications on how best the agreements they make best serve their individual needs.²⁶¹

²⁵⁵ Xiem, N. T. (2018). John Stuart Mill's liberal thought on education and the dissemination of education in enforcing the right of liberty. *American Journal of Educational Research*, 6(5), 570-577.

²⁵⁶ Raz, J. (1986). *The morality of freedom*. Clarendon Press.

²⁵⁷ Supra n 251

²⁵⁸ Supra n 250

²⁵⁹ Trebilcock, M. J., & Keshvani, R. (1991). The role of private ordering in family law: a law and economics perspective. *The University of Toronto Law Journal*, 41(4), 533-590.

²⁶⁰ Hahlo, H. R. (1973). Matrimonial Property Regimes: Yesterday, Today and Tomorrow. *Osgoode Hall LJ*, 11, 455.

²⁶¹ Supra n 255

3.3 Justifications on Limits by the State on Private Ordering Arrangements Public Policy

Public policy aims to protect the public from injury as much as possible and normally come in form of principles and legal provisions.²⁶² Public policy necessitates the court to at times decline to enforce an agreement.²⁶³ In making determinations the court may depart from its primary function and refuse to enforce an agreement.

The state through its paternalistic attempts may often want to regulate the terms of marriage and justify its actions by arguing that marriage is a public status despite the fact that it grounded on an intimate relationship and therefore the state is the only entity with the authority to set the terms for marriage.²⁶⁴ Another justification by the state would be that it only acts in the best interest of the state and its citizenry. In this regard the state may at times prohibit some private transactions and urge citizens to compare the benefits of authorizing these agreements against the effects of enforcing such agreements.

Some agreements may at times have provisions that are contrary to existing law. In *Williams v Williams*²⁶⁵ the plaintiff sought specific performance. An agreement had been made by the parties to the effect that the parties were living separately and apart and that the parties would in the future desire to resume cohabitation as husband and wife with a view of reconciling. The agreement further provided that the defendant was to pay the plaintiff \$500.00 monthly and that he acknowledged that the resumption of the marital relationship had no effect on the payment of the money. The court held that the agreement in question was neither a marital or separation agreement but was a void

²⁶² Bix, B. H. (2010). Private Ordering and Family Law. *J. Am. Acad. Matrimonial Law.*, 23, 249.

²⁶³ *Supra* n 257

²⁶⁴ In this case the entry rules, rules to govern the subsistence of the marriage and the exit rules.

²⁶⁵ (*Williams V Williams* 1995)

contract. This was because the language of the agreement was found to be ambiguous as the parties were not sure if they would reconcile and stay together as husband and wife.

In premarital agreements the question of public policy also arises in instances when issues presented for disposal at the wrong time. These involve hashing out terms of schedules for visitation of children prior the separation or the divorce is completed and even specifying the level of child support. In regards to child financial support the amounts discussed may end up being insufficient for the child need's when it actually becomes necessary thereby causing the child to miss out on its right to have support. Such offending provisions may render the entire agreement unenforceable and invalid.

The other scenario when a premarital agreement is against public policy is when it favours one party more than the other to the extent that it becomes unconscionable. This is because it brings in the element of unreasonableness.

a. Bounded Rationality

One justification for encouragement of private ordering is that it promotes autonomy because parties know better what is in their best interest but there are situations when this is not the case like in the situation where a couple plans to marry.²⁶⁶ The reality in society is that persons who are planning to marry often reject suggestions from friends and family that involve signing premarital agreements. This might be because they have naive notions of living a happy and fulfilled life and do not foresee problems during their marriage.²⁶⁷

²⁶⁶ Bix, B. H. (2001). Premarital agreements in the ALI Principles of Family Dissolution. *Duke J. Gender L. & Pol'y*, 8, 231.

²⁶⁷ Bix, B. (1998). Bargaining in the shadow of love: the enforcement of premarital agreements and how we think about marriage. *Wm & Mary L. Rev.*, 40, 145.

In other instances one party may want to protect their own interests and coerces the other party to consent demands without being afforded a chance to understand the full implications.²⁶⁸ The party being asked to give their consent in this case normally has no experience with divorce and is asked sign a waiver of their rights in the event of divorce without them really choosing to agree to the demand. In contract law such an agreement cannot be enforced because it exhibits misrepresentation, duress and undue influence. The doctrine of fiduciary relationships also applies in this case in the sense that where persons in situations of trust must show full disclosure to make a contractual agreement enforceable.²⁶⁹ The relevance of the rules of contract law to private ordering in family law is that certain situations like those involving intimates mirror cases where individuals have a poor comprehension of their individual interests and bounded rationality ideally works to address shared plans between intimates. It is practical and strengthens commitment to a marriage.²⁷⁰

b. Third party effects

When private arrangements directly affect third parties even those who support private ordering concede the need for government regulation. In situations where families choose to be regulated by private ordering children are the third parties who are greatly affected in the event of family breakdown.

²⁶⁸ In instances involving marriage one of the party's (party A) normally asks the other (party B) to sign a premarital agreement because of a past bad experience which in most cases concerns divorce.

²⁶⁹ Alexander, G. S.(1999). Cognitive Theory of Fiduciary Relationships, Cornell L. Rev., 85, 767.

²⁷⁰Doherty, M. C.(2016). Romantic Premarital Agreements: Solving the Planning Issues without the D Word. *J.Am.Acad. Matrimonial Law.*, 29 35.

Some social scientists have advanced arguments that family unions formed by way of private ordering are unstable²⁷¹ and further that private ordering arrangements encourage inequity between spouses and in particular they work against women.²⁷²

c. Exploitation

This comes up when one party takes undue advantage of another's bad circumstances.²⁷³ Examples in this scenario may include creating premarital agreements that are one sided.

3.4 Misconceptions About Matrimonial Property Agreements

a) Matrimonial property agreements are for the wealthy

It is true that matrimonial property agreements protect the wealthy but what is not understood by many is that premarital agreements ensure that spouses can pre-determine the resolution of issues that may arise upon divorce.²⁷⁴ This is because spouses are given the freedom to set their own rules within the limitations of law and this means that there will be reduced controversy and litigation thereby cutting costs for spouses.²⁷⁵

b) Premarital agreements are only useful in the event of divorce

These agreements are also important upon the death of a spouse.²⁷⁶ They can be used to preserve the wishes of the deceased just like a will would do.²⁷⁷

²⁷¹ Popenoe, D. (2009). Cohabitation, marriage and child wellbeing: A cross-national perspective. *Society*, 46(5), 429- 436.

²⁷² Brod, G.F. (1994). Premarital agreements and gender justice. *Yale JL & Feminism*, 6, 229.;

²⁷³ Wertheimer, A. (1996). Remarks on coercion and exploitation. *Denv. UL Rev.*, 74, 889.

²⁷⁴ Romo, L. K., & Czajkowski, N. (2021). An Examination of Redditors' Metaphorical Sensemaking of Prenuptial Agreements. *Journal of Family and Economic Issues*, 1-14.

²⁷⁵ Supra n 269

²⁷⁶ Nachshin, R. J. (2001). Prenuptial and Postnuptial Agreements. *GPSolo*, 18, 54.

²⁷⁷ Supra n 271

Prenuptial agreements also outline the expectations of how the finances of spouses are to be handled in the course of marriage and thereby gives parties a written understanding of these expectations so that they are on the same page.²⁷⁸

c) Matrimonial Property agreements only benefit spouses who earn more in marriage

This is false because in the event of a divorce matrimonial property agreements also provide the spouses who does not earn with guaranteed protection.²⁷⁹ Matrimonial property agreements apply the doctrine of fairness.²⁸⁰

d) Matrimonial property agreements are expensive

Divorce petitions take a long time to conclude and are quite costly.²⁸¹ The cost of getting an advocate to prepare a prenuptial contract is insignificant.²⁸² If spouses agree mutually on how a divorce is to be handled beforehand, they are able to avoid the struggle experienced by majority of divorcing couples that entails miscommunication and causing distress to the children.²⁸³

3.5 Human rights issues brought out by enforcement of matrimonial property agreements

Spouses enter into marriage with a lot of expectations of what the marriage can offer them in terms of property. Some of these expectations are anchored in law while others are not. The Constitution provides for family protection as an essential human right and

²⁷⁸ Gadlin, H., & Jessar, K. (2002). Preempting discord: prenuptial agreements for scientists. *The NIH Catalyst*, 10(3).

²⁷⁹ Marston, A. A. (1997). Planning for love: the politics of prenuptial agreements. *Stanford Law Review*, 887-916.

²⁸⁰ Supra n 274

²⁸¹ Nachshin, R. J. (2001). Prenuptial and Postnuptial Agreements. *GPSolo*, 18, 54.

²⁸² Supra n 276

²⁸³ Supra n 273

acknowledges that family is a fundamental and natural unit of society.²⁸⁴ It further provides that the family has a right to enjoy economic and social rights²⁸⁵. The Constitution further provides that the aim of such protection and recognition of rights is to the maintain communities and individuals dignity to advance social justice and the acknowledgement of human beings potential²⁸⁶ Some of the emergent constitutional and human rights issues in matrimonial property include the concept of equal rights, the legitimate expectations of marriage, the clean break theory and unintended consequences of the law. The emergent human rights issues are discussed hereunder.

a. The Concept of Equal rights

Equality of partners in marriage has been provided for in various pieces of legislation.²⁸⁷ Equality guarantees spouses the ability to act under different capacities in marriage. In this regard, spouses can acquire, hold, dispose property, sue and be sued.²⁸⁸ This provision also guarantees spouses the right to freely enter into contractual agreements.²⁸⁹ Contractual agreements in family law include premarital, postnuptial, and separation agreements.

There are two perspectives in which the concept of equality is interpreted. The first is that spouses are allowed to own separate property in the subsistence of the marriage and secondly that spouses have a right to an equal share in the matrimonial property. For purposes of this thesis, the chapter will discuss separate ownership of property approach.

²⁸⁴ (Constitution of Kenya. art. 45(1).)

²⁸⁵ Supra n 279

²⁸⁶(Constitution of Kenya. art. 19(2).)

²⁸⁷ (Constitution of Kenya.art.45(3).), Section 4 Matrimonial Property Act, Section 3(2) Marriage Act

²⁸⁸(Matrimonial Property Act. Section 4(a).)

²⁸⁹(Matrimonial Property Act. Section 4(b).)

Separate ownership of property allows parties to have their own assets and this is significant in the sense that it allows for independence of spouses especially the woman.²⁹⁰ This right is quite important as property is regarded as an essential tenet for the security, growth and development of self worth of an individual.²⁹¹ The separate property regime propagates that each party should only benefit from their own contribution in the acquisition of matrimonial property and that one should not gain from what he has not contributed.²⁹² Contribution brings in the element of quantification of the monetary and non monetary participation from spouses towards the acquisition of property in the marriage and this include domestic work, child care, companionship, farm work and even management of family business.²⁹³

The second interpretation of equality of spouses in marriage is that both the spouses have a right to an equal share in the matrimonial property. This school has adopted the community of property approach which is premised on the assumption that married spouses have equal rights to property. The approach has both social and economic dimensions and the theory is that the individuals in a marriage undertake a critical role although their mandated role may differ in quality and type. In a system that is purely community of property, the legal possession of matrimonial property is joint from the commencement of the marriage. Therefore, immediately a marriage is celebrated all the property that was owned by either of the spouses are brought together and perceived to be owned jointly. Upon application for determination of property ownership or

²⁹⁰ In Kenya this was made possible with the introduction of the 1882 Married Women's Property Act which has been replaced by the 2013 Matrimonial Property Act 2013 that grants women the right to ownership of property and a share in the matrimonial property too.

²⁹¹ Claris Ogaanga et. al., Women's Land and Property Rights in Kenya- Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation. Georgetown University

²⁹² See Part IV of the Matrimonial Property Act No 49 of 2013; In *Stack v Dowden*(2007)UKHL 17,(2007) 1 FLR 1858 the court held that property acquired by a sole party of the marriage belongs to the party unless the other party contributed to make improvements

²⁹³ Section 2 of the Matrimonial Property Act No 49 of 2013 has defined contribution.

divorce the entitlement of the spouses to property is deemed as a marriage incident and is thus divided equally between the spouses. The paternalistic school of thought supports this approach and propagates that parties should have equal rights to ownership of matrimonial property. This is because the paternalists believe that a marriage is a partnership in which the spouses should share all the property that they acquire in the subsistence of their marriage. That equal property rights is what promotes the sanctity of a marriage.²⁹⁴ This school of thought is supported by the teachings from the Holy Bible which provide that spouses are one and as such should share whatever they have²⁹⁵.

The Kenya Constitution 2010 provides for spouses equity in marriage even at the dissolution of the marriage²⁹⁶ and promotes the principle by further providing for freedom from discrimination²⁹⁷. In addition, the constitution adds in Article 10 the national principles and values of governance to include equality, social justice, protection and non-discrimination of marginalized persons. Kenya has adopted international law in Article 2(6)²⁹⁸ on supremacy of the Constitution. Therefore, under CEDAW the Kenyan government has the duty to establish legal protection of the rights of women on the grounds of men equality and in ending all discrimination and bias against women, so that they may have similar rights to the men in terms of property management, ownership and enjoyment.²⁹⁹

²⁹⁴ This is on the grounds that marriage is an equal partnership with social and economic elements. The marriage system also acknowledges that individual parties contribute largely to the union both socially and economically. The system holds to the matrimonial equality approach. Using the pure community of interest, matrimonial property is equally joint from the commencement of the marriage (Kenya Law Resource Center- from the web)

²⁹⁵ Holy Bible, King James Version, Mathew 19:5

²⁹⁶ (Constitution of Kenya. art. 45(3).)

²⁹⁷ (Constitution of Kenya. art. 27.)

²⁹⁸(Constitution of Kenya. art 2(6).)

²⁹⁹ Article 6(1) (h) of the Convention on Elimination Of All Forms Of Discrimination Against Women

In my opinion, the use of separate property approach promotes prenuptial and postnuptial agreements in marriage and encourages hard work. This regime also makes it impossible for creation of vices like gold digging in marriage,³⁰⁰ crimes of passion³⁰¹ and bankruptcy in marriage³⁰².

In conclusion the provision on equality specifically takes care of promoting women's rights by allowing them participate in the socio economic activities on equal footing with their spouses and hence appreciating the value of both the spouses' contribution to work and the family. This is in line with the millennium development goal number three on women empowerment which is geared at promoting gender equality alongside empowering women.

b. The Clean break theory

In the course of marriage, spouses owe each other a reciprocal duty of support provided that the party who claims the support is in need of it and the other party can actually provide it.³⁰³ The clean break theory is founded on the basis that upon the dissolution of marriage the parties need to become economically self-sufficient.³⁰⁴ Separation agreements provide finality to marriage and provide an end of financial responsibility towards the other party.³⁰⁵

³⁰⁰ Financial exploitation in matrimony is one such example where the regime in place encourages the practice like in the community of property jurisdictions.

³⁰¹ Spouses and former spouses murdering each other because of property has been witnessed because of the bitterness that hardworking spouses feel when they are compelled by the law to share their property.

³⁰² Majority of the legal concepts appear to be grounded on fair and wise principles in the abstract however, issues arise when their applicability are tested on real people.

³⁰³ Nelson, R. M. (2006, May). Nurturing marriage. In *April General Conference*.

³⁰⁴ Regan Jr, M. C. (1994). The Boundaries of Care: Constructing Community after Divorce. *Hous. L. Rev.*, 31, 425.

³⁰⁵ Clark, H. H. (1955). Separation Agreements. *Rocky Mntn. L. Rev.*, 28, 149.

The underlying objective of this principle is to forget the past and start a new life that is not eclipsed by a broken relationship.³⁰⁶ The principles of justice, liberty and equality present a concrete basis for abolishment of ex spousal maintenance and advocate that dead marriages remain buried.³⁰⁷

States with progressive marriage and divorce laws advocate for equal participation of spouses in marriage and this includes financial participation and provision of child support. Justice Musyoka's ruling elaborated on this by stating that with regards to article 45(3) of the constitution, the mechanism of deciding the spouse's rights in marriage, needs to consider both the husband and the wife as equals and neither of them is given lesser or greater responsibilities in terms of maintenance.³⁰⁸

c. Legitimate expectations of spouses in regards to matrimonial property

The legitimate expectations of spouses in marriage is a constitutional issue and entails what married partners expect to gain out of the marriage institution.³⁰⁹ A few issues that crop up in this regard are discussed below.

The first issue concerns itself with the question of whether spouses are bound to share their property by virtue of being married.³¹⁰ Private ordering in family law promotes the principles of hard work, reasonableness and fairness in marriage.³¹¹ Most prenuptial and postnuptial agreements expressly advocate for separate property ownership but have clear provisions as to when property is to be termed as matrimonial thus allowing

³⁰⁶ Brown, S. L., & Wright, M. R. (2017). Marriage, cohabitation, and divorce in later life. *Innovation in Aging*, 1(2), igx015.

³⁰⁷ Ripstein, A. (2007). Liberty and equality. *RONALD DWORKIN, Arthur Ripstein, ed*, 82-108.

³⁰⁸ (SMR v PHS 2013)

³⁰⁹ Jackson, C. (2012). Introduction: marriage, gender relations and social change. *Journal of Development Studies*, 48(1), 1-9.

³¹⁰ Schuz, R. (2019). Choice of law in relation to matrimonial property in the 21st century. *Journal of Private International Law*, 15(1), 1-49.

³¹¹ Supra n 305

parties to an equal share. There have been instances when spouses who have signed prenuptial agreement still claim a share in the property of the other spouses.³¹²

The second issue is in regards to the ratio in which property is to be divided between spouses. The Kenya Matrimonial Property Act provides for the concept of acquisition of interest through contribution by partners in a marriage.³¹³ In the event a spouse decided to contribute towards improving the non-matrimonial property the partner automatically becomes a beneficiary according to the ratio of interest of their contribution.³¹⁴ Of importance is that if the value of separate property increases because of the relationship property application of the other partner who has no share in the property then the increase or income/gain becomes the relationship property which is similar to the provisions of the Kenya matrimonial property laws.

According to the *CNW v BN*³¹⁵ case the courts held that the matrimonial property distribution is not reliant on the name of the spouse registered under the property. Further, in *Njoroge v Ngari*³¹⁶ the ruling was that in the event that only one spouses' name has been used to register the property, while the other spouse contributed to acquire the property, both spouses have a right to claim the interest gained from the property. The ruling was held prior to the enactment of the Matrimonial Property Act but is in line with section 14 of the MPA 2013.

3.6 Conclusion

Chapter three has discussed the current status of matrimonial property agreements as provided in the Matrimonial Property Act of Kenya. The chapter has also discussed the

³¹² Supra n 305

³¹³ (Matrimonial property Act, Section 9.)

³¹⁴ Supra n 308

³¹⁵ (CNW v BN, 2009)

³¹⁶ (Njoroge v Ngari, 1985)

reasons why the state may choose to enforce or decline the use of matrimonial property agreements. This has been followed by a discussion concerning human rights issues that come up as a result of enforcing matrimonial property agreements.

CHAPTER FOUR

A COMPARATIVE STUDY OF MATRIMONIAL PROPERTY

AGREEMENTS IN OTHER JURISDICTIONS

4.0 Introduction

Chapter four covers an analysis of marital agreements use in England and South Africa. England was used as a case study since it colonized Kenya, a country that later adopted the common law system by the English courts. South Africa formed part of the case study since it is a state in Africa that has a wide jurisprudence on marital agreements. It is critical to note that the jurisprudence of Kenya has been influenced continually by that of South Africa over the past few years. In addition, the community of property system of South Africa has proven useful in the analysis used in dividing matrimonial property during divorce in conjunction with the marital agreements.

4.1 Marital Agreements In South Africa

In South Africa, marriages are classified in three categories namely; civil marriages, civil unions, and customary marriages. Before the year 1996, the South African law only recognized civil marriages.³¹⁷ This was before the promulgation of the country's Constitution.³¹⁸ The import of this was that the South African MPA was only applicable to spouses that engaged in civil marriages³¹⁹ but this was however cured by the Civil Union Act³²⁰ and the Recognition of Customary Marriages enactment.³²¹

³¹⁷ Maithufi, I. P., & Bekker, J. C. (2002). The recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa. *The Comparative and International Law Journal of Southern Africa*,

³¹⁸(Constitution of South Africa.)

³¹⁹ Lowndes, G. C. (2014). *The need for a flexible and discretionary system of marital property distribution in the South African law of divorce* (Doctoral dissertation).182-197.

³²⁰ (Civil Union Act.)

³²¹ (Recognition of Customary Marriages.)

South Africa has three classifications of matrimonial property systems.³²² This study focused on the second and third contracts.

The distinction among the three regimes is the availability of a duly executed ante nuptial agreement between the parties.³²³ Ante nuptial agreements are drafted and signed prior to entering a marriage. The parties may also draft postnuptial agreements as well as settlement agreements. It is noteworthy to point out that the South African Matrimonial Property Act does not define ante nuptial contracts and does not specify what they should contain.

4.1.1 Marriage out of community of property without the accrual system

In the regime, spouses were allowed to maintain their individual/separate property within the marriage and any property that was purchased before the marriage would be perceived to be separate property.³²⁴

The eligibility of spouses in the out of community property system without accrual established that the spouses ought to have registered and signed an ante-nuptial agreement that excluded them from the profit and loss, out of community of property and out of community property with accrual.³²⁵ The out of community property with accruals effect notes that no spouse can directly claim separate property of their partners unless consent from the other spouse was granted. This implies that liabilities and debts cannot be shouldered by the partner who did not incur the cost.

This regime of marriage is encouraged when: the parties involved earn high incomes, are business persons, and do not have any plans to bear children; in the instance of a

³²² These regimes are provided for in the Matrimonial Property Act of South Africa.

³²³ (Matrimonial Property Act, Section 3.)

³²⁴ (Matrimonial Property Act, Schedule.)

³²⁵ (Matrimonial Property Act, Section 2.)

wealthy widow and widower who decide to conclude a marriage for companionship; and when the children's interests included in the following marriages.

Separate legal counsel is advised particularly for women who with regards to domestic responsibilities are pushed out of the labour market over long time periods to protect their rights.

4.1.2 Marriage out of community of property with the accrual system

The system is the same as that of the out of community property without accruals since the spouses retain their individual property within the marriage and build their estate and have the obligations for their individual debts. However, during the marriage dissolution, the assets value that are obtained during the marriage³²⁶ is shared equally.³²⁷ In the event that a single partner's value does not increase, the other partner's value increment is equally shared between the spouses.³²⁸

The accrual is calculated by the net starting value and net final value differences of the estate of individual spouses excluding any inheritance, donation or legacies. The difference value in the accrual of the estates considering inflation is then divided equally. The calculation is made possible by a spouse's declaration their individual estate value at the beginning of the marriage in the ante nuptial agreement.³²⁹ In the absence of this, spouses must make a value declaration of their individual estates at the commencement of the marriage in a separate statement which is to be prepared by a notary and attached to the ante-nuptial agreement.³³⁰ In situations where the accruals are

³²⁶ The accrual

³²⁷ (Matrimonial Property Act. Section 4(1a).)

³²⁸ (Matrimonial Property Act. Section 3(1).)

³²⁹ (Matrimonial Property Act. Section 6(1).)

³³⁰ (Matrimonial Property Act. Section 6(1).)

payable, the court has the power to issue an installment payment order of a deferred payment.

The system of accrual is an equitable and modern tool and is conducive for encouraging harmony in a marriage.³³¹ Spouses who do not wish to be governed by the accrual system should specifically state so in the marriage contract³³².

During the subsistence of the marriage, the ability of the parties to handle their assets is not limited if the spouse does not prejudice the other spouses rights to share in the accrual.³³³ The system also gives protection to spouses in marriage for example insolvency of one spouse or during a marriage dissolution each gets an equal share.

The disadvantages of the accrual system especially for wealthy spouses is that they may feel that they are not free to handle their property since the other spouse has the ability to go to court for the division of accrual if the latter feels the former is segregating his/her accrual share by entering into specific transactions.³³⁴

The other disadvantage is that the parties have no right to share in the credit worthiness of each spouse which may lead to the non-working spouse getting a limited credit worthiness during the marriage given that their individual estate is small.

4.2 Content of the ante nuptial agreement

The Act³³⁵ does not define ante nuptial contracts. However, the agreement is noted to be an essential document that enables the spouses to design the matrimonial property

³³¹Himonga, C. (2005). The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession. *Acta Juridica*, 2005(1), 82-107.

³³²(Matrimonial Property Act. Section 2.)

³³³Gillespie, D.L.(1971). Who has the power? The marital struggle. *Journal of Marriage and Family*, 445-458.

³³⁴Kaganas, F., & Murray,C. (1994). Law and women's rights in South Africa: an overview. *Acta Juridica*, 1.

³³⁵ Matrimonial Property Act (South Africa)

regime.³³⁶ The law fails to show all the terms required in ante-nuptial agreements to offer spouses the freedom to make decisions on how they can share property.

The law however requires that formal ante nuptial agreements follow the characteristics below:

1. Be in writing
2. Both parties need to sign the agreement in the presence of a notary
3. A notary needs to sign the agreement
4. The agreement must be registered by the registrar of deeds in the region that the couple intends to get married

The importance of registering ante nuptial contracts is to ensure recognition of the class under which a couple is registered under the out of community property by the state and other third-party organizations.³³⁷

Failure to register the contract within the time stipulated makes the contract not binding to third parties.³³⁸ The courts have also established that an unregistered ante-nuptial agreement needs to indicate the parties' intention who will be bound by the agreement. As such, when property is being divided following a divorce, the court needs to consider the terms of any informal ante-nuptial agreement.³³⁹

The Matrimonial Property Act also sets out the implied and express terms that can be included in an ante nuptial agreement, for example spouses who do not want to be categorized in the community of property regime need to state so in the agreement³⁴⁰

³³⁶ Jassiem, M. S. (2010). Critical overview of the application of the default system in South Africa's matrimonial property regimes.

³³⁷(Exparte Spinazze and Another, 1985)

³³⁸(S v S,2015)

³³⁹ (Mathabathe v Mathabathe, 1987)

³⁴⁰ (Matrimonial Property Act. Section 2.)

also the contract needs to make a clarification if the couples intentions is to be categorized under the regime of out of community property with or without accrual system.³⁴¹ When an agreement does fails not to include the out of community system with accrual, then the couple is placed in that system by default.³⁴² In *G v G*³⁴³ it was held that the parties with a joint estate needs to be divided equally between the wife and the husband following a divorce. One of the determination issues was in deciding if a marriage belonged in a community property with regards to the ante nuptial agreements, out of community property without the accrual system. The court held that the plaintiff could not be held with reference to the ante nuptial agreement and no consensus was identified. Further, it was found that the dissensus resulted from the mistakes by the plaintiff: the defendant may or may not have been aware that the plaintiff was not satisfied with the ante nuptial agreement.

The court has power to set aside an ante nuptial agreement if the terms contained in the agreement are contrary to public good and morals. In addition to this, the court may also set aside an ante nuptial agreement if it is proven that a spouse was unduly coerced or influenced to sign the agreement.³⁴⁴

In *S v S*³⁴⁵ it was held that both parties were married out of community property without the accrual system. The couple had initially entered into a customary marriage which was later changed to a marriage following the 1961 Marriage Act. The issue for determination was to decide if the parties were in a marriage in out of community property without accruals or in community of property. In arriving at the judgment, it

³⁴¹ (Matrimonial Property Act. Section 2.)

³⁴² Matrimonial Property Act. Section 2.)

³⁴³ (*G v G*, 2018)

³⁴⁴(*EAL v ECE*, 2015)

³⁴⁵ *Supra* n 22

was noted that the plaintiff agreed that she was in consensus to a marriage out of community property until her lawyer advised her otherwise. Therefore, it could not have been the parties' intention to change the customary marriage which is usually in community property to a similar marriage according to the Marriage Act as it was an unnecessary exercise. The judge found that their verbal agreement at the beginning of their marriage was an informal antenuptial contract.

4.3 Divorce Settlement Agreements³⁴⁶

Spouses have the right to decide on how to divide their joint estate upon divorce. They can draft a settlement agreement and present the same before court for enforcement together with the decree of divorce.³⁴⁷

According to section 7(1) of the Divorce Act³⁴⁸, settlement agreements are required to be in written form. From the aforementioned, the issue of enforceability of oral settlement agreements arises and spouses who fall victim to this have to lower their oral agreements into writing form agreements in order to make them enforceable by the courts.

At the time a settlement agreement is attached to a decree for divorce, then any changes to the settlement agreement must be sanctioned by court³⁴⁹.

A settlement agreement may be composed of any terms provided that the terms are just, legal, or not prejudicial to good morals. This may entail the way in which property is to be shared, child maintenance and custody sharing agreements, and liquidator/receiver appointment to divide estate that is owned jointly.

³⁴⁶ This can also be referred to as deed of settlement or consent papers.

³⁴⁷ (Divorce Act. Section 7.)

³⁴⁸ (Divorce Act.)

³⁴⁹ (Kruger v Kruger, 2007)

4.4 The Use of Marital agreements in England

England is one of the case studies in the chapter since the country's common law system followed in Kenya has its origin in Great Britain.³⁵⁰ To the present day, England's jurisprudence remains influential in Kenya.³⁵¹

England makes use of the separate property regime.³⁵² In case of a divorce, the spouses according the England courts have the right to petition for ancillary relief.³⁵³ However, the law has failed in providing a specific approach to which the ancillary relief is to be granted, rather it provides the court with an open interpretation of how the ancillary relief can be granted by making specific considerations prior to making the judgement.³⁵⁴ The considerations are: the spouses standard of living during the marriage, contributions by the spouses in the purchase of property, the parties conduct, physical and mental disabilities, and the children born in the family.³⁵⁵

The discretion to acknowledge a private marital contract was not recognized in the 1973 Matrimonial Causes Act. At the time, the courts were opposed to marital property agreements with the majority of the courts declining to uphold the contractual validity of the marital property agreements signed by couples.³⁵⁶ The justification for the opposition was that the agreements that were made anticipating divorce or separation violated the public good thus void ab initio.³⁵⁷ Additionally, the fact that a couple had

³⁵⁰ Daniels, R. J., Trebilcock, M. J., & Carson, L. D. (2011). The Legacy of Empire: The common law inheritance and commitments to legality in former British colonies. *The American Journal of Comparative Law*, 59(1), 111-178.

³⁵¹ Supra n 345

³⁵² Lowe N and Douglas G, Bromely's Family Law, 10 ed, Oxford University Press, Oxford, 2007, 106.

³⁵³ (Matrimonial Causes Act, Section 23)

³⁵⁴ (Matrimonial Causes Act, Section 25)

³⁵⁵ Supra n 349

³⁵⁶ Fairbairn R, (2017). 'Pre-Nuptial Agreements', http://www.onepaper.co.uk/wp-content/uploads/2014/01/N11_Pre-nuptialAgreements.pdf.

³⁵⁷ Sanders, A. (2010). Private autonomy and marital property agreements. *International and Comparative Law Quarterly*, 571-603.

knowledge of the property they would claim following a divorce/separation was perceived to be an incentive for divorce.³⁵⁸

In the past, wives had a strict duty to cohabit with their husbands.³⁵⁹ This right was perceived to be a threat to the marital agreement that was signed in anticipation of divorce or a separation. Over the years, the position has changed and today, a decision to divorce is not a unilateral decision that is made by the husband only, rather both wife and husband must agree to the divorce.³⁶⁰ Additionally, the wife is not strictly required to cohabit with the husband.³⁶¹

4.5 Separation Agreements in England

The matrimonial property agreements were opposed by the courts since they purported to take away the jurisdiction of the court over granting judgement on ancillary relief.³⁶² This may have been as a result of the fact that separation agreements may be unjust and therefore oppress the economically inferior spouse.³⁶³ In case an unjust agreement was signed, the inferior spouse would have no way out in court and would be at the mercy of his/her spouse.³⁶⁴ In *Hyman v Hyman*,³⁶⁵ it was held by the court that the contract that took away the court's jurisdiction to grant ancillary relief was void since it violated the interests of the public.³⁶⁶ The spouses had signed a separation agreement that explained the approach that was to be used to divide the matrimonial property and the

³⁵⁸ Bridge, S. (2001). Marriage and divorce: the regulation of intimacy. *Family Law: Issues, Debates and Policy*.

³⁵⁹ Brabcová, A. (2012). *Marriage in Seventeenth-Century England: The Woman's Story*. University of West Bohemia, Plzeň

³⁶⁰ Cooke, E., & Clarke, S. (2014). The Law Commission's Report on Matrimonial Property, Needs and Agreements. *Fam. LQ*, 48, 359.

³⁶¹ Supra n 355

³⁶² Cooke, E. (2012). Matrimonial property, needs and agreements: the Law Commission's extended project. *Journal of Social Welfare and Family Law*, 34(4), 509-513.

³⁶³ Buckley, L. A. (2011). Ante-nuptial Agreements and "Proper Provision": An Irish Response to *Radmacher v Granatino*. *Irish Journal Of Family Law*.

³⁶⁴ Supra n 358

³⁶⁵ (*Hyman v Hyman*, 1926)

³⁶⁶ Supra n 360

amount of money the wife was supposed to receive for her maintenance. Another provision of the agreement was that the wife was not allowed to contest the terms provided by the agreement with regards to maintenance following the divorce.

As the concept of divorce became more popular and became accepted within the English society, so did the position held by the courts on matrimonial agreements.³⁶⁷ The English courts started to consider matrimonial property agreements as a discretion in granting ancillary relief and granting spouses with equitable interests.³⁶⁸ In the case of *Edgar v Edgar*, the court of appeal provided some principles to direct the courts in enforcing the separation agreement.³⁶⁹ The principles were referred to as the Edgar principles and they included: the agreements need to be fairly and properly agreed at with competent advice. The agreements would be implemented if they met the requirements, however they would not be implemented if there was an existence of substantial and good reason not to uphold the contract.

4.6 Antenuptial and Postnuptial agreements in England

This section will use some decided case law to discuss antenuptial and postnuptial agreements. In the case of *S v S* the judge held that under the Matrimonial Causes Act, section 25 gave the courts the discretion to recognize contracts that were entered into freely and with proper legal advice and guidance.³⁷⁰ The court raised concern over the strict application and use of such agreements since some may be unfair, or unjust to one of the spouses.³⁷¹

³⁶⁷ Rose, R. T. (2012). Asset Protection Through the Use of Premarital Agreements.

³⁶⁸ Supra n 362

³⁶⁹ (*Edgar v Edgar*, 1980)

³⁷⁰ (*S v S*, 1997)

³⁷¹ Supra n 365

In the case of *K v K*, the husband was experiencing pressure to marry the wife who was expectant and he agreed to the marriage under a prenuptial agreement that prohibited the wife from making any capital claim in the event of a divorce.³⁷² Upon divorce the wife claimed for more than was provided by the agreement. The judgement by the court stated that the following questions ought to be asked in determining whether the parties involved were bound by the prenuptial agreement.

- i. Did both parties have a clear understanding of the agreement?
- ii. Did the parties receive proper and effective advise in relation to the agreement terms?
- iii. Was any of the parties pressured to sign the agreement?
- iv. Was complete disclosure adhered to?
- v. Was the signing of the agreement voluntary?
- vi. Did the husband hold a dominant position during the signing of the agreement either financially or otherwise?
- vii. Did the agreement provide knowledge that a child would be in the marriage?
- viii. Has any uncertain circumstance been raised since the signing of the agreement that would make holding the parties to it unjust and unfair?
- ix. Does the agreement rule out an order for periodical payments for the wife?
- x. Are there any supporting grounds to conclude that it would be unjust to hold the parties to the agreement?
- xi. Is the agreement a circumstance for the consideration of the case?

In the case, the court held that the wife had a clear understanding that the signing of the agreement was not conducted under any pressure and that there were no uncertain

³⁷² (*K v K*, 2003)

situations that would make it unjust to hold the parties to the agreement in line with capital provision. Regardless, the judge also held that the wife was entitled to ongoing payment of maintenance so as to enable her to raise their child.

In the case of *Macleod v Macleod* the Privy Council distinguished between pre and postnuptial agreements.³⁷³ The case facts were that Mr. Macleod and the wife signed pre and post nuptial agreements. The antenuptial agreements provided that Mrs. Macleod would receive a lower amount than the postnuptial agreement. The wife petitioned the agreement with the claim of a higher maintenance amount than the amount guaranteed by the postnuptial agreement. Both the High Court and the Court of Appeal allowed the petition. The husband also appealed to the Privy Council. The council held the following:

“The board believes that it is not their mandate to reverse a long-standing rule that ante-nuptial agreement violate public policy and therefore not binding or valid in court. A difference in practice and principle exists between an agreement that provides for current state of affairs that has been established between the spouses and an agreement that is developed prior to the spouses making a marriage commitment that may govern the uncertainties to come and be upheld in the future.”

The statement identified that postnuptial agreements provide a clearer standing in court since they reflect the marriage status as compared to ante-nuptial agreements that may be impractical in the context within marriage.³⁷⁴

The case of *Radmacher v Granatino*³⁷⁵ explained the position held by the courts in regards to ante-nuptial agreements. In the mentioned case, the wife held a superior position economically as compared to the husband. To secure the wealth of the wife, her family ensured that an ante-nuptial agreement was signed prior to the marriage so

³⁷³ (*Macleod v Macleod*, 2008)

³⁷⁴ *Supra* n 368

³⁷⁵ (*Radmacher v Granatino*, 2010)

that the husband would not be in a position to claim her individual wealth in the event of a divorce. The ante-nuptial agreement was signed in the presence of a German notary and was written in German under the German law. The couple was situated in London and during their marriage they had two children. In 2008, when the marriage ended, the husband applied a petition to the high court for ancillary relief. The court agreed to his terms and granted that he be paid over £5.5 million which would amount to £100,000 annual income and allow him to purchase a house in London where the children were allowed to visit. The judge considered the ante-nuptial agreement, but lowered the weight of the contract as a result of the circumstances that led to its signing. On appeal by the wife, the court of appeal overruled the judgement by the high court explaining the high court ought to have considered the contract terms and made provisions that cater for the children. Later, the husband appealed to the Supreme Court and the courts held that the perception that ante-nuptial agreements are prejudicial ought to be disregarded. In addition, the Supreme court reversed the ruling in the Macleod case and explained that an essential difference exists between pre and post nuptial agreements.³⁷⁶ The court held that a similar status ought to be provided for both agreements since there is no difference if the agreement is signed prior or after the marriage. In addition, the supreme court explained that factors that may lead to an ante-nuptial agreement voidable include misrepresentation, fraud and signing a contract under duress. Also, the court noted that as long as both parties voluntarily sign an ante-nuptial agreement and that the intention of the contract being upheld, then the courts would uphold the parties' intention. The Supreme Court however stated that the agreement ought not to violate the spouses right to petition for ancillary relief particularly if the agreement did not

³⁷⁶ Supra n 7

consider the children born by the spouses.³⁷⁷ Presently, in England, the law acknowledges three categories of matrimonial property contracts. The concept that the agreements are prejudicial to the public good has been disregarded and the spouses are free to use matrimonial property agreements provided that they are not unjust to any of the spouses and fail to oust the jurisdiction of the court to provide ancillary relief.

4.7 The comparison between the Kenyan and South African systems

The two systems acknowledge the individual property of married spouses.³⁷⁸ The out of community property system without accrual is the same as the separate property ownership in Kenya since each of the spouses is allowed to maintain their individual estates upon the start of a marriage.³⁷⁹ This is attained through the matrimonial property contract.³⁸⁰ Hence, the individual spouses have the responsibility to their own liabilities and debts.³⁸¹

In both jurisdictions, matrimonial property agreements have to be in written form and must be signed and the signatures attested.³⁸² This ensures that the matrimonial agreements become binding.

The courts in both jurisdictions have authority to set aside matrimonial agreements if it is determined that the agreements were concluded as a result of fraud, misrepresentation or force³⁸³ with a view of protecting the vulnerable parties.

³⁷⁷ Supra n 11

³⁷⁸ Section 13 of the Kenyan Matrimonial Property Act provides a comprehensive description of the constituents of separate spousal property while section 2 of the Matrimonial property Act of South Africa describes indivisual property by spouses.

³⁷⁹ Section 93 of the Kenyan Land Registration Act provides for the joint ownership of matrimonial property. However, this is only effective once the marriage has started.

³⁸⁰ (Matrimonial Property Act. Section 6(3).), (Divorce Act. Section 7.)

³⁸¹ (Matrimonial Property Act. Section 10(1).), (Matrimonial Property Act. Section 19.)

³⁸² (Deeds Registration Act. Section 87.), (Law of Contracts Act.)

³⁸³ (Matrimonial Property Act. Section 6(4).); (EAL v ECE, 2015)

The parties, in both jurisdictions are also required to attach the spouse's matrimonial agreements to divorce petitions and, in the event, that a divorce is issued the court hence implement the court orders and enforce the agreements.

The distinction of the two jurisdictions is that for the South African antenuptial agreements to be enforceable according to the law, the agreement ought to be registered with the registrar of deeds.³⁸⁴ This is not a requirement in Kenya.

Antenuptial agreements protect spouses by allowing them to maintain their individual properties within a marriage. They can be used by the spouses who intend to enter into subsequent marriages after divorcing their previous partners so as to ensure the interests of their children from the former marriages are protected from the consequence of remarriage on property. In Kenya prenuptial agreements can be used in cases where the spouses come from wealthy/affluent backgrounds with a view of protecting their individual property particularly since it is supported by Article 45(3) of the Constitution.

It is noteworthy to point out that ante nuptial agreements are not practical for parties who possess no property before the marriage. This category of parties only need a postnuptial agreement so as to divide their property purchased within the marriage.

Antenuptial agreements do not cover all the property that the spouses can acquire within the marriage.

Ante nuptial agreements depend on the parties' full disclosure,³⁸⁵ this develops a gap that a spouse may use to manipulate and keep part of their property a secret from their

³⁸⁴ Supra n 21

³⁸⁵ Leech, S. (2000). With All My Wordly Goods I Thee Endow-The Status of Pre-Nuptial Agreements in England and Wales. *Fam. LQ*, 34, 193.

partners. Also, during the making of an ante nuptial agreement a party may be caught up in the excitement of being married and it may influence their judgement and their rationality to conclude the prenuptial agreement.

4.8 The Differences between the Kenyan and South African systems

The difference between the two jurisdictions is that in South Africa, the ante-nuptial agreement must be registered by the registrar of deeds.³⁸⁶ This is not a requirement in Kenya.

In South Africa, the matrimonial property law does not offer a description of the constituents of matrimonial property. However, the Act offers a description of joint estate as when both husband and wife own property among other properties together.³⁸⁷

In addition, the Act notes that separate property is the individual property owned by either the husband or wife alone within the marriage.³⁸⁸ The Act also does not define ante nuptial agreements or what it should contain.

The Kenyan MPA does not acknowledge the settlement or postnuptial agreements. This omission hinders in attaining equality between the spouses³⁸⁹ because these prenuptial agreements may be unfairly used to prevent one spouse from acquiring interest in matrimonial property.³⁹⁰

4.9 The comparison between the Kenyan and England system

Both jurisdictions acknowledge separate matrimonial property. Although, Kenya borrows from the laws of England, the jurisprudence in Kenya in relation to

³⁸⁶ (Ex parte Spinazze and Another ,1985)

³⁸⁷ (Matrimonial Property Act. Schedule 1)

³⁸⁸ (Matrimonial Property Act. Section 2)

³⁸⁹ (Constitution Kenya. art. 45(3).)

³⁹⁰ Carter, E. R. (2019). Are Premarital Agreements Really Unfair?: An Empirical Study. *Hofstra L. Rev.*, 48, 387.

matrimonial property agreements is not as harsh as the approach taken by the English courts. Kenya has been faced with the dilemma relating to matrimonial property division.³⁹¹ The biggest dilemma facing the English courts with regards to matrimonial property division is ensuring that marriage is secured as a social institution.³⁹² Therefore, a question that ought to be asked in the Kenyan case is the identification of which matrimonial property agreement types best encourage equality and fairness between the spouses.

As explained above, prenuptial agreements are only useful for spouses who possess property before marriage.³⁹³ However, few Kenyans are privileged to own property prior to marriage. In addition, if an economically superior party enters into a marriage with an economically inferior party, the prenuptial agreement may be unfair as it may be used to prevent and derail a partner from claiming the other partner's wealth even if one had made considerable contribution. In Kenya, a prenuptial agreement may be used to prevent the wife from equal ownership of matrimonial property if the husband is economically superior to the wife.³⁹⁴ Granted the history of Kenya, in relation to discrimination against the female gender in matrimonial property division following a divorce, settlement and postnuptial agreements are better fitted for use in Kenya to protect the rights of the spouse who is economically inferior in the marriage.

A query that is raised about the matrimonial property agreement use, is how the agreements help in distributing property that is jointly owned by spouses. Both the English and Kenyan courts have acknowledged that dividing property owned jointly

³⁹¹ Murungi N.L, 'Consolidating Family Law in Kenya,'319.

³⁹² Sanders A 'Private Autonomy and Marital Property Agreements' 571.

³⁹³ Mweresa E.S 'Prenuptial Agreements Blessing or Curse?' <http://salclaw.co.ke/prenuptial-agreements-blessing-orcurse/> on 14 January 2017.

³⁹⁴ Institute of Economic Affairs-Kenya, Profile of Women's Socio- Economic Status in Kenya, 2008, 18.

can be done equally or with respect to the contribution of each spouse; relying on the case facts. Settlement and postnuptial agreements can be used to indicate the share of spouses to property owned jointly, either on the grounds of each spouses' contribution or on a 50/50 basis.

The courts aim in enforcing the agreements is a good practice that the courts in Kenya can emulate from the courts in England. The aim of courts is to interpret ordinary agreements/contracts without creating obligations or intentions that is not revealed in the terms of the contract signed by the spouses.³⁹⁵ Matrimonial property agreements, however, are sensitive as compared to other types of contracts.³⁹⁶ This is as a result of the critical position the society holds marriage. The state has the mandate to protect marriage as an institution and the parties affected.³⁹⁷ In other terms pre and postnuptial agreements can be enforced to the letter, however, they may be prejudicial to fairness and justice.³⁹⁸

The court's intervention is essential since a spouse who is oppressed or dissatisfied by the matrimonial contract terms can have a recourse in a court.³⁹⁹ This is because, although the English courts have acknowledged the three categories of matrimonial property agreement, they can still nullify all provisions in the agreements that hinder spouses from applying petitions to the courts for higher property share or alimony that may not have been covered by the matrimonial agreement. The spouses' right to petition a court for property claim or alimony need to be protected by the matrimonial agreement system in Kenya.

³⁹⁵ Smith S.A, Atiyah's Introduction to the Law of Contract, 6th ed, Clarendon Press, Oxford, 2006,147

³⁹⁶ Supra n 390

³⁹⁷ (Constitution of Kenya, Art. 45(1)).

³⁹⁸ (S v S, 1997)

³⁹⁹ (Hyman v Hyman, 1929)

4.10 Challenges of ante nuptial agreements

It is noteworthy to point out that ante nuptial agreements are not practical for spouses who possess no property before marriage. This category of parties has better chances signing postnuptial agreements to guide how they will divide the property obtained within the marriage.

Another challenge is that ante-nuptial agreements do not cover all the property that may be acquired within the marriage by the spouses.

The challenge with safeguarding the rights of spouses who opt for private ordering arrangements to govern their marriage is that despite the existence of legislation providing for matrimonial agreements no extra efforts have been put to effectively provide the same. There hardly seems to be processes, resources, systems, procedures, structures and reports with respect to the implementation.

4.11 Lessons that can be borrowed From South Africa And England

The courts in South Africa acknowledge how important post-nuptial agreements are and how they ensure the parties are free to make such decisions rather than subjecting property division to the dictates of the court. The court system in Kenya can learn from the South African court system as it works to reduce the courts workload in regard to cases on the division of matrimonial property. These agreements can help in attaining Article 159(2)⁴⁰⁰ which requires the judiciary to provide other alternate forms in resolving disputes.

⁴⁰⁰(Constitution of Kenya.)

4.12 Conclusion

Chapter four has tackled the comparative study of legislation on matrimonial property agreements in South Africa and England and done a comparison of the jurisprudence to Kenyan law on matrimonial property agreement. The chapter has pointed out the role that the courts play in regards to enforcing matrimonial property rights between disputing spouses with a view of ensuring that fairness prevails during determination of property rights. From the discussion in chapter two it was found out that the Kenyan legislation only recognizes the use of premarital agreements and it can therefore be concluded that Kenyan jurisprudence on matrimonial property rights is not developed and cannot be compared to the South African and England jurisprudence. It is important to point out that prenuptial agreements alone do not have the ability to attain gender equality as provided by Article 45(3) of the Kenyan constitution. Provision of settlements and postnuptial agreements gives a spouse a better opportunity to negotiate for equitable and fair matrimonial property division.

CHAPTER FIVE

FINDINGS CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This thesis has analyzed Kenya's legal position regarding privately ordered agreements in the matrimonial property regime. Inclusive of this analysis is a detailed discussion on the conventions and protocols that protect matrimonial property agreements. The thesis further sought to carry out a comparative study of South Africa's legislation on matrimonial property agreements with a view of finding out how they have implemented their laws and the lessons that Kenya could learn to improve on the progressive implementation of privately ordered arrangements. Chapter five will discuss the conclusions and recommendations. In particular, the chapter will conclude by highlighting whether or not the study objectives were met, whether the statement problem of the study was resolved and whether the stated hypotheses in chapter one has been proved or disproved.

5.1 Summary of Previous Chapters

The first chapter introduced the concept of marriage and highlighted the mind state of most spouses at the inception of marriage. The chapter further pointed out the need of having legal backup to protect a spouse's interest to matrimonial property by invoking the use of matrimonial property agreements. The remaining bit of the chapter discussed the theoretical framework, literature review, problem statement, the research questions and objectives, hypothesis, limitations of the study and the relevance of the study.

The second chapter discussed the Kenyan legislative framework and focused on the historical background, the current legislative framework governing prenuptial agreements in Kenya. The chapter also discussed the state's obligation towards governance of matrimonial property and the emerging human rights issues brought out

by use of prenuptial agreements. Chapter two concluded by discussing justifications of why prenuptial agreements are important and the misconceptions people have about prenuptial agreements.

Chapter three discussed the use of matrimonial property agreements in South Africa. The focus in the chapter was on the categories of South Africa's matrimonial property regimes and the contents of ante nuptial and settlement agreements.

Chapter four will discuss the lessons learnt from South African jurisprudence on matrimonial property agreements and make a comparison and contrast between the Kenyan and South African jurisprudence. This will be done with a view of borrowing best practices from South Africa as it has extensive jurisprudence in the area of marital property agreements.

5.2 The Findings

i. The status of matrimonial property agreements in Kenya

It has been established that the Matrimonial Property Act 2013 provides spouses the right to opt for premarital agreements in section 6(3). The section provides that

Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

The MPA has however not made provision for postnuptial and or settlement agreements. This omission has not barred the courts in upholding postnuptial agreements made by spouses to determine property rights in the event of divorce.

ii. The rights of spouses in regards to matrimonial property

This subject was discussed in chapter two. The chapter highlighted the legal provisions governing the rights of spouses and specifically discussed Article 45(3) of the Kenyan Constitution and Section 4 of the MPA 2013. They provide inter alia that

A couple in a marriage have an entitlement of equal rights from the commencement, during and after the marriage as stipulated by the Constitution (2010)

and

Despite ant other existing law, a married woman has similar rights to the man in acquiring, administering, holding, controlling, using and disposing property whether it can be moved or not moved; sign a contract and sue and be sued in her name (MPA, 2013)

In addition to the above the MPA supports that matrimonial property ownership is on the basis of contribution of the spouses and it can be in the form of monetary or non-monetary. The Kenyan courts have not given consistent rulings on how contribution can be determined. Today, courts have issued different judgements on spousal rights status to matrimonial property with the court of appeal favoring the 50/50 property ownership while the High Court favours ruling on the grounds of individual spouses' contribution. The courts are still to offer directions on how matrimonial property ought to be divided.

iii. Enforcement of matrimonial property agreements

Chapter two has established that the Kenyan courts have an essential role to play in enforcing MPA(s). This is because spouses who opt to use matrimonial property

agreements need legal backing to protect their interests. The courts can do this by varying the terms of agreement by granting spouses a higher matrimonial property interest than has been granted for any MPA. They may set aside the agreement if it was concluded to be coerced or fraudulent.

5.3 Recommendations

a) Recognition of Postnuptial and Settlement Agreements by Law

More to recognizing pre-nuptial agreements, the law ought to provide recognition to settlement and post-nuptial agreements to eliminate ambiguity on the agreements validity and to improve spouse's equality.

b) Guidelines on enforcing Matrimonial Agreements

The MPA has not made provision on how matrimonial property agreements are to be drafted and enforced. In my opinion, issuance of direction and guidelines on the way courts ought to enforce MPA in varying situations would enable parties to design the agreements clearly on the grounds of the guideline to enhance the agreements efficiency.

Most jurisdictions which practice private ordering in family law have laid down regulations which guide them in enforcement of matrimonial property agreements. In *Edgar vs Edgar*⁴⁰¹ the English courts gave certain provisions that were to be followed to direct the courts to enforce separation agreements. These are the Edgar principles that provide that the agreement needs to be justly arrived at under a consultation of competent advice.

⁴⁰¹ (*Edgar v Edgar*)

In *K v K*⁴⁰² the English court developed a checklist of questions that would guide when assessing the binding nature of premarital agreements as follows

- i. Did both parties have a clear understanding of the agreement?
- ii. Did the parties receive proper and effective advice in relation to the agreement terms?
- iii. Was any of the parties pressured to sign the agreement?
- iv. Was complete disclosure adhered to?
- v. Was the signing of the agreement voluntary?
- vi. Did the husband hold a dominant position during the signing of the agreement either financially or otherwise?
- vii. Did the agreement provide knowledge that a child would be in the marriage?
- viii. Have any uncertain circumstances been raised since the signing of the agreement that would make holding the parties to it unjust and unfair?
- ix. Does the agreement rule out an order for periodical payments for the wife?
- x. Are there any support to conclude that it would be injustice to hold the parties to the agreement?
- xi. Is the agreement a circumstance for the consideration of the case?

The Kenyan courts could borrow from such best practices as they would be useful in implementing matrimonial property agreements

⁴⁰² (*K v K*)

c) Enforcement of further legislation to support the MPA

There is need for implementation of further legislation in the Matrimonial Property Act No. 49 of 2013 to supplement section 6(3) and (4). These would act as minimum standards. The annexure may read like this:

Maintenance Agreements

- i. Subject to subsection 6(3) and (4) spouses or two people in contemplation of their marriage may for the purpose of facilitating the settlement of their support rights and obligations make such orders as they deem fit.*
- ii. For purposes of this part, a maintenance agreement means:

 - a) An agreement that makes provision for support rights and obligations of the parties with respect to themselves or any child that either party has parental responsibility obligations as provided for in the Children's Act; and*
 - b) Includes provisions in respect of financial matters, direction of education and moral training of their children and any other matter in the settlement of support obligations of the parties and may include further agreements that may vary the earlier maintenance agreements**
- iii. Parties to maintenance agreements shall obtain independent legal advice and the legal advisor shall certify that the implications of the agreements have been explained to the person obtaining the advice*
- iv. All agreements shall be in writing and shall be signed by both parties and shall be witnessed by an advocate*
- v. A maintenance agreement shall be unenforceable if

 - a) There is non-compliance to provision iii and iv or*
 - b) The court is satisfied that it would be unjust to give effect to the agreement**
- vi. The court shall have jurisdiction to enquire into agreements made under provision and may in any proceedings under this Act or on application made for the purpose, declare an agreement to have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance mentioned has not materially prejudiced the interests of a party to the agreement*
- vii. In evaluating whether an agreement is unjust, regard will be given to

 - a) The provisions of the agreement*
 - b) The time that has elapsed since the agreement was made**

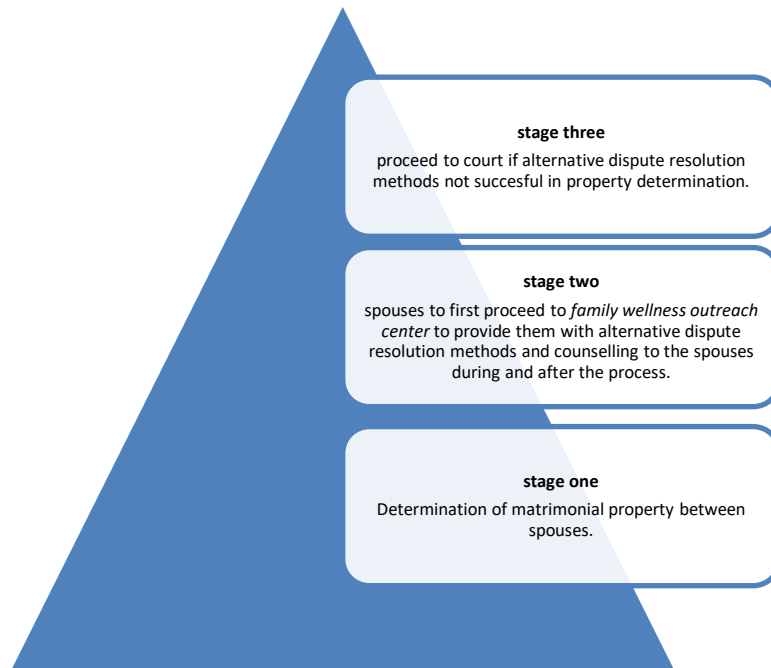
- c) *If, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable*
- d) *Whether any changes in circumstances since the agreement was made render the agreement unfair or unreasonable*
- e) *Any other matter that is considered relevant to any proceedings*
- viii. *Nothing in this annexure shall limit or affect the capacity of spouses to agree to acquire or hold any property jointly or in common (whether or not with any other person) and whether legally or beneficially*
- ix. *Upon the death of a party to an agreement a maintenance agreement will cease to be in force unless the agreement otherwise provides*
- x. *Where in relation to a maintenance agreement the court is satisfied that the arrangements in respect of a child that either party has an obligation to maintain a child under provision vii are*
 - a) *Not proper; or*
 - b) *No longer adequate; the court may make such order as it deems fit to secure the proper support of the child*
- xi. *Any maintenance agreement that is intended to defeat any creditor of either party to the agreement shall be void.*

d) Introduction of administrative mechanisms

There is need for the introduction of administrative mechanisms to supplement the judicial processes of resolving matrimonial property disputes that arise as a result of use of private ordered agreements.

If adopted, it would be a requirement that before a dispute is referred to court, the disputants should first seek assistance from other offices at lower levels to help them. This would ensure that disputes are solved using the concept of subsidiarity which is a principle of social organization and is largely associated to decentralization. Basically it holds that social problems should be dealt with at the most local level that can offer a solution. The adoption of administrative mechanisms in the form of alternative dispute

resolution methods would ensure efficiency, affordability and privacy. The following diagram would perhaps present a pattern to be followed;



Pyramid diagram showing channels to be followed when dividing matrimonial assets.

Source: Author 2019

In this scenario spouses are required to first visit the Family wellness center for the determination of their property rights. The spouses would be then required to attend three compulsory meetings which would be responsible for helping them value and distribute property. They would then be issued with a certificate of participation. In the event that that they are not successful they would then proceed to court and would be required to present the certificate as evidence of their participation in the program in order to get audience in court.

e) State Reporting

Kenya rarely submits reports to the various regional and international instruments it has ratified and acceded to. So far, no state report has been submitted to the Maputo Protocol in regards to section 6 of the privately agreed arrangements in family law.

There is a need to submit periodic reports to the various committees of both regional and international human rights instruments because it will help in monitoring steps taken to implementing section 6 of the MPA 2013 and to identify areas of difficulty in implementation of the same. Reporting will also help in planning and strategizing on the appropriate legal and policy measures it needs to promote usability of privately ordered arrangements in family law.

f) Promotion of public awareness programs

In regard to civic education there is need for continuous public awareness programs that will be responsible for educating people on the provisions on section 6 of MPA.

5.4 Conclusion

The statement of the problem of the study was that the law only recognizes prenuptial agreements. This leads to injustice and inequality in dividing matrimonial property following a divorce or separation. The scenario that is most ideal would be recognizing the three types of MPAs to ensure efficiency when dividing the matrimonial property. This is because it has been acknowledged that postnuptial agreements aid in the efficient and just determination and division of matrimonial property and Kenya should make steps to ensure that the same are provided for in law.

The objectives that were set out in the thesis were three and they have been achieved as follows:

4. To understand the viability of using marital property agreements in dividing matrimonial property. This study found that despite the existence of legislation providing for use of prenuptial agreements, a very few percentage of spouses in Kenya opt to use them.
5. To find out whether matrimonial property agreements promote fairness, efficiency and effectiveness in property division. This research has established that matrimonial property agreements promote fairness, efficiency and effectiveness only if they are drafted and implemented using proper legal guidance. The research also established that use of prenuptial and postnuptial agreements are a viable method of dividing property and the courts have held such agreements to be binding whenever there is mutual consent of both spouses to such agreements.
6. To draw best practice on use of marital agreements from other jurisdictions. This research carried out a comparative study of the South African jurisprudence and came up with lessons and recommendations that Kenya can borrow.

The hypothesis of this research was that matrimonial property agreements are practical in regards of dividing matrimonial property and that they help the courts in distributing matrimonial property justly. The study tested the hypothesis and revealed that MPA can be used as practical tools in dividing matrimonial property.

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