

Dividing Matrimonial Property on Divorce: Colonialism, Chauvinism and Modernism in Kenya

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Family lawyers in England and Wales wrestling intellectually and practically with the concepts – or even elevated ‘principles’ – of need, compensation, contributions and sharing often think they have a rough deal. I did so too within those daily struggles but it is all too easy to forget that the converse benefit of legal uncertainty is often flexibility; and that it is invariably the flexibility inherent in the rules governing the division of matrimonial property that assist us in achieving a degree of fairness in the outcome for our clients.

Lawyers in England and Wales privately and sometimes publicly lobby for reform or even abandonment of the heel-worn s 25(2) factors (I do neither in this article): they are 37 years out of date after all. In Kenya, the lawyers, judges and clients rely on the colonial principles of a law some 91 years senior to our equally exalted and maligned 1973 Act, the Married Women's Property Act of 1882 (MWPA). This article seeks to:

- (1) inform the reader of the MWPA's terms as they apply in Kenya;
- (2) examine the efforts underway to extricate Kenya's matrimonial laws from this legislative vice of colonial chauvinism;
- (3) discuss the current and proposed matrimonial property laws in the wider contexts of gender-equality and non-discrimination in Kenya; and
- (4) provide brief comparisons with, and perhaps lessons for, our own jurisdictional system.

The MWPA

In Kenya, polygamy remains lawful and relatively popular where – in this country of significant ethnic, tribal and religious diversity – marriage can be through custom or state registration. The country boasts 42 state-recognised tribal groupings, increasing to 70 or more if the position of Minority Rights Group International is adopted. The MWPA applies universally to the distribution of property upon divorce in all types of marriages within Kenya. It is an antiquated Act, ill-equipped in every way to deal with the realities of the lives of Kenyan women or to protect their basic human and economic rights.

Separate property acquired before or during the marriage is open to an express claim. However, a woman's claim to matrimonial property, whatever is her or her family's need, has extremely limited legal basis and absolutely no statutory guidance:

‘In any question between husband and wife as to the title to, or possession of property, either party . . . may apply by summons . . . to any judge of the High Court of Justice . . . and the judge of the High Court of Justice . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit ...’ (redacted, para 17, MWPA 1882).

FIDA-Kenya, the Federation of Women Lawyers in Kenya, argues that the current law is applied inconsistently by judges, who have no legislative parameters within which to assess critical issues such as the contributions, needs and resources of separating couples.

The economic disempowerment for women is further compounded by the traditional registration of property in the sole name of the husband. FIDA Kenya's research has highlighted the frustration amongst the judiciary in Kenya at being wedded to the MWPA's restrictive and archaic provisions, particularly regarding the legislation's silence as to the status of non-monetary contributions to matrimonial property. This omission betrays the reality of life for many Kenyan women, particularly those who are most vulnerable to economic exploitation. By way of example, the Honourable Lady Justice Joyce Aluoch reported to FIDA that ‘very few African women . . . will make financial contributions [to matrimonial property], very few. We should always be talking about the woman in the rural area; where would she get the money to contribute to the property? Her money goes to feed the children. That is her contribution.’ (Interview conducted by FIDA in Nairobi, Kenya, 4 April 2008).

Pressure to modernise and efforts to reform

The pressure on Kenya to reform – internally and externally – has been impressive and multi-faceted. Internationally, Kenya has obligations under the terms of a number of conventions to which she is a signatory. In particular, Art 10 of the International Convention on Economic, Social and Cultural Rights (ICESCR) expresses Kenya's recognition that ‘the widest possible protection and assistance should be accorded to the family . . . particularly for its establishment and while it is responsible for the care and education of dependent children.’ Furthermore, pursuant to the 1979 Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) Kenya has agreed to establish legal

protection of the rights of women on an equal basis to men and, importantly, to eliminate all discrimination against women to ensure they have 'the same rights and responsibilities as men regarding the ownership, management and enjoyment of property' (Art 16).

Regionally, the African Charter reaffirms the need to achieve equality for separating spouses, requiring states to ensure the elimination of all types of discrimination against women and also to ensure the protection of the rights of women as stipulated in international conventions and declarations (Art 18(3)). Finally, sister countries in Africa have made progressive legislative reforms in the area of matrimonial property, including Ethiopia and South Africa where, for example, a presumption of equal entitlement to matrimonial property on divorce is directed by statute. Ethiopia's Family Code reads that 'common property shall be divided equally between the [parties]' and the presumption is that 'all property shall be deemed to be common property even if registered in the sole name of one of the spouses' (Art 90).

Conventions, lofty international aspirations and comparative regional developments are all well and good. However, real pressure to reform the MWPA in Kenya has been exerted nationally through international shadow-reporting techniques and governmental lobbying undertaken, for example, by non-governmental organisations (NGOs) such as FIDA-Kenya. Shadow reports provide the ICESCR and CEDAW committees with objective, non-governmental assessments of Kenya's [non]-compliance with her international obligations. National lobbying has resulted in the drafting of the Matrimonial Property Bill 2007 ('the Bill'), arguably a revolutionary piece of legislation that seeks to repeal the MWPA's application in its entirety.

The Bill addresses a number of the critical inequalities and inadequacies inherent in the MWPA but, despite the urgency, it has stalled and failed to reach the statute books. Nevertheless, the petitioning for its enactment (and for that of the corresponding Marriage Bill 2007) continues unabated. In FIDA-Kenya's most recent shadow report to the ICESCR Committee, she called for the Bill's immediate enactment. The report argues that the MWPA is 'a woefully inadequate remnant of British colonial rule' and is discriminatory in its application and severely limited in its scope 'as it neither defines matrimonial property nor provides guidance about the equitable division of such property' (FIDA-Kenya, 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights', report to ICESCR Committee, 3 October 2008). The Bill, despite remaining dormant on the legislators' shelves, is regularly in the news. At the start of 2010, the 'revolution in marital property' was reported in *The Standard* national newspaper with 'a new dawn' awaiting ownership and distribution of property in

marriage if – but the majority hope, when – the Bill receives assent (H Ayodo, *The Standard*, 14 January 2010, at p 8).

Finally, a discussion about the modernisation of laws in Kenya cannot ignore the currently-debated proposed constitution. This document, albeit a focus for personal political power struggles in Nairobi, will – if approved by the Kenyan people later in 2010 – enshrine non-discrimination on the basis of sex and will provide a significant impetus to the growing calls for the Bill to become law. However, the energy that the new draft constitution offered to the reformists' agenda has been significantly muted by recent and lamentable decisions by the Parliamentary Select Committee to edit from the draft constitution section 42(4) of the Bill of Rights, which reads, 'Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage'.

This clause would provide an excellent platform to mount a constitutional challenge to the current inadequacies of matrimonial property law: its removal demonstrates 'moral cowardice' and significantly dilutes the strength of the proposed Bill of Rights (H Omar, Kenya National Commission on Human Rights Vice-Chair, *The Standard*, 26 January 2010, at p 24). With more than a hint of irony, the Select Committee is a male-dominated body (21 men to 5 women). The reason for the clause's removal was given as the need to restrict the length of the constitution whereas the obvious motivation is a fear of legal activism leading to proper and public-parliamentary accountability for the gender-inequities inherent in Kenya's laws and processes.

Gender-equality and non-discrimination in Kenya

Women in Kenya suffer the cultural, economic, physical and social effects of endemic discrimination in both the public and private sphere: the current dire state of matrimonial property law is merely symptomatic. The most pressing obstacle to gender equality, particularly in marriage and the family, 'remains patriarchy grounded on [a] deep-rooted culture that subordinates women to men' (N Baraza, 'Family Law Reform in Kenya: An Overview', Nairobi Gender Forum, 30 April 2009). It is impossible within the limits of this article to do justice to the countless inequalities that persist in Kenya but a few examples can be very illustrative.

In terms of basic human rights, the current constitution of Kenya (as at March 2010) expressly permits discrimination with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal or customary law, respectively (s 82(4)(b) and (c)). As can be seen, the aspects of life in which gender-discrimination is constitutionally permissible are those that impact most significantly on a Kenyan woman's economic, social and cultural standing and security. In the Kenyan government's own report to the ICESCR

Committee, it has sought to excuse legislative inaction to curb discrimination by shifting emphasis to the judicial system which, it claims, has '*been very proactive in declaring the rights of women as far as property is concerned, whether in matrimonial, succession or other suits*' (Kenyan Government Report to ICECSR Committee, 07/09/2006, para 40). That is simply a fallacy in matrimonial cases.

Traditionally, the registration of land is in the man's or the husband's sole name. Despite women providing the vast majority of agricultural labour in Kenya (89% of the subsistence farming labour force) they hold in their sole name just 1% of available registered land titles (see www.kenyalandalliance.or.ke).

On divorce, current case law offers them little or no protection regarding matrimonial property registered in the sole name of the husband. The 2007 leading Court of Appeal authority of *Echaria v Echaria* (Civil Appeal 75 of 2001 (2007) eKLR (CA) (KENYA) determined that non-financial contributions of the female spouse could not entitle her to a share of matrimonial property. This decision regrettably reversed a growing judicial acceptance of non-monetary contributions of Kenyan wives as a route to a beneficial entitlement when dividing matrimonial property (eg *Nderitu v Nderitu*, Civil Appeal 203 of 1997, unreported). The Court in *Echaria* held that previous judicial colleagues, although 'undoubtedly guided by a noble notion of justice to the wife, were ahead of the Parliament when they said that the wife's non-monetary contributions have to be taken into account and a value put on them' (*Echaria*, at p 20). Therefore, for the Kenyan wife fulfilling the traditional reproductive, productive and social roles in society – with responsibility for many children and her husband – she will often find herself entirely disentitled and without means to survive upon divorce (FIDA-Kenya, 'The Division of Matrimonial Property' policy brief, p 3). In direct reproach of the Kenyan government's suggestion that judges have proactively declared women's property rights, the court in *Echaria* expressly called upon Parliament to issue urgent reforms stating: '*there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our law reform agenda to keep the country shackled to a 125-year-old foreign legislation which the mother country found wanting more than 30 years ago.*' (*Echaria*, p 20).

Discrimination against women in Kenya is pervasive and infectious. Wives of polygynous marriages – who are often the rural poor – are forced to rely on customary rules to divide matrimonial property and are prevented by custom from inheriting land. In Kenya, approximately 16% of married women live in polygynous unions, the figures rising to 34% in certain areas of the country, for example, in the North Eastern Province (Kenya Demographic and Health Survey 2003).

Wives in polygynous unions also face numerous practical and cultural hurdles to asserting their basic rights, coupled with the fact that they are often the women in Kenya who have little or no education. First, given the lack of any official registration of a customary marriage, wives often have difficulty proving the validity of their marriage as a pre-requisite to a proprietary claim. Secondly, husbands are essentially free to use any matrimonial property acquired with the first wife to assist the procurement of a second wife, a third and so on. As a result, women who fear a complete loss of their livelihoods and families should they seek a divorce often remain with co-wives in abusive and unhappy unions. The CEDAW committee, therefore, has urged Kenya to view its cultures as dynamic rather than static and, consequently, subject to change. The committee implores Kenya to legislate to modify or eliminate discriminatory cultural practices and stereotypes and to vigorously address harmful cultural practices, such as polygamy.

Finally, women in Kenya often face considerable physical abuse, for example, through female genital mutilation or in the form of widow cleansing, a practice which can involve forced sexual relations with a woman – at any age – after the death of her husband. This often leaves women at significant exposure to HIV infection as well as obvious psychological trauma. Gender-based violence in Kenya is rife, whether this is physical, sexual or economic. Additionally, for those women whose husbands die from AIDS-related illnesses, the stigma and blame attached to the widow often forces her to leave the community in which she lives and works without any means of economic independence. It is clear to see, therefore, that the Matrimonial Property Bill 2007, albeit a small strand of a much larger web of necessary reforms, is a critical step towards the empowerment of, and equality for, women (and their children) in Kenya. The inflexibility of the MWPA and the current retrograde judicial approach to the property rights of divorcing women perpetuates their vulnerability, exclusion and abuse.

A Brief Comparative Analysis

The Matrimonial Property Bill 2007 is, by Kenyan standards, quite revolutionary. It defines contributions to a marriage as being both monetary and non-monetary (s 2); it enshrines the right of women to acquire, hold and dispose of property on equal terms to men (s 3) and it guarantees the equality of rights and responsibilities for women of polygamous relationships (s 5). Furthermore, it protects women from the arbitrary sale of matrimonial property by the husband during the subsistence of the marriage without their consent (s 12(1)). The Bill also boldly gives objective statutory expression to a number of issues that, in the changeable and subjective world of English precedent, cause daily consternation amongst lawyers in the UK. For those who advocate legislative reform in Westminster, perhaps there are some lessons that the UK parliament can draw from

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Kenya's efforts to modernise. For example, s 7 of the Bill defines 'matrimonial property' as matrimonial homes, household goods, property which provides income for the family's sustenance and any other property acquired during the subsistence of the marriage, which the spouses expressly or impliedly agree to be matrimonial property. Exhaustive definitions can dangerously impede the success of a discretionary jurisdiction but they do provide the clarity that lawyers so often crave!

The Bill also provides for the statutory recognition within marriage of the principles enunciated in *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858, to the extent that property acquired during the marriage in the sole name of one party is presumed to belong absolutely to that party: unless, of course, contributions can be shown to the acquisition or improvement of the property. Sections 14(a) and (b) provide for the opposite presumption where property is acquired in joint names. The presumption is, of course, rebuttable. One can only imagine the delight that such an amendment would bring to the face of the client in Bristol county court on a grizzly Monday morning who fails in any way to comprehend the logic of giving her what he has bought with his own money. Finally, for the purposes of informing the comparisons in this article – and in a rather sweeping manner – the Bill determines that the definition of matrimonial property does not apply if spouses have, by agreement, determined their property rights before or during the marriage. And there we go, for the years of court debate endured in England regarding the status, validity and application of prenuptial contracts!

Conclusion

Family lawyers in England and Wales will continue to wrestle with the terms of art in matrimonial property law precedents that pour out from the doors of our highest courts. The reason behind that struggle is that the judges are having their own battle with the vision of parliament some 37 years ago. We all strive to give meaning and purpose to the statute but the overall goal is fairness and it is the flexibility of application that allows this pursuit. Kenya is modernising its matrimonial laws to eradicate the colonial inflexibility of the MWPA, perpetuated by the country's customary and discriminatory approach towards women. The Bill is a small but important, revolutionary and – for the lawyer at home – interesting legislative step towards equality and a more robust system of human rights protection for the majority sex in Kenya. One can only hope that the freeze of parliamentary inaction will thaw.

At the time of writing, Andrew Commins was living in Kisumu, Kenya and working as a volunteer Informal Justice Consultant for FIDA-Kenya, the Federation of Women Lawyers (www.fidakenya.org). FIDA-Kenya is an NGO working to protect and promote women's human rights and access to justice, and strives for gender equality in all aspects of public and private life.