

CASE REVIEW

Women's Right to Matrimonial Property Is Still in Murky Waters: A Review of *Federation of Women Lawyers v the Attorney-General*

Patrick O'phade Phiri & Bright Sefah

*Since time immemorial, women have been marginalised in issues of the right to matrimonial property upon dissolution of marriage. The recent decision by the Constitutional and Human Rights Division of the High Court of Kenya in the matter of *Federation of Women Lawyers Kenya (FIDA) v the Hon. Attorney-General* was a missed opportunity to correct historical wrongs in the realisation of women's right to property.*

In its decision, the Court held that section 7 of the Matrimonial Property Act (MPA) of 2013 – which bases the criteria for distributing matrimonial property upon dissolution of marriage on contributions by the parties in the acquisition of the property – is constitutional and does not impinge on women's right to equality and right to property. In a nutshell, the Court is of the view that the Act secures women's right to property and equality by including both monetary and non-monetary contributions in the equation for ascertaining the distribution of property.

This article contends, however, that the Court's decision failed to protect women's right to matrimonial property by overlooking the unequal power relations between men and women in general and in marriage in particular. The woman's financial contribution to the property acquired during the marriage is, indeed, restricted by cultural factors and the hierarchical relationship between men and women, while her non-financial contribution is undervalued by the same system.

Overview of the case

The MPA of 2013 became law in Kenya on 16 January 2014, repealing the Married Women's Property Act of 1882. The law was enacted to establish a new regime regulating matrimonial property and codifying the principles governing the distribution of matrimonial property. The law gave effect to the principle of equality before, during and after the

subsistence of marriage, as enshrined under article 45(3) of the Kenyan Constitution of 2010.

However, within two years of its application, a petition was brought before the Constitutional Division of the High Court of Kenya challenging the Act's constitutionality and its adherence to international human rights. The Court, upon hearing the case, delivered its decision on 14 May 2018 in favour of the defendant, holding that section 7 of the Act does not

violate rights of women to property and equality, as had been argued by the petitioner

The Court summarised the issues before it into one question: Is section 7 of the Act unconstitutional? Within this question is the issue of whether the section infringes women's right to property and equality by requiring proof of contribution upon distribution of matrimonial property.

Background to the case

The petitioners, the Federation of Women Lawyers (FIDA-K), a nongovernmental, non-profit and non-partisan organisation, brought a petition against the Attorney-General in its own interest and on behalf of the women of Kenya. The petitioners alleged that section 7 of the MPA violates or threatens the fundamental rights and freedoms of women, including their rights to property, equality and non-discrimination, and is thus unconstitutional. The Initiative for Strategic Litigation in Africa (ISLA), a pan-African and feminist-led initiative, joined FIDA-K as an *amicus curiae*.

Prior to the passing of the MPA, the distribution of matrimonial property in Kenya was regulated by principles enunciated under the common law as a result of the Married Women's Property Act of 1882, a statute of general application in England that was applicable in Kenya pursuant to section 3 of the Judicature Act (cap 8 of Laws of Kenya).

In brief, section 17 of the Married Women's Property Act gave wide discretion to the judge when faced with the distribution of matrimonial property. Subsequent changes to the Act, made by virtue of amendment under section 37 of the Matrimonial Property and Proceedings Act of 1970, resulted in the recognition by the courts of substantial monetary or non-monetary contributions made by either spouse.

Developments under the common law led to the courts applying section 17 of the Married Women's Property Act in a such a way that the non-financial contribution by women, including domestic work, constituted a contribution warranting a share in the matrimonial property (Oyuga and Ikinu 2017). The position was precarious, though, as there was no



The Court of Appeal ... rejected the existence of a general principle of sharing property in equal shares upon dissolution of marriage

uniformity in the proportion of value attached to such contribution (Owino 2017).

The adoption of the 2010 Constitution brought about further developments in the jurisprudence on the distribution of matrimonial property. The Constitution enshrined the right to property (section 46) as well as guaranteeing women equal rights during and at the dissolution of the marriage (section 45(3)). Buoyed by the new constitutional framework, the courts progressively enforced distribution of matrimonial property on a 50-50 basis, and there was a presumption that the domestic duties of a wife amounted to a substantial contribution to the acquisition of property (Oyuga and Ikinu 2017).

The Court of Appeal in effect halted this progress in *Agnes Nanjala William v Jacob Petrus Nicolas Vander* (Civil Appeal No. 127 of 2011) when it rejected the existence of a general principle of sharing property in equal shares upon dissolution of marriage; it held, furthermore, that the courts can only consider non-financial contribution to acquisition of property upon the legislature passing a law to that effect. It was to this end that the MPA was adopted.

Section 7 of the MPA provides that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and is divided between the spouses if they divorce or their marriage is otherwise dissolved. Section 2 of the MPA, however, defines contribution towards acquisition of property as both monetary and non-monetary in nature. After the law was put to use, and upon receiving complaints from women

that they were being disadvantaged in the distribution of matrimonial property under the new regime, the FIDA-K brought the present application.

Arguments by the parties

The petitioner argued that the effect of section 7 of the MPA is to deprive women of enjoyment of property rights. It was the petitioner's view that basing the distribution of matrimonial property on contributions disadvantages women because their indirect contributions are undervalued. In support of the petitioner's arguments, the *amicus curiae* submitted that despite the provision's appearance of neutrality, its application adversely affects women's right to matrimonial property.

The respondent's main counterargument was that there is a general presumption of the constitutional validity of legislation and that the onus is on the person challenging legislation to rebut the presumption. The respondent argued that the petitioner failed to do so, among other things by failing to demonstrate how the provision in the MPA contravenes the right to equality.

The Court's key findings

In dismissing the petitioner's action, the Court held that section 7 of the MPA does not infringe on the right of women to hold property. It opined that the constitutional and legislative framework guarantees men and women equal opportunities in general and, in particular, equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

The Court regarded marriage as a partnership of equals, with both parties bearing equal responsibility to acquire property and develop the family. Thus, the Court believed it only fair that, at the dissolution of the marriage, each party should receive property in proportion to its contribution to the acquisition of it. The Court was of the view that holding that equality demands a 50-50 share of matrimonial property at divorce would be tantamount to creating a safe haven

for spouses who do not pull their weight during the marriage, or to providing an avenue for those seeking easy riches through marriage.

Lastly, the Court held that the section does not discriminate against women because it does not make a distinction between men and women: since the provision is gender-neutral, there is no distinction to give rise to discrimination.

Was women's right to property protected?

The petition presented the Court with an opportunity to entrench the principles of gender equality and non-discrimination insofar as the distribution of matrimonial property is concerned. Arguably, however, it would seem that the Court missed the opportunity to do so and, in the end, entrenched the infringement of women's right to matrimonial property.

First, the decision fails to conceptualise the principle of equality and non-discrimination properly. One is led to the conclusion that the Court considered only formal equality and direct discrimination, rather than substantive equality, transformative equality and indirect discrimination.

For instance, it found that section 7 of the MPA promotes the constitutional principle of equality in that it treats men and women as equal partners during the subsistence of marriage as well as at divorce by allowing them to contribute to the acquisition and ownership of property. The Court erred by not considering that indirect discrimination may arise in the application of an otherwise seemingly neutral provision or practice.

Furthermore, substantive and transformative equality calls for measures beyond the legal provision of equality, including the removal of social constraints and barriers to enjoyment of rights. To this end, the Court failed to consider gendered structures and systematic stereotypes that may affect the actual contribution women can make to the acquisition of matrimonial property.

Research shows that there are disparities in Kenya

between men and women's access to economic wherewithal such as employment and credit (Nature Conservancy Central Science 2013). There is also a gender imbalance in decision-making within the family and in society at large. Women are constrained, too, by the competing demands of the household and the labour market, since they are responsible for most of the household work. These and other factors disadvantage them in the contribution they make to the acquisition of property.

The recognition of non-monetary contribution, though a step in the right direction, cannot on its own alleviate all these social constraints. As the petitioner argued, because the non-monetary contribution is undervalued, what typically happens is that the person who made the monetary contributions gets the major percentage of the property. Unfortunately, in the light of gender inequality in Kenya, in most instances the person making the non-monetary contribution will be a woman.

Secondly, and relatedly, the Court failed to properly elucidate the position and application of the right to equality and non-discrimination as provided for under international human rights law. Among other international instruments, the petitioner relied on the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Kenya ratified in October 2010 and March 1984, respectively. The two instruments call for the elimination of all forms of discrimination against women and for laws and legal constructs to be subjected to an in-depth gender analysis.

At their core, these instruments entail the removal of gendered structures and systemic stereotypes that impinge on women's enjoyment of their rights.

Article 16 of CEDAW calls on state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, to ensure that women enjoy on a basis of equality with men the same rights and responsibilities during marriage and at its dissolution. Furthermore, states are called upon to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

The Committee on CEDAW (the Committee) in its



These instruments entail the removal of gendered structures and stereotypes that impinge on women's rights

General Recommendation on article 16 (hereafter General Recommendation) recognises that property distribution and post-distribution often favour men regardless of whether the laws appear neutral. It identifies gendered family roles and insufficient recognition of non-financial contribution as among the cause of this unfair state of affairs (para 43).

In its interpretation of the obligations imposed by article 16, the Committee adopts an expansive approach to the distribution of matrimonial property to ensure substantive equality. For instance, it says that other factors that should be considered in the distribution of matrimonial property, including the 'recognition of use rights in property related to livelihood or compensation to provide for replacement of property-related livelihood; and adequate housing to replace the use of the family home' (para 47 CEDAW General Recommendation on article 16). When measured against this standard, the Kenyan provision is found wanting for restricting the distribution of matrimonial property to contribution only.

Furthermore, the CEDAW Committee's definition of non-financial contribution is widened to include household and family care, lost economic opportunity, and tangible or intangible contribution to a spouse's career development, economic activity and human capital (para 47). By contrast, the definition under section 2 of the MPA includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work.

The MPA's allowance of non-financial contribution is not enough to offer real protection. Although it takes into account the work performed by a spouse, it does

not recognise the intangible influence one spouse can have on the professional or economic development of the other. It also fails to make provision for sacrifices that either of the parties make for the betterment of the marriage. For instance, a woman who is well educated might agree to be a housewife in order to take care of the children and thereby allow the husband to work or conduct business. Taking care of children is indeed recognised as a contribution warranting a share of the property, but the economic loss the woman suffers as a result of sacrificing her own professional career may not suffice as a contribution under the MPA.

The Maputo Protocol, on the other hand, specifically obliges states to ensure that men and women have an equitable share of the joint property deriving from the marriage – its article 7 places an obligation on states to enact appropriate legislation to ensure that women enjoy the same rights as men during separation, divorce and annulment. Equity is concerned with fairness. Distribution of property based on contribution may in some cases not be equitable because of the disadvantaged position of women.

It has to be mentioned that the Court did remark that the essence of the section 7 of the MPA is that the Courts are to evaluate the interests of the parties and the property to reach a just and equitable distribution of the property (para 62). The problem, however, is that this evaluation will be constrained by the ambit of the section – by its narrow provision of factors to be considered when distributing property, and by its narrow definition of non-financial contribution.

For substantive equality to be achieved and guarantee the enjoyment of the right to matrimonial property for women, the Court needs to consider all the pertinent factors, including those identified by the CEDAW Committee, to ensure fairness. The MPA is therefore in conflict with the Maputo Protocol in that it recognises contribution as the only factor in the distribution of matrimonial property.

Conclusion

Both CEDAW and the Maputo Protocol recognise the gender disparities between men and women in the enjoyment of the right to property. This is evident from the emphasis their provisions on the distribution of matrimonial property place on substantive equality

and equity. Taking contribution as the sole factor in the distribution of matrimonial property can have the unfair result of disadvantaging women; by contrast, considerations such as health, housing needs and the anticipated post-dissolution income of the spouses may demand a different share than the computed share contributions to acquisition of property.

The MPA therefore fails to adequately protect women's right to property on an equal basis with men – and the Court failed to remedy this.

Patrick O'phade Phiri is an AUCYV legal assistant at the African Commission on Human and Peoples' Rights (ACHPR). He holds an LLB (Hons) from the University of Malawi and an LLM from the University of Pretoria.

Bright Sefah is a political officer at the African Union Commission. He holds a BA in Sociology and Social Work (Ghana) and an MPhil from the University of Pretoria.

References

Agnes Nanjala William v Jacob Petrus Nicolas Vander Civil Appeal No. 127 of 2011

General Recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on temporary special measures

Kenya's National Gender Context and Its Implications for Conservation: A Gender Analysis (2013) Nature Conservancy Central Science

Married Women's Property Act of 1882

Matrimonial Property Act 49 of 2013

Owino, FK (2017) *The Division of matrimonial property in Kenya: a feminist approach* (Doctoral dissertation, Strathmore University)

Oyuga M and Ikinu N (2017) 'Land as matrimonial property in Kenya: Demystifying the concept of contribution to acquisition of land as a matrimonial property.' Paper prepared for presentation at the 2017 World Bank Conference on Land and Poverty. The World Bank – Washington DC, 20-24 March 2017