REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 164B OF 2016

IN THE MATTER OF ARTICLES 20, 21, 22 (1) AND (2) & 23 (1) AND (3) OF THE CONSTITUTION

AND

IN THE MATER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2 (4), 2 (6), 10, 27, 28, 40 (1) AND (2), 45 (3), 60 (1) (A) & (F) & 68 (C) (III) & (VI) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013

BETWEEN

FEDERATION OF WOMEN LAWYERS KENYA (FIDA).....PETITIONER

VS

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA).....AMICUS CURIAE

JUDGMENT

THE PARTIES

1. The Petitioner, the Federation of Women Lawyers Kenya (FIDA-K), is a non-governmental non-profit and non-partisan organisation registered under Section **10** of the Non-Governmental Organizations Co-ordination Act.[1] It states that it brings this Petition in its own interest[2] and on behalf of all women in Kenya alleging violation or threat of violation of fundamental rights and freedoms of women.

2. The respondent is the honourable Attorney General of the Republic of Kenya and the Principal Government legal adviser pursuant to Article **156** of the Constitution.

3. The *amicus Curiae*, the Initiative for Strategic Litigation in Africa (ISLA) is a Pan-African and feminist led initiative that aims to contribute to the development of jurisprudence on sexual rights and women's human rights on the continent by providing expertise on strategic litigation. ISLA seeks to use the rule of law and African domestic and regional courts to advance women's human rights and sexual rights. Its programmes include focusing on using courts to challenge discriminatory laws that adversely impact on women's ownership, control and access to land and property rights.

The Petitioner's case

4. The Petitioner challenges the constitutionality of Section **7** of the Matrimonial Properties Act.[3] FIDA's attack on the said section is on three fronts. *First*, it avers that that the section offends Article **45 (3)** of the Constitution which provides that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage." The argument here is that the

section infringes on the rights of women to own property after the dissolution of a marriage, because the section requires women to prove their contribution towards its acquisition, yet the definition of contribution has been expanded to include non-monetary contributions. FIDA avers that the section permits a scenario whereby the bulk of the property will belong to the spouse who has made monetary contributions and has proof of the same. The core argument here is that the section disadvantages married women who contribute to acquisition of their matrimonial properties but have no tangible proof of the same.

5. *Second*, FIDA avers that the provision will be used to deprive women of their Fundamental Rights to property in violation of Articles **40, 60** and **68** of the Constitution. It avers that the impugned provision contrasts Section **10(2)** of the Matrimonial Property Act[4] which provides that "any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree" while section **10(3)** of the Act[5] provides that parties to a marriage shall share equally any liability incurred during the subsistence of the marriage and reasonable and justifiable expenses incurred. FIDA also avers that since liabilities are to be shared equally, expenses should similarly be shared equally.

6. *Third*, the FIDA challenges the impugned section on grounds that it offends Article **27** of the Constitution in that it creates unfair discrimination against women. FIDA argues that research shows that women suffer most after dissolution of marriage.

7. Referring to the Hansard, FIDA averred that the impugned section was passed by Parliament despite objections that it would be unconstitutional. It states that the original Bill read *"subject to section **6(3),** ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved."*

8. FIDA also avers that the impugned section offends several international conventions, among them Article **7** of the Maputo Protocol,[6] Article **3** of the Banjul Charter,[7] Article **26** of the ICCPR[8] and Article **15** and **16** of the CEWAW.[9]

9. As a consequence, FIDA seeks the following orders:-

> *a. **A DECLARATION** that Section **7** of the MPA to the extent that it bases division of matrimonial property upon contribution, is invalid as it is in conflict, inconsistent and contravenes Articles **27, 40, 43 (3), 60 (1)** of the Constitution and is therefore null and void;*
>
> b. *An order of **MANDAMUS** compelling the Respondent to publish a Statute Miscellaneous Amendment Act within thirty days of delivery of judgment deleting the aforesaid Section and inserting:" Subject to Section **6 (3),** ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved."*
>
> *c. Costs if this Petition be granted to the Petitioner.*
>
> *d. Any other order that the court may deem fit to grant.*

Respondent's grounds of opposition

10. The Respondent filed grounds of opposition on **13th** March 2016 stating that:- ***(a)** the Petitioner has not rebutted the presumption of constitutionality enjoyed by the impugned provision; **(b)** that the Petitioner has failed to sufficiently demonstrate the manner in which the impugned section has denied, violated, infringed and threatened the rights of married women in Kenya; **(c)** that the Petitioner has misunderstood and misapplied the nature of the constitutional concept of "equality of the rights" of parties to marriage regarding the right to own property; **(d)** that the Petitioner has failed to demonstrate the manner in which the impugned provision violates Articles **10 (2) (2),27 (4)** and **45 (3)** of the Constitution; **(e)** that the Petitioner has failed to demonstrate the nature of the conflict and or contrast between section **7** and **10** of the act; **(f)** that the Respondent has lawfully discharged his lawful mandate; **(g)** that the question of division matrimonial property based on contribution of spouses is judicially settled by dint the Court of Appeal Decision in PNN vs ZWN**[10]** and that the Petitioner ought to have exhausted its rights under Article **119** of the Constitution.*

Petitioner's further Affidavit

11. Also on record is an Affidavit filed on **21st** November 2016 sworn by Christine Ochieng, the FIDA's Executive Director annexing the Hansard containing the Parliamentary debate on the amendment that introduced the impugned provision.

Issues for determination

12. Upon considering the opposing facts presented by the parties, I find that only one issue falls for determination:- *Whether Section **7** of the Matrimonial Property Act is unconstitutional.*

Whether Section 7 of the Matrimonial Property Act is unconstitutional.

13. In her submissions, the Petitioner' Counsel urged the court to consider the legislative history of the statute.[11] She highlighted the historical background on the division of matrimonial property law in Kenya. She cited numerous court decisions among them *Kivuitu vs Kivuitu*[12] where the Court recognized indirect contribution of a wife in a marriage, *Ndiritu vs Ndiritu*,[13]in which the Court held that bearing children was a form of contribution in determining wife's interest in the assets under consideration. She submitted that these decisions were applied in subsequent cases among them *Muthembwa vs Muthembwa*[14] and *Mereka vs Mereka*.[15]However, she pointed out that the notion on non-monetary contribution was overruled by a subsequent five judge bench of the Court of Appeal decision in *Echaria*

vs Echaria.[16]In the said case, she argued, the Court noted absence of legislation to govern the subject. It was her submission that the said decision formed the backdrop against which the Matrimonial Property Bill was drafted and particularly section **7** of the Bill.

14. On presumption of constitutionality of a statutory provision, she argued that such a presumption cannot apply in respect to statutes that limit fundamental rights.[17]She also argued that any limitation must meet the Article **24** analysis test.[18] To her, the impugned section is unconstitutional because it promotes inequality, discrimination and contravenes international treaties which Kenya has ratified. She submitted that equality before the law means that all laws must apply to everyone, and that the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not to suffer any greater disability.[19] In her submission, the test is whether any departure from identical treatment offends equality before the law and whether it amounts to discrimination.[20] She argued that the impugned section contrasts with section **10** of the act which provides that parties are to share liabilities incurred during the subsistence of the marriage for the benefit of the marriage and reasonable and justifiable expense incurred for the benefit of the marriage. She urged the court to consider the purpose and effect of the statute, which in her view, deprives women enjoyment of property rights. She also argued that women's indirect contributions are undervalued, and that in marriage, which is a personal choice, there is no waiver of rights.

15. Counsel for the *Amicus Curiae* argued that even though the impugned provision on the face of it looks neutral, in application it impacts more significantly upon women's rights to ownership of matrimonial property. She argued that men suffer less after divorce. She cited several international conventions and argued that Kenya is bound by the conventions by dint of Article **2 (6)** of the Constitution.

16. On comparable jurisprudence, she cited extensively from the House of Lords decision in *White vs White*[21] in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords[22]with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality.

17. Counsel for the Respondent argued that there is a general presumption of constitutional validity of a legislation, and he who challenges its constitutionality, should rebut the presumption.[23]To buttress his argument, he cited *Mark Ngaywa vs Minister of State for Internal Security and Provincial Administration & Another*[24] and *Susan Wambui Kaguru & Others vs A.G & Another*.[25] He also referred to *U.S. vs Butler*[26] where the court pronounced the duty of the Court when the constitutionality of a statutory provision is challenged, "as to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

18. Also, he argued that the Court is also required to consider the objects and purposes of the legislation[27]and its effect[28] which would be to revert to the old days with no specific provision that governs division of matrimonial property. Further, He also argued that the Petitioner has not demonstrated how the provision offends Article **27** of the Constitution and property rights guaranteed under Article **40** of the Constitution. On the alleged violation of Article **45(3)** of the Constitution, counsel submitted that the argument is premised on a misunderstanding of the Article. He referred the Court to the definition of equality of rights as pronounced by Kiage J in *PNN vs ZWN*.[29]

19. On the prayer for mandamus, he cited Article **156 (1) & 261 (1) (4)** of the Constitution and submitted that the Petitioner has not demonstrated failure on the part of the AG in performing his functions to merit issuance of such an order.[30] Also, he argued that under the Constitution, only Parliament enacts legislation, hence this court lacks jurisdiction to direct Parliament in the manner it does its legislative work. He also argued that it is not sufficient to state that women will find it difficult to prove their contribution since the fact that a particular legislation is difficult to implement is not sufficient ground to invalidate it.[31]

Guiding principles of Constitutional and Statutory Interpretation

20. It is beyond argument that interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence.

21. It is also beyond argument that Article **259** of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote *'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance.* This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article **259** is mandatory.

22. Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be “unduly strained.”[32] It should avoid “excessive peering at the language to be interpreted.[33]

23. It is by now trite that the Matrimonial Properties Act,[34] an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes, having been enacted pursuant to Article **45(4)** of the Constitution, must be understood purposively because it is umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purport and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees.

24. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary

meaning of the provision to be construed is clear and unambiguous.

25. Also, in construing the impugned provision, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are obliged to be guided by the provisions of Article **159 (e)** which requires us to promote and protect the purposes and principles of the Constitution.

26. I need not point out that it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[35]

27. The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article **259**.

28. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. Courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. Courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, which is certain to subvert the societal goals and endanger the public good.

29. The Legislature, *after* enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. This led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

30. A court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

31. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

32. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

33. Article **2** of the Constitution proclaims the Constitution to be the supreme law of the country. Importantly, it declares that any law or conduct inconsistent with it is invalid. The Constitution is underpinned by a Bill of Rights that, according to Article **19**, is declared a cornerstone of our democracy. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

34. When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through “the application of all legitimate interpretive aids,”[36] the impugned legislation or provision is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution.[37]

35. It is also necessary to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The *first* principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[38]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in ‘a narrow, mechanistic, rigid and artificial’ manner.[39]Instead, constitutional provisions are to be ‘broadly, liberally and purposively’ interpreted so as to avoid what has been described as the ‘austerity of tabulated legalism.’[40]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[41] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[42] *Secondly,* in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[43]

Determination

36. At the centre of this determination is Article **45 (3)** of the Constitution which provides that "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."

37. Also cited by the Petitioner is Article **60 (1) (f)** of the Constitution which provides for elimination of gender discrimination in law, customs and practices related to land and property in land and Article **27** of the Constitution which provides for equality from discrimination and in particular sub-article **(3)** which provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The Petitioner also argues that the impugned provision violates women's right to own property.

38. The impugned provision reads:-*"Subject to section **6(3),**ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."*

39. The Act defines Matrimonial property Matrimonial property as the matrimonial home or homes, household goods and effects in the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.[44] The matrimonial home is any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. Trust property including property held in trust under customary law does not form part of matrimonial property.

40. Furthermore, subject to Section **6** of the Act, the interest of any person in any immovable or movable property acquired or inherited before marriage does not form part of the matrimonial property. The Act introduced and recognizes prenuptial agreements which were previously not recognized by the courts. The Act allows parties to any intended marriage to enter into an agreement before their marriage to determine their property rights, which is enforceable provided that the agreement is not influenced by fraud, coercion or is manifestly unjust. This means that if the property inherited before marriage is used as the matrimonial home then it falls within matrimonial property.

41. Article **45 (3)** of the Constitution provides for the equal rights of parties to a marriage at the time of the marriage, during the marriage and at the dissolution of the marriage. Article **60(1)(f)** provides for the elimination of gender discrimination in law, customs and practices related to land and property in land.

42. Section **3 (2)** of the Marriage Act[45] provides that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. Notwithstanding the system of marriage, that is, whether the marriage is contracted under Islamic law, customary law or any other law, a married woman has the same status as a married man protected under the Constitution and the Marriage Act.[46] It can be stated without fear that the provisions of Sections **2, 6** and **7** of the Matrimonial Properties Act[47]have enlivened the rights provided in Article **45 (3)** of the Constitution.[48]

43. Section **9** of the Matrimonial Properties Act[49] recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution. The Act, which repealed the Married Women Property Act, recognizes the equal status of spouses. Thus, a married woman has the same rights as a married man to acquire, administer, hold control, use and dispose of property whether movable or immovable, to enter into a contract and to sue and be sued in her own name. Historically, the doctrine of coverture applied where once married, a woman could not enter into a contract or sue and be sued in her own name. Upon marriage, a woman's legal existence as an individual was suspended; this is no longer the position. Two other pieces of legislation being the Land Act[50] and Land Registration Act[51] also safeguard the rights of a spouse to matrimonial property by requiring the consent of a spouse for the transfer or charge of the matrimonial home.

44. The equality of the rights of spouses in a marriage was recognized by the Court of Appeal in the case of *Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes**[52]*** where the Court of Appeal observed that Article **45 (3)** of the Constitution gives parties to a marriage equal rights before, during and after a marriage ends. The Marriage Act[53] and the Constitution provide for equal rights in marriage. However, the impugned provision, seems to favour an approach that takes into account the contribution of either spouse towards acquisition of the property, hence the basis of the challenge in this Petition.

45. It is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. Contribution is couched both in terms of monetary and non-monetary contribution. The contribution includes: domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

46. Fortunately for me, I am travelling on a path that has been trodden by others before me. The difficulty Courts have grappled with in cases of this nature is discernible from the words of Waki JA in *PNN vs ZWN*[54] where he stated *"The matter before us relates to the perennial war between husband and wife over matrimonial property after the collapse of their marriage. It has always been a murky waterway for the courts in this country to navigate since the applicable procedural law was a piece of archaic legislation enacted in England in 1882 and inherited as a statute of general application in this country."*

47. In the same case, Kiage JA., agreeing with the majority decision, examined in detail the question of marital equality as captured in Article **45 (3)** of the Constitution. I find it useful to reproduce below what the appellate Judge stated:-

> *"First, while I take cognizance of the marital equality ethos captured in **Article 45 (3)** of the Constitution, I am un persuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;*

"45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage."

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse

is superior to the other. In those few words all forms of gender superiority-whether taking the form of

open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate

essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally" I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice

does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in ***FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE,*** *Nairobi Civil Appeal No. 179 of 2009;*

" … a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33;

'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by

*its very nature cannot be – a precise mathematical exercise'***."**

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property."

And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better

than to simply declare that property shall be shared on a 50:50 basis. Rather, if set out in elaborate

manner the principle that division of matrimonial property between spouses shall be based on their

respective contribution to acquisition.

Section 7 of the Act states;

"Subject to section 6(3), ownership of matrimonial property vests in the spouses according to

contribution of either spouse towards its acquisition, and shall be divided between the spouses if

they divorce or their marriage is otherwise dissolved."

Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at ***Section 2*** *that contribution towards acquisition of property takes both*

monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting. Non-monetary contribution is defined as including;

(a) Domestic work and management of the matrimonial home

(b) Child care

(c) Companionship

(d) Management and family business or property, and (e) Farm work

....I have gone into all this detail to demonstrate my firm conviction that both from a practical stand-point and from the statute law now ruling, (though admittedly was not in force when the learned Judge rendered the impugned judgment) neither the Constitution nor general law imposes, compels or lionizes the doctrine or 50:50 sharing or division of matrimonial property."

48. Discussing the same provisions, the High Court of Kenya in *UMM vs IMM*[55]rendered itself in the following words:-

19. In resolving the rival views taken by parties my work is made somewhat lighter by two recent developments. First, the Court of Appeal has recently given its views as to the place of Echaria (supra) in the context of Article 45(3) of The Constitution. In Civil Appeal No.127 of 2011 Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes, the Court observed that Echaria(supra) may no longer be good law, and then held,

> *"Article 45(3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coveture. Pending such enactment, we are nonetheless of the considered view that the Bill of rights in our Constitution can be invoked to meet the exigencies of the day."*

20. The Legislation hoped for by the Court of Appeal is The Matrimonial Property Act, 2013 which received assent on 24th December 2013 and commenced on 16th January 2014. That is an important development in the law of Matrimonial Property for this country. Section 7 is of paramount significance. It provides:-

> *"7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."*

Contribution is defined by Section 2 to mean monetary and non-monetary contribution. And non-monetary contribution includes:-

a. Domestic work and management of the matrimonial home;

b. Child care;

c. Companionship;

d. Management of family business or property; and

e. Farm work;

> *"Family business" means any business which-*

a) is run for the benefit of the family by both spouses or either spouse; and

b) generates income or other resources wholly or part of which are for the benefit of the family;"

21 The provisions of that Statute ameliorates the harshness that was associated with ***Echaria*** *(supra). Statute now recognizes the non- monetary contribution of a spouse. It however does not go as far as what the Court of Appeal had suggested in* ***Nanjala William*** *where it argued that Article 45(3) was perhaps "****a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends."*** *As far as I can see it is the provisions of Sections 2,6 and 7 of The Matrimonial property Act, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of The Constitution that parties to a marriage are entitled to equal rights at the time of the marriage,during the marriage and at the dissolution of the marriage. I take the view that at the dissolution of the marriage each partner should walk away with what*

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

49. From the above two decisions, it is clear that both the High Court and the Court of Appeal had the occasion to pronounce themselves on the impugned section, the relevant provisions of the Matrimonial Property Act[56] and Article **45(3)** of the Constitution. Both Courts reviewed decided cases on the subject and the said provisions and rendered themselves as quoted above. Whereas the High Court is a court of co-ordinate jurisdiction, and decisions of co-ordinate courts are not binding to this Court, the decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R.* vs. *Nor. Elec. Co.*,[57] McRuer C.J.H.C. stated:-

> *"....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).*

50. As for the Court of Appeal decision cited above, I am alive to the fact that the passage reproduced above is attributed to Kiage JA while agreeing with the majority decision. His opinion falls into the category of what is described in law as a **"concurring opinion."** In law, a **concurring opinion** is a written **opinion** by one or more judges of a **court** which agrees with the decision made by the **majority** of the **court**, but states different (or additional) reasons as the basis for his or her decision.

51. Justice Kiage's concurring opinion, coming as it does from the Court of Appeal, though not binding, it is persuasive to this Court. The High Court decision cited above is also of persuasive authority to this Court. As such, it will require a strong reason for this Court depart from these two decisions. In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to a particular judge, but something that may indicate that the opinion was "*given without consideration of a statute or some authority that ought to have been followed*." I have carefully followed Justice Kiage's processes reasoning and conclusions. I have also carefully examined the views offered by the High Court in the above decision. The learned Appellate Judge examined Article **45 (3)** of the Constitution and the impugned section and concluded that the provision does not command **50:50**. I entirely agree with his reasoning for two reasons. *First*, he addressed the same legal provision as in the present case, that is, Article **45(3)** of the Constitution and section **7** of the MPA, the section under challenge in this Petition. The higher the degree of legal and factual similarity, the more weight this Court gives the prior case when deciding the matter at hand. The *Second* reason is that the decision is by a superior Court.

52. As for the High Court decision, it also addressed the same provisions and the question of 50:50 sharing of Matrimonial Property. The Petitioners Counsel made no efforts to distinguish these two decisions from the present case.

53. Admittedly, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.[58] (The court should start by assuming that the Act in question is constitutional). Discussing the presumption of Constitutionality of a statute, the Supreme Court of India**[59]** stated that:-

> *"In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."*

54. Perhaps, the above is what Kiage JA had in mind when he quipped*"And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, if set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition."*

55. On the question of the alleged discrimination, the impugned section talks of parties to a marriage. My understanding is that it means both men and women. It does not specifically refer to women. There are and there will be situations where women earn or will earn more than men or contribute more than men in acquiring matrimonial property. The act expressly recognizes non-monetary contribution by either spouse. What non-monetary contribution amounts to must be determined in the circumstances of each case. The Matrimonial Properties Act[60] defines monetary and non-monetary contribution in very clear terms.

56. To me, the guiding principles in cases alleging discrimination are clear. The first step is to establish whether the law differentiates between different persons.[61] As stated above, the section talks of "parties to a marriage" which phrase includes men. It does not refer to women. The Provision applies to both me and women in marriage. The second step entails establishing whether that differentiation amounts to discrimination.[62] The provision clearly recognizes nonmonetary contribution by either spouse. Non-monetary contribution is not limited to women alone. It applies to both men and women. The third step involves determining whether the discrimination is unfair. As stated above, the section has not been shown to be discriminatory in the first place because it applies to both men and women in marriage nor has the unfairness been proved.

57. In ***Willis vs The United Kingdom[63]*** the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

> *"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group,*

which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society". (See Andrews vs Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.)

58. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

59. Article **45 (3)** of the Constitution treats parties to a marriage as equal partners. That equality is reflected in the provisions of the act which recognize that the contribution of parties to a marriage whether monetary or non-monetary will be treated equally. The same equality is maintained by section **7** of the act which provides that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary. The Petitioner's fear as I understood it is that it is difficult to prove non-monetary contribution. I do not think so. Section 2 of the act defines contribution in very clear terms. All that a party is required to do is to provide evidence on details of his or her non-monetary contribution in the marriage and leave it to the Court hearing the dispute to determine. I have no doubt that the Court will rise to the occasion and in the circumstances of the individual case, apply the evidence, the law and appropriate legal skills and arrive at a fair determination of the valuation of the non-monetary contribution in the circumstances of the case under consideration, and determine the respective rights of the parties in the case. That, our Courts are capable of doing.

60. The interpretation preferred by the Petitioner in my view is an open invitation to this Court to open the door for a party to get into a marriage and walk out of it in the event of divorce with more than they deserve.The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.

61. The greatest injustice which in my view forms the basis of the Petitioner's fear as I understood it is that there has been failure to reward or recognize a spouse whose contribution to the family has been or was through being a homemaker, performing household chores, bearing children and raising children or a spouse who used his or her resources for the day today subsistence requirements of the family and thereby deprived himself or herself of the opportunity of acquiring durable property. Historically, majority of these were or are women, hence, the Petitioner's fear that women are disadvantaged. I am clear in my mind that the drafters of the act were conscious about this, hence the clear definition of non-monetary contribution in the act. The essence of this provision is that Courts will evaluate the interest of the parties and the property and make a just and equitable distribution of the property or properties.

62. The argument that the Bill was passed amid protest in Parliament cannot suffice. It was subjected to a vote as required and it sailed through after the majority voted in its favour. It became law. Its constitutionality cannot be assailed on the grounds that some members of Parliament voted against it. The Bill went through the legislative processes and was enacted into law.

63. I also find that the impugned section does not contradict section **6** of the Act which provides for liabilities incurred during marriage to be shared equally. The provision was meant to curb situations where one party to a marriage would be left to settle debts incurred during the subsistence of the marriage.

64. Further, the assertion that the section infringes to the right to property cannot succeed. First, the act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.

65. It is my conclusion that the impugned section does not offend any of the provisions of the Constitution as alleged, nor does the section contradict any of the provisions of the act. Having so concluded, I find and hold that the Petitioner does not qualify for any of the reliefs sought in this Petition. In the circumstances, I dismiss this Petition with no orders as to costs.

Orders accordingly.

Dated at Nairobi this 14th day of May 2018

John M. Mativo

Judge

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[1] Cap 134,Laws of Kenya.

[2] Under Article **22** of the Constitution.

[3] Act No. 29 of 2013.

[4] Ibid

[5] Ibid

[6] **Article 7**: **Separation, Divorce and Annulment of Marriage**: States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:- (i) separation, divorce or annulment of a marriage shall be effected by judicial order; (ii) women and men shall have the same rights to seek separation, divorce or annulment of a marriage; in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance; (iv) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

[7] ***Article 3*** (1). Every individual shall be equal before the law. (2). Every individual shall be entitled to equal protection of the law.

[8] **Article 26.** All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[9]***Article 15*** (1). States Parties shall accord to women equality with men before the law.(2). States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. (3). States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. (4). States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: **(a)** The same right to enter into marriage; **(b)** The same right freely to choose a spouse and to enter into marriage only with their free and full consent; **(c)** The same rights and responsibilities during marriage and at its dissolution; **(d)** The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; **(e)** The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; **(f)** The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; **(g)** The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; **(h)** The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. **2**. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

[10]Civil Appeal No. 128 of 2014

[11] Counsel cited Namit Sharma vs Union of India {2013}1 SCC 745

[12] {1990-1994} E.A. 27

[13] {1995-1998}E.A.235

[14] {2008}1 KLR 247

[15]Civil AppealNo.236 of 2001

[16]{2007}2 E.A. 139

[17]Counsel cited Ahmed Abdalla Mohamed & 3 Others vs A.G {2012}eKLR. 10 Others {2015}eKLR

[18]Counsel cited coalition for Reforms and Democracy (CORD) & 2 Others vs R & Mary Wambui Muigai vs A.G & Another {2015}eKLR, Councilof Governors & 3 Others vs Senate & 53 Others {2015}eKLR; Geoffrey Andare vs A.G & 2 others {2016}eKLR. Also cited is AIDS law Project vs A.G & 3 others {2015}eKLR

[19] Citing R vs Turpin {1989} 1 SCR 1296

[20] Citing Secretary for Justice vs Yau Yuk Lung and Another {2006}4HKLRD 196

[21]{200}UKHL 54

[22]See Miller vs Miller & McFarlane {2006}UKHL 24

[23] Counsel cited Ndyanabo vs A.G {2001} ea 495.

[24] Pet No 4 of 2011.

[25] {2012}eKLR.

[26] 1{1936}

[27]Counsel cited Muranga Bar Operators and Another vs Minister of State for Provincial Scurity,NBI Pet. No. 3 of 2011,{2011} eKLR & SamuelG.Momany vs A.G & Another,HC Pet No.341 of 2011.

[28] Counsel cited R vs Big M Drug Mart Ltd {1985}1 S.CR. 295

[29] Civil Appeal No. 128 of 2014

[30] Counsel also cited several decision among them Knya National Examination Council vs R, Ex perte Geoffrey Gathenji & 9 Others,NBI CivilApealNo. 266 of 1996 & R vs The Commissioner of Lands and Anoither Ex-parte Kithinji Murugu Mahere,NBI HC Misc AppNo. 395 of 2012

[31] Council cited Mark Obuya, Tom Gitongo & Thomas Maara Gichuhi & Others vs Commissioner of Domestic Taxes & 2 Others {2014}eKLR

[32]Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24

[33] Johannesburg Municipality v Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H.

[34] Act No.49 of 2013

[35]Smith Dakota vs. North Carolina, 192 US 268(1940)

[36]National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[37] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[38]S v Acheson 1991 NR 1(HC) at 10A-B

[39]Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A.

[40] Id at 340B-C.

[41]See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.

[42]*Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.

[43]*Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234.

[44] Section 6 of the Matrimonial Property Act.

[45] Act No.4 of 2014

[46]Ibid

[47] Act No.49 of 2014

[48] See VWN v FN (2014) eKLR

[49] Act No.49 of 2014

[50] Act No. 6 of 2012

[51] Act No. 3 of 2012

[52] Civil Appeal No 127 of 2011

[53] Supra

[54] {2017}eKLR

[55] {2014}eKLR

[56] Supra

[57] {1955} O.R. 431

[58] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[59] In the case of Hamdarddawa Khana vs Union of India Air {1960} 554

[60] Act No. 49 of 2014

[61] See note 18 below (at para 48).

[62] Ibid Par 54

[63]**No. 36042/97, ECHR 2002 – IV**