

FAMILY LAW REFORMS IN KENYA: AN OVERVIEW

Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi, 30 April 2009

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Introduction

This paper gives a broad overview of family law in Kenya, including its historical development. Further it gives an analysis of current status of Kenya's family law vis-à-vis international standards. In analysing the shortcomings inherent in the current laws, the paper notes the imperatives for urgent reforms in this area of the law. These include modern social, economic, cultural and political trends in the international arena, making the need for reforms in the laws inevitable. It further gives an overview of the draft Marriage Bill 2007, Family Protection Bill 2007 and the Matrimonial Property Bill 2007 as models for reforms.

Background

Kenya has over the years made attempts to reform family laws but that history has not been a happy one. The earliest attempt in reforming this law came five years after independence, when two commissions were appointed by the president in 1967 to undertake the purpose. One commission was charged with the task of reviewing the law on marriage and divorce, and the second commission was tasked with the reviewing the law of succession. Both commissions were tasked with the drafting of a single law on each of these matters that would have a nation-wide application, rather than the multiple legal regimes that existed at the time, which were largely based on racial classifications and in many respects defied the principles of equality between men and women. The overarching mandates of these two commissions were therefore to consolidate the fragmented succession and marriage laws as well as ensure recognition of the equal rights of women and men to property in marriage and upon dissolution of marriage.

To date, the only laws that have been legislated are the ones relating to succession (through Chapter 160 of the Laws of Kenya) that has been operational since 1981. In the case of laws relating to marriage and divorce, three attempts were made to pass the Bill drafted by the Commission was defeated by parliament. On all these attempts, the main grounds for failure to enact the law were that it was purportedly an assault on local customs or had granted too many rights to women. Another attempt was made in 1993 when the Attorney General appointed a task force to review the laws relating to women in Kenya, which submitted its report in 1999. Among its recommendations were the enactment of the marriage law, the matrimonial property law and the domestic violence law. Thus to date the laws relating to marriage and divorce, matrimonial property remain unlegislated. And domestic violence is yet to receive an appropriate legal regime. It should also be noted that initiatives in marriage law reform are not unique to Kenya.

Indeed the world over, and particularly in Africa, many countries have either reviewed their marriage laws in recent years or are on the verge of doing so.¹

Imperatives for Reforms

Three things dictate the marriage and family law reform agenda in Kenya. First, the need is based on the idea of law reform, which demands that law be reviewed regularly to keep in conformity with real life as expressed by ever changing social economic and cultural trends. Over the years, the socio-economic order has changed, and so have political and cultural trends, initiating adjustments in the institutions of marriage and the family.²

These include the increased universalism, secularisation and egalitarianism that have had far reaching consequences on the institution of marriage which include clamor for equality of spouses within marriage and the rights and duties in marriage.³ The biggest challenge to gender equality, particularly in marriage and the family remains patriarchy grounded on deep rooted culture that subordinates women to men. Within the political context, one of the factors that underpin family law in almost all societies is the heritage of gender inequality, which reforms in marriage laws aims at redressing to create a normative standard of equality of parties in the marriage. Over the years, Kenya has signed and ratified a number of international treaties and protocols on human rights such as the Covenant on Civil and Political rights (ICCPR), the International Covenant on Economic, social and Cultural Rights (ICESCR), the Convention on the elimination of all forms of Discrimination Against women (CEDAW), the convention on the Rights of the Child (ICRC) and the African Charter on Human and Peoples' Rights and its additional Protocol.

Under these instruments, Kenya is under an obligation to eradicate discrimination against women and to guarantee women's equality in all aspects of life, including the law relating to marriage.⁴ Within the economic context, in the last three decades of the 20th century, the paradigm of women's dependence on their men for financial support has shifted toward a partnership model in which marriage is more like a contractual relationship between two individuals. Under this model, a husband and a wife are considered equal partners contracting in a marriage, and both retain an independent legal existence. Thus modern laws relating to marriage views "the marital relationship" as one constituted by personal choice, the natural character of which is rooted in the desire of individuals to seek happiness through intimate association with one another, thus

¹ To name a few, Tanzania, Botswana, South Africa, Tunisia and Egypt. See Proposals in Andreas Rahmatian, "Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience," *10 International Journal of Law, Policy & Family* 281-316 (1996).

² See generally the Report on the Review and analysis of the marriage Bill 1993, The matrimonial Property bill (FIDA & ICJ Drafts). The Equality Bill 2002 and The domestic Violence (Family Protection) Bill 2002 by Mohammed Muigai, Advocates, Consultants for the Kenya Law Reform Commission, 2007

³ Joy Asiema, "Gender Equality and the Legal Process: The Kenyan Experience," *Transnational Law and Contemporary Problems*, 561-581 (2000) p 569

⁴ Ibid

fundamentally altering the nature of marriage.⁵ These developments notwithstanding, marriage laws in Kenya have remained static for over half a century.

The second need for reforms in family laws relates to the existence of laws, practices and customs some of which have the effect of impairing the exercise by women and men of rights, powers and duties on an equal basis in marriage and upon dissolution of marriage. The reform of marriage laws is thus aimed at ensuring equality, nondiscrimination, justice and rights in marriage, and upon dissolution of marriage. Part of this enterprise is to respond to the developments in case law as well as international law, human rights and broader global developments, some of which demand incorporation in legislation.⁶ The third explanation responds to the historical legacy of the colonial rule in Kenya, and the subsequent legal pluralism engendered by the project. With the enactment of laws by the colonial authorities as will be seen hereunder, and the introduction of Christianity, the state was set for the westernisation of the marriage institution.⁷ Although some African contracted marriages under the so called modern laws, most of them continued and indeed continue to observe their customs and practices. At this juncture, it is important to understand the history and nature of family law in Kenya.⁸

History of Family Law in Kenya

The history of marriage law in Kenya may be divided into three main stages: the pre-colonial period, colonial period and the present post-colonial period. In the pre-colonial period, autonomous ethnic communities had their own traditions, customs and customary laws regulating the institutions of the family and marriage providing for procedures and institutions regulating the conclusion of marriages and their subsistence including the resolution of disputes and dissolution. During the colonial period, the colonial administration imported marriage laws which segregated indigenous customary practices, statute law requirements and religious systems.

With the promulgation of the East African Order in council of 1897 – Indian and British Acts were introduced in Kenya and the customary systems were to apply the common law of England in the East African Protectorate. The order in council had very little application to the natives. Cases between the natives were to be settled in the native courts and the commissioner gave the courts regulations. The 1897 Act provided that matters affecting the penal status of the non Islamic natives be resolved by the law of the tribe in so far as the law would be applicable and to the Mohammedan natives, Islamic law would apply. For Christians, English law and Common law would apply. Tribal laws could only apply so long as it was not repugnant to morality. From 1897, there was a distinction between the Christian natives, non-Mohammedan natives and Mohammedan natives. There were communities living in the Protectorate such as British settlers and

⁵ Mary Ann Mason, Mark A. Fine and Sarah Carnochan (***)Family Law for Changing Families in the New Millennium, p 433

⁶ Supra Note one above p 2

⁷ See generally H.F. Morris, “The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa,” 23(2) *Journal of African Law* 37-64 (1979)

⁸ *Ibid*

Indian Migrants workers. While the Order affected the settlers, it did not affect the Indians since they applied the Indian divorce Act the (ITPA),

The settlers had the English common law and the British Law. However, the Indian Acts were British laws passed in India. Some of the Indian Acts had to be disappplied in Kenya (for the Indians e.g. The Indian Act on Succession of Estates – property and Arbitration Act. The Indians had a grey area when it came to matters of succession since laws was silent on what marriage and Divorce law applied to them. After the 1897 Order in council, there was another order passed in 1902 which provided that all cases (either criminal or civil) to which natives are party, then every court was to be guided by native laws so long as they were applicable and not repugnant to justice and morality; and so long as they were not inconsistent with the East African Order in Council.

Current state of the law in Kenya

(i) Marriage and Divorce

Due to the historical factors explained above, family law in Kenya is regulated under four different legal regimes, namely:

- African customary laws of the various cultural groups;
- Hindu Marriage and Divorce Act (chapter 157), based on Hindu law and governing adherents of the Hindu faith;
- Mohammedan Marriage and Divorce Act (chapter 156), based on Islamic law and governing adherents of the Islamic faith;
- Marriage act (chapter 150) and the African Christian Marriage and Divorce Act (chapter 151), governing people who choose to marry under the formal law, regardless of their cultural or religious background.

In addition to these four systems, the courts are given the power to make a legal presumption of marriage in situations where couples have cohabited without any formalization of marriage under any of these systems, for purposes of determining disputes that relate to their relationship. This multiplicity of legal regimes means that a person's rights and obligations with respect to marriage and divorce can only be determined by reference to the system under which the marriage was created.⁹ This makes it difficult to apply a common standard for assessing gender justice within the family, for instance, the standards developed under CEDAW or the African Protocol. The systems based on customary law and those based on religion present particular difficulty when their definition of what is 'just' differs normatively from the equality principle articulated under international law such as CEDAW and the African Protocol that set normative standards for the protection of the rights of women.¹⁰

⁹ See generally Celestine Nyamu- Musembi in ‘Promoting the Human rights of women in Kenya: Comparative Review of the Domestic Laws’: A study Commissioned by UNIFEM, Consultancy No. RFP/XXX/2008

¹⁰ *Ibid*

The Marriage Bill, 2007

The Draft Marriage Bill, 2007 is an attempt to capture the foregoing concerns within the marriage law regime in the country. The following are the salient features of the Bill, 2007: The unification of marriage laws to minimise the complexity, unpredictability and inefficiency occasioned by the multiplicity of laws on the subject. Liberty to contract marriage in either civil form or according to the rites of a specified faith.

Presumption of marriage where a man and woman having capacity to marry have lived as husband and wife for two years. Centralised registration and issuance of marriage certificates for all forms of marriages. The establishment of the age of marriage at 18 years for both parties and invalidation of child marriages. Liberty of parties to subsisting marriages contracted under customary law, the Hindu Marriage and Divorce Act, or the Mohammedan Marriage and Divorce Registration Act, which has not been registered, to apply to the Chief Registrar or District registrar or to a registration assistant for the registration of that marriage. Recognition of both monogamous and polygamous marriages. Liberty to convert potentially polygamous marriages into a monogamous marriage. Declaration of the rights and duties of parties in marriage and its dissolution. Determination of matrimonial property rights and simplification of the procedures in matrimonial causes. Conciliatory body to resolve conflicts before divorce proceedings are instituted, streamlined grounds for divorce and adjudication of matrimonial causes to be heard before Magistrates courts, Kadhis courts and High Court of Kenya. Custody and maintenance of children in accordance with the Children Act No. 8 of 2001.

(ii) Matrimonial Property

In Kenya, there is no single detailed law dealing with matrimonial property. The law on the subject is scattered in a number of statutory instruments which include the constitution; the Matrimonial Causes Act, The Married women's Porperty Act and the Law of Succession Act. Thus the area of martrimonial property in Kenya remains an area in which no appropriate law has been enacted by Kenya's parliament to address the question of division or allocation of property between the spouses at the dissolution of a marriage. However, Division of matrimonial property in Kenya occurs in accordance with the Married Women's Property Act.¹¹ This Act is an old English statute of 1882. The purpose of the statute was to recognise a married woman's legal capacity to hold property in her own right and to transact in it. Prior to the MWPA of 1870, a predecessor of the 1882 statute, the English common law applied the doctrine of covertures, under which the wife's legal identity was subsumed into her husband's. Upon marriage, the husband became seized of all freehold lands held by the wife both prior to marriage and in the course of marriage. He was entitled to collect rents and profits from the. The wife had no power to dispose of the property during marriage. The husband could dispose of it to the extent of his share, or the entire estate with her consent. The MWPA changed all this by recognising the wife's separate legal interest in the property, thus replacing her total incapacity under common law with a rigid doctrine of separate property.

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Section 17 of the MWPA provides that

“in any question between husband and wife as to the title or possession of property, either of them may apply to the High court or a county court and the judge may make such order with respect to property in dispute As he thinks fit”

This old English piece of legislation is applicable in Kenya by virtue of Section 3 of the Judicature Act, the statute that spells out what courts in Kenya shall refer to as ‘sources’ of Kenyan law in resolving disputes. The relevant portion of the Judicature Act states that in the absence of a written law enacted by the Kenyan parliament, courts may also apply ‘the substance of the common law, the doctrines of equity, and the statutes of general application in force in England on 12 August 1897...so far only as the circumstances of Kenya and its inhabitants permit...’¹² This is known as the ‘reception’ Since 1971, Kenyan Courts have innovatively interpreted S, 17 of the MWPA to develop rich jurisprudence in the division of matrimonial property between husband and wife.

The High Court case of I vs. I (1970)¹³ was the first case to establish that the MWPA did apply to marriages solemnised in Kenya. The respondent had sought a declaration under S 17 of the MWPA claiming a half share in the proceeds of the sale of a house that the parties held in joint registration. The applicant husband objected to the application of the Act, in determining the parties’ respective interests in the proceeds. He relied on the qualifier in the reception clause which states that English law shall apply only in so far as the circumstances in Kenya permitted. The court respecting observing the ‘circumstances of Kenya and its inhabitants do not generally require that a woman should not be able to own property. Karanja Vs Karanja,¹⁴ dual application – of the MWPA to a marriage solemnised under Kikuyu Customary law. The second, Essa Vs Essa¹⁵ dealt with application of the MPWA to resolve a marital property dispute between a Muslim couples.

In Karanja, the parties had been married for 20 years. The property in dispute included six pieces of real estate within the city of Nairobi, all registered in the name of the husband. The wife sought a declaration of joint ownership over five of the six. Properties on the basis of direct or indirect contribution to their purchase with respect to the sixth property, she sought a declaration of full ownership on the basis that it was purchased with her earnings from salaried employment.

The husband objected to the application of the MWPA, as well as to the application of English cases based on the MWPA, which had established that where only one spouse had title to property in which the other spouse claimed an interest, the court could infer a

¹² This clause in Section 3 of the Judicature Act is known as the ‘reception clause’ because it permits the reception of English law into Kenya. The clause is present in the laws of all former British colonies. The date 12th August 1897 refers to the date when Kenya moved on from being a Protectorate to being a Colony. Legally this meant that the colony could now start to enact its own laws, and therefore subsequent developments in English law would not apply. Thus, even though the Married Women’s Property Act (MWPA) underwent several revisions in England, those subsequent revisions are not relevant in application of the statute to Kenya. For further discussion of the application of the MWPA see Nyamu-Musembi (2002).

¹³ I vs I (1970)

¹⁴ Karanja vs Karanja (1976) Kenya Law Reports, 307

¹⁵ Fathiya Essa vs Mohammed Essa (Unreported) Civil Appeal No. 101 of 2995 (Nairobi)

trust in favour of the non-title holding spouse to the extent of his/her where no intention to share land with his wife could be attributed to a husband. He called two ‘expert’ witnesses on Kikuyu customary law to testify on married women’s (lack of) capacity to own land. One witness was adamant in maintaining that married women had no entitlement whatsoever to land and other forms of property. All property belongs to the husband because the wife should be under him.

The other witness conceded that circumstances had changed quite considerably and that women, married or unmarried, could own property in their own names. The court relied on the evidence of this witness as a more honest and fare statement of Kikuyu customary law. The court observed that, even if it were to accept the version of customary law presented by the first witness, the court would have been bound to reject it since it contradicted a written law, the MWPA. Section 3 of the Judicature Act sets out criteria for the application of customary law. One of which is that customary law shall apply only if it does not contradict a written law on the specific subject matter in dispute. The court concluded that a presumptive trust in favour of a wife with respect to property registered only in the husband’s name does apply where an African husband and wife in Kenya are both in salaried employment and both contributed to the household expenses and education of children. The court awarded her one-third of the property.

In Essa vs Essa, the parties had been married under Islamic law for 10 years. One year after marriage, the wife had resigned a relatively well paying job in Nairobi and started working in a Mombassa business owned by her husband and his parents for no pay. The parties later set up a dress business in partnership, which the wife ran single-handedly. In the court of the marriage, they acquired three pieces of real estate in prime areas of Mombassa town. Two of these were registered in the husband’s name. The third was the matrimonial home which was registered in their joint names. At the time of the proceedings the home was occupied by the husband. The wife sought a half share of the national market rent for the home and a declaration of joint ownership or ownership thereof that may be just with respect to the other two properties.

Over objections to the application of the MWPA to a Muslim marriage, the court reiterated the ruling in 1 vs 1 regarding the status of the MWPA as a statute of general application adding that the act ‘applies equally to Muslims as it does to non-Muslims in Kenya’. The court awarded the wife a half share in one of the properties, a rental commercial building, based upon evidence that she made payment from her business towards the purchase of the property. Her claim for a national rent on the matrimonial home was denied since the home was occupied by the husband and occasionally by the children of the marriage. The third property had been registered in the joint names of the husband and the children of the marriage, in accordance with an order of the High Court.

Essa and Karanja are significant because, by applying the MWPA across the board to Kenyan marriages irrespective of the specific normative systems, the courts have accomplished what the legislative has not been able to do. They that these women do definitely contribute to the acquisition of property even though their contribution is not quantified in monetary terms. Limiting the definitions of contribution to monetary

contribution ‘would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by. Thus even in the absence of evidence of any financial contribution, a wife’s contribution in this capacity would be considered.

Kivuitu vs Kivuitu¹⁶ was acclaimed as a landmark case and it was relied upon in several subsequent applications under the MWPA , most notably , the case of Omar Said Jaiz v Naame Ali took Kivuitu one step further to rule that, even without clear evidence of the extent of actual contribution made by both spouses, since the property was acquired through a joint venture it would be considered joint property.

Kivuitu vs. Kivuitu seems to suggest that the fact of contribution could be presumed by virtue of a wife’s participation in managing the family’s affairs. Therefore, in a dispute over property registered only in the name of the husband, the starting point would be the extent of the wife’s contribution and what value to attach to it, not whether she contributed at all. The optimism that Kivuitu generated was dampened by a 1995 High Court decision, Beatrice Wanjiru Kimani Vs. Evanson Kimani Njoroge.¹⁷

The parties had been married under statute for 16 years with some periods of intermittent separation in between. The wife was a high school teacher, while the husband had a better paying job as a US embassy staff member. The property in dispute included five pieces of land and a house all registered in the name of the husband; as well as a business dealing in Auto parts and hardware. The wife alleged that she partly financed the purchase of these properties by taking out loans from Mwalimu Savings and Co-operative Society on four occasions and on this basis she sought a half-share in the property.

The husband denied that the wife made any contributions towards the purchases, adding that two of them were made at a time when their relationship was strained and marked by repeated separations, and therefore she had not collaborated with him in any way toward acquisition of the property. He alleged that, other than paying the house-maid’s salary, the wife made no contribution towards household expenses and the children’s welfare.

At the High Court level, the judge accepted the husband’s argument and ruled that the wife had no interest whatsoever in the property; as the parties were unlikely to have co-operated in acquiring property together in view of the strained relationship. That she had custody and are of the children during the periods of separation was not regarded as a contributor at all, since the husband had sent money for their schooling. But is it possible that for a period of sixteen years a wife never contributed anything? The judge ruled that a wife’s contribution cannot be presumed:

“Contribution of whatever form must be proved on evidence unless it is admitted. There is no presumption that every wife is an automatic asset..... A wife, whether she be a working woman or a housewife must be considered on the basis of her individual worth”

¹⁶ Kivuitu vs Kivuitu (1991) 2 Kenya Appeal Reports, 241

¹⁷ Beatrice Wanjiru Kimani vs Evanson Kimani Njoroge (Unreported) High court Civil Case No. 1610 of 1995

This insistence on strict proof on contribution is echoed in the most recent of the six cases discussed here, the Nderitu case:

“(A wife must prove) that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her (to simply show that during the period under review she was sitting on the husband’s back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties”¹⁸

In the absence of strict proof of contribution, there is no basis for awarding a spouse a beneficial interest in property held by the other spouse. On appeal, the court of Appeal agreed with Justice Kuloba’s statement of the law on the subject, but remitted the case for retrial before a different High Court judge, on grounds of bias. The judge had made additional comments which constituted an “off-course” discouragement on women burdening on bias against the female gender....

There is a basis for arguing that once it is established that a couple was married for a certain period, say ten years, there should be a presumption in favour of equal ownership, at least of the matrimonial home and its contents. The burden of proof should shift to the party claiming that the non-title holding spouse has no entitlement to the family’s assets.

In the case of Echarya vs Echarya,¹⁹ the High Court judgment had recognised non-monetary contribution by the wife so that it moved a step higher from Kivuitu vs. Kivuitu which affirmed Registration. The Court of Appeal is a drawback in the sense that the principle of non-monetary contribution in Kivuitu vs. Kivuitu was mere obiter and thus has no basis in law. The drawback caused by the Court of Appeal’s decision in Echarya vs. Echarya has left huge legal vacuum, with the Court of Appeal expressing opinion about the need for the Kenyan legislature to pass appropriate law to govern the area of matrimonial property.

The Matrimonial Property Bill, 2007

Upon coming into operation of this Act, the Married Women Property Act of England of 1882 shall cease to extend or apply to Kenya. This Bill attempts to answer the need for the new legislation to define and harmonize property rights within marriage and upon the dissolution of marriage. The proposed Matrimonial property Bill, 2007 will become the first substantive piece of legislation in the country that will address the current lacunae in the marital property regime. It seeks to do this by first and foremost giving a legal definition of marital property and secondly by setting out the method for division of the same.

¹⁸ Tabitha Wangechi Nderitu vs Simon Nderitu Kariuki (1997) Civil Appeal No. 203 (Nairobi)

¹⁹ Echarya vs Echarya Civil Appeal No. 75 of 2001 (Judgment issued on 2nd February, 2007)

(iii) DOMESTIC VIOLENCE LAW

Historical background

Domestic violence and abuse are rampant in all cultures; people of all races, ethnicities, religions, sexes and classes and manifests when a family member, partner or ex-partner attempts to physically or psychologically dominate another. While domestic violence often refers to violence between spouses, or spousal abuse it can also include cohabitants and non-married intimate partners. Domestic violence has many forms, including physical violence, sexual abuse, emotional abuse, intimidation, economic deprivation, and threats of violence. While this form of abuse is largely criminal behaviour under the Kenyan laws, socio-cultural and economic factors together with the complex court procedures have prevented many victims of domestic violence from getting protection from the law.

In view of the above, there is need for a law that recognises domestic violence (in all its forms) as unacceptable behaviour and ensures that where it happens, the victims are protected by: empowering the courts to make certain orders to protect the victims; ensuring speedy, inexpensive and simplified procedures to access justice; requiring perpetrators of such violence to undergo counseling programmes with a view to preventing the violence; and Providing counseling programmes for the victims.

In the year 2000 the Domestic Violence (Family Protection) Bill was tabled before Parliament but it lapsed before it was enacted. The Bill has now been revised and updated to reflect present day requirements by making it wider and flexible to accommodate and tackle all matters related to domestic violence without limiting it to the penal law alone. The Bill seeks to make provisions for the protection and relief of victims of domestic violence and to provide for related matters.

CONCLUSION

There are various compelling reasons for urgent reforms in the Kenyan family law regime. The reforms being undertaken by the Kenya Law reform commission in family law and specifically in the areas of marriage law, the marital property law, domestic violence law and equal opportunities law is long overdue. The justification for these reforms lies in the fact that Kenyan Laws in these areas are clearly out dated and represent the predominant thinking and views of a bye gone era. They embody and perpetuate either express or latent gender bias, inequality or discrimination. They cannot obviously pass close scrutiny against international instruments and standards which as a nation we recognized and accepted. In reality, the society appears to have moved ahead of these laws, even as they desperately and in futility try to hold it back.