UNIVERSITY OF NAIROBI

SCHOOL OF LAW

MASTER OF LAWS

THE DIVISION OF MATRIMONIAL PROPERTY IN KENYA: A FEMINIST CRITIQUE

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REG NO: G62/34467/2019

SUBMITTED: 17TH MARCH, 2023

DECLARATION

This research paper is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Any material, scholarly works and writing not being my own which has been relied on, the same has been properly acknowledged and referenced accordingly.

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CHAPTER ONE

1.0 INTRODUCTION TO THE STUDY

Marriage is a voluntary union of a couple and which is recognized under the laws of Kenya as one entity. An entity at whose dissolution, entitles each of them to a share (at least to the ratio of distribution if not equally with considerations of distribution). In the event of a divorce, there have arisen squabbles as to what constitutes matrimonial property and the entitlement of each of the parties to its share.[1]

In considering what constitutes contribution, the Kenyan Courts have considered both monetary and non-monetary contribution in making such decisions which aspects will be argued in later chapters of this research.[2]

1.1 DEFINITIONS

The research seeks to investigate; ***'the division of Matrimonial Property in Kenya: A Feminist Approach'***. In understanding this problem, there is need to define the key concepts as contained in the title as below:

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[1] Available at: http://aip-advocates.com/wp-content/uploads/2017/09/Matrimonial-Property-Act-in-Kenya.pdf (accessed on 8th June, 2020).
[2] Ibid.

Division: the term division comes from the word "divide" which means to separate or cut into pieces, separate or keep apart.[3] Put into context therefore, division thus means the separation of a whole.

Matrimonial Property: According to the Matrimonial Property Act, marital property includes any movable or immovable property jointly owned and acquired during the course of the marriage, property held in trust, as well as property governed by customary law, as well as the matrimonial home or homes, household goods, and effects in the matrimonial home or homes.[4]

Even those who praise or criticize it disagree on what they are praising or criticizing, making the concept of "equality" a hotly debated one. It's just complicated. As adopted and used in this work, the term "equality" refers to correspondence between a variety of different things, people, processes, or circumstances that share the same qualities in at least one way but not all ways, i.e., respecting one particular aspect, with disparities in other features.[5]

[3] Henry Campbell Black, *Black's Law Dictionary*, (9th Ed. 2009) p. 564.
[4] Ibid Section 6.
[5] < https://plato.stanford.edu/entries/equality/> (accessed on 29th October, 2020).

Additionally, the study makes the case that "equality" must be distinguished from "identity," which is the idea that one and the same object corresponds to itself in all of its aspects and can be referred to by a variety of distinct terms, proper names, or descriptions. It needs to be distinguished from "similarity," which is just a loose correlation, for the same reason.

1.2 BACKGROUND OF THE STUDY

1.2.1 Historical underpinnings of the question of the division of matrimonial property in Kenya

For several decades, there was little or no comprehensive law or legal principles that governed the division of matrimonial property. For a fact, divorce and post subsistence of a marriage arguments have only but developed over the 20th century.[6] The causes of this rise have been argued by researchers, judges and scholars alike to be as a consequence westernization, globalization, urbanization and industrialization not forgetting the shift or rather disregard of the nuclear family system who have over the years been seen to be less involved in the resolution of marital conflicts.[7]

Kenya being former colony of the United Kingdom (U.K) had over the years relied heavily on the UK's Married Women's Property Act of 1882 (MWPA) as a statute of general application.[8] On paper, this law established that spouses had equal rights in ownership of property. This however, was never the reality on the ground as divorced and separated women were often expelled from

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[6] Adeta yo Olaniyi, *Analytical Study of the causal factors of divorce in African Homes,* (2015) Published in Vol. 5, No. 14, 2015 of IISTE Website; www.iiste.org,

[7] Ibid at page 18.

[8] Odhiambo, R. A., & Oduor, M. (2013). Gender Equality; P. L. Lumumba, M. Morris, & S. Odero, *the Constitution of Kenya: Contemporary Readings* (p. 113). Nairobi: Law Africa.

their homes if not those properties being sold without their knowledge and left with nothing under the guise; women were not entitled to own property. [9]

It is further seen that, the MWPA took precedence over customary law (including the patriarchal beliefs of male dominated society), meaning that women in customary marriages now started finding those voices and agitation to own property.[10] In practice, though, the application of this law still faced rejection, mis-(interpretation/application) based on a combination of the Victorian and Kenyan traditional views of the place of women in society.

The Victorian perspective was that women were the fairer sex that needed communal protection and could not fend for themselves.[11] This perspective created a wave what would now be termed as a feminist approach to law and governance and informed in turn the fight for equality as will be seen in the later bit of this paper. Traditional perspectives on the place of women saw them as subordinate, especially after marriage, and often did not entitle them to any property rights. Several laws have attempted to rectify this, with little success key to which includes the Law of Succession Act (1981).[12]

Following the disgruntlement and move to have a revolution of our laws post the year 2010, we have had some significant changes which though have cause if not presented still some challenges. These laws are to wit; The Constitution of Kenya 2010, the Marriage Act, No. 14 of 2014 and the Matrimonial Property Act, No 49 of 2014. A discussion hereunder follows on the foregoing.

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[9] Human Rights Watch, "*Double Standards: Women's Property Rights Violations in Kenya"* Retrieved from Human Rights Watch: available at: <https://www.refworld.org/docid/3f4f59583.html> (accessed on 7th June, 2020.)
[10] Thongori, J. *Gender and Economic Growth in Kenya: Unleashing the Power of Women.* (2007).
[11] *Ibid*
[12] Standard encyclopedia of Philosophy n6.

1.2.2 The Constitution of Kenya, 2010

Kenya on the 27th August, 2010 promulgated the Constitution of Kenya, 2010 (CoK).[13] The Constitution is praised as being the most 'progressive', 'futuristic' and 'transformative' for the manner of its reconfiguration and the imprint of 'the Bill of Rights' at its heart as a tool for democratic transformation. This Constitution has only been compared to the Constitution of the United States of America and South Africa in that respect.[14]

Contextualizing this in the study herein, arguably the Constitution charged the legal landscape and the prevailing position for three years after the *Echaria V Echaria*. The CoK introduced Article 45 that recognizes the family as *"the natural and fundamental unit of society and the necessary basis of social order"* and it goes further to provide that it (the family), shall enjoy the *"recognition and protection of the state"*.[15]

The Constitution, Article 45 (3) further provided as follows as relates to marriage, "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."

Particularly relevant to the study at hand is Article 45 (3) that speaks to equality in marriage. This equality theme has since been seen as a stepping stone for women in the ownership of property and entitlement to have a say at its distribution. Though still the full implementation and or realization of the same; 'equality' is on, different courts have interpreted the said differently leaving no settlement on this debate.

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[13] Constitution of Kenya, 2010; presented to the AG (Amos Wako) of Kenya on 7 April 2010, officially published in the Kenya Gazette on 6 May 2010, and subjected to a referendum on 4 August 2010 and finally promulgated on 27 August 2010

[14] Japheth Biegon "Introduction: Socio-economic Rights as One Promise of a New Constitutional Era (ICJ Kenya) 2011, at page 3.

[15] Constitution of Kenya, 2010 Article 45 (1).

1.2.3 The Marriage Act, No. 14 of 2014

Prior to 2014, the customary laws, civil laws, sharia law, Hindu and Christian marriage laws applied on matters marriage reflecting plurality of marriage systems in Kenya. These systems essentially were regulated by seven (7) different laws leading up to the Marriage Act, 2014.[16]

On 29th April, 2014, the president assented to the Marriage Act[17] which repealed all the aforementioned laws under section 97. The Act has consolidated five (5) different regimes into a single law and distinguishing the said in parts. Of particular importance herein, the Act has set the standards that must be met to qualify a union as a marriage and the parameters for its dissolution and succession.

It has been suggested that the Marriage Act treats women and property from the perspective of Article 45 (5) in terms of equality of rights before, during, and after marriages.[18] This shifts from a traditional/customary epithet of women having just but usufructuary rights to property and more particularly immovable properties like land which vice developed over the years and advanced by the relationships with their fathers and husbands.[19]

1.2.4 The Matrimonial Property Act No. 49 of 2014

Today, Kenya takes pride in having consolidated the law on matrimonial property distribution into one act of parliament; Matrimonial Property Act,[20] (hereinafter MPA).[21] Leading to the enactment of this piece of legislation were certain considerations and activism in the jurisprudence emanating

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[16] The Hindu Marriage and Divorce Act, Cap 157 Laws of Kenya.
[17] The Marriage Act, No. 14 of 2014.
[18] *Ibid* Section 3 (2)
[19] P. Kameri-Mbote, "The Land Has its Owners! Gender Issues in Land Tenure under Customary Law, (2005).
[20] No. Act No. 49 2013
[21] The Matrimonial Property Act No. 49 of 2013.

from the Kenyan judiciary to wit; the decision in *Kivuitu vs. Kivuitu*[22] in which case, the Court recognized indirect contribution of a wife in a marriage as to entitle her to the share of matrimonial property.

This tradition came to an end in 2007, when a five-judge Court of Appeal bench dismissed the idea of a spouse's non-financial contribution when the issue of how to divide the marital estate came up. The absence of relevant law is one of the factors mentioned by the court. The Matrimonial Property Bill is said to have been written in 2007 against the backdrop of this judgement.[23]

1.3 STATEMENT OF THE PROBLEM

The study sought to investigate the division of matrimonial property in Kenya and how close we have come in the realization of the 'equality' of both sexes in so far as the division of matrimonial property is concerned. The Conflict between the CoK 2010; Article 45 (3) that speaks of pure equality and Section 7 of the MPA which has taken the approach of 'a party to a marriage only being entitled to a share of matrimonial property depending on his contribution' seem to have provided latitude that judicial officers have explored to most of which have exposed women and left them miserable at the dissolution of marriage. As has been seen in the background of this study the constitutional reforms that have been brought about by the CoK, 2010 and more clearly, the principle of 'equality' running through the same right from Article 10, 27, 40 and 45 to mention but a few of concern on the subject herein.

Kenya has experienced what would be regarded as an incomplete revolution of the norms (dis-entitlement of women to equal share of matrimonial property). In addition, there have been some

[22] {1990-1994} E.A. 27.
[23] *Ibid*.

ambiguities in court rulings and judgments some of which have broadened the definition of matrimonial property, what amounts to contribution inter alia which aspects can only be seen to be having a situational, cultural, social and administrative elements combined and have subjected women to harsh decisions in respect of property.

1.4 JUSTIFICATION OF THE STUDY

Women throughout the country have for a long time been losing their homes, land and property as a result of discriminatory and retrogressive cultures and laws. Even though there have been steps under the new constitutional dispensation to rectify these injustices, these steps seem only to exist in paper making the implementation only but a dream. For instance, the courts have been inconsistent with judgments on the question of equality in divorce, with the Court of Appeal and the High Court providing conflicting judgment.

Further, women are not necessarily aware of the legal protections they have like pre-nuptial agreements and the complex legal frameworks around them. Furthermore, traditional Kenyan practices around marriage like the payment of bride price, child and forced marriages have made some of these legal agreements impossible for women.[24]

1.5 RESEARCH HYPOTHESIS

Whereas Kenya takes pride in the great strides it has made with regards to reforming the legal framework and which efforts have been defined as being progressive with the CoK amassing its supremacy over other laws in its support of women's equal land rights, patriarchal social and

[24] Odhiambo, A., & Nnoko-Mewanu, J. (2018).

traditional standards have been seen to continue to limit women's ability to exercise and enforce their rights to land and other property.

Further to the said, women's vulnerability in cases of divorce has proven the inadequacy yet of our laws rights upon dissolution of a marriage for we are still haunted by history (which is of today vague in light of existing laws) and contains gaps that makes it difficult, for them to assert their property rights following a divorce.

1.6 OBJECTIVES OF THE STUDY

i. To conduct a historical analysis of the challenges to the distribution of matrimonial property in Kenya, pre-2010 Constitution.

ii. To analyze and test whether the Constitutional reforms brought about by the CoK 2010 particularly Article 45 (3) is adequate and can withstand the test of time and achieve equality in distribution of matrimonial property.

iii. To conduct a study of the International best practices to ascertain whether Kenya is making gains towards achieving equality.

1.7 RESEARCH QUESTIONS

i. What are the historical challenges Kenya faced pre-2010 Constitution and how have they impacted on the distribution of matrimonial property today?

ii. How has Article 45 (3) of the CoK 2010 reformed the subject distribution of matrimonial property in Kenya and has it adequately addressed the historical challenges?

iii. What adjustments; legislative or otherwise must Kenya do to achieve the standards of international best practices?

1.8 THEORETICAL FRAMEWORK

The theoretical framework driving this thesis is on the principle of equality of marriage espoused in the CoK, and is then expanded to cover contextual factors by the feminist theories. Feminist legal theory arises from the woman question, which pushes for the questioning of gender implications that might otherwise appear to be objective or neutral.[25] In understanding these questions and to better address the afore-set research questions, the paper will look at the common concern by feminist theories in addressing the question of equality .

Feminist legal theory often begins with an examination of what the world has grown used to in a patrilineal world order. Heilbrun and Resnik in one of the earlier critiques and espousals of the feminist legal theory explain how the world has gotten used to women being the other, the subject of discussion and not necessarily the speaker. This has been particularly harmful in law.

They provide an example of the *Hoyt v. Florida* where a woman, accused of having killed her husband, is tried by an all-male jury. Her opposition to the composition of the jury failed in the Supreme Courts of both the state and the United States. This paints a relatively accurate picture about the struggles of women in the challenge of laws written by and for men, and largely excluding women and their rights. This is the point of the feminist legal theory.

When speaking about the need for the feminist theory in the law, Baer[26] identifies the fact that feminists have always identified the law as an instrument of male supremacy for a long time. This

[25] Bartlett, K. (1990), *Feminist legal methods*, Harvard Law Review, 829–888.
[26] Baer Judith, *Feminist Theory and the Law*. (2011)

is why one of the most important tools of the feminist movement has always been criticism of the law. It is such criticism that succeeded in helping overcome some of the most blatant forms of legal sexism.

Baer recognizes that there are many feminist schools of thought, but almost all agree on the perspective so expertly outlined by Scales.[27] First, the conventional legal theories or doctrines that have been developed by men, in societies that are mainly dominated by men, have a fundamental male bias even in situations where they are ostensibly gender-neutral. Secondly, the lives and realities of women are so different from the lives and realities of men, such that legal theory that is developed by men does not necessarily fit the realities of women. Finally, the development of feminist theory calls for women to be able to produce theory from their own perspective and experiences.

Looking at the law from a feminist theory perspective might help right these inconsistencies. Baer presents the feminist theoretical framework and how it then applies to the law[28]. Although the research here is based on western feminist discourse but is in large part still applicable to the Kenyan situation. Bartlett further presents the differences between conventional jurisprudence and the woman question as presented in feminist theory in terms of neutrality and outcomes.[29] This difference is important in understanding the difference between division by contribution and 50/50 distribution in the Kenyan context.

This is in contrast with the conventional jurisprudence that calls for neutrality. The principle of neutrality has often been presented as independent of the politics of the time, and has been

[27] Scales, A. M, "The emergence of feminist jurisprudence: an essay" (1986) *Yale Law Journal*, 95: 1373–403.
[28] Baer, J, "Feminist Theory and the Law. In R. E. Goodin" (2011).
[29] Bartlett, K. (1990), *Feminist legal methods*, Harvard Law Review, 829–888.

described by jurists as genuinely principles, transcending the immediate result that is to be achieved.[30] Looking at the bigger picture, the feminist theoretical framework builds on the pragmatist mode of constitutional interpretation, which involves the court weighing or balancing the probable practical consequences of one interpretation against others.[31]

Arguably the principle of equality that runs across the CoK in 2010 in all spheres of life (cultural, political, social and economic sphere) was informed in part by feminist discourse as it deliberately sought, to achieve equal the rights for both men and women, especially in marriage and with regards to matrimonial property.[32]

However, the feminist theoretical view posits that historical and current contextual factors mean that women are disadvantaged in many ways just as before to mean there is still a long way to go. The study therefore explores a legal perspective that seeks true equality between men and women, especially with regards to matrimonial property and its advancement by a feminist approach.

1.9 LITERATURE REVIEW

The study takes a feminist approach to the division of matrimonial property in Kenya. To that end, it is important to look at the historical progress of matrimonial property laws in Kenya. Various researchers have looked into the issue of division of matrimonial property from various different angles as will be thermalized below with the main theme flowing through the work being equality or rather the quest for equality.

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[30] Postema, GA, *"Treatise of Legal Philosophy and General Jurisprudence"* (2011). *Volume 11 Legal Philosophy in the Twentieth Century: Common Law World.* New York: Springer.
[31] Murrill, B. "*Modes of Constitutional Interpretation"* (2018). Washington DC Congressional Research Service.
[32] *Ibid*

1.9.1 Gender Equality

The right to equality is a protected right under the CoK 2010,[33] whether in within marriage or without family relations. Subject to Article 2 (5 & 6) of the CoK, international Laws ratified by Kenya are applicable in Kenya. To this extent therefore, Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[34]; Article 16 (1) of the (ICCPR)[35]; Article 23 (4) require equality of rights and responsibilities of spouses during marriage and at its dissolution.

Nations around the world have made significant efforts provide protection for culturally considered minority groups. These included letting religious and cultural groups create customary laws that allowed them to practice their beliefs, all of which created conflicts with the ideals of equality and choice for women that are at the heart of the liberal feminist movement globally. As one of the fundamental advancements of gender equality, this is especially envisioned in the rights of women to own property equally.[36]

Hardee[37] starts her discussion from the celebrated case of S.M. Otieno case to create an understanding of from where the inequality started with women's views or concerns segregated or rendered second class. She states, '*the battle over the right to bury Mr. Otieno is one example of the tension between cultural rights and protecting the rights of women.* '[38]

She makes a further case that Kenya's marriage law at the time was complicated because many cultures were fighting for control over what personal law was. People around the conflict had the

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[33] Article 27 of the CoK.
[34] Adopted by UNGA in 1979.
[35] Adopted by UNGA in 1966; The UN Human Rights Committee, which enforces the ICCPR,.
[36] Catherine A. The Rights of Women and Cultural Minorities in Kenyan Marital Law, New York University Law Review, 2004.
[37] Ibid.
[38] Ibid at page 713.

choice to select from various personal law regimes, which is why this paper's title, "Balancing the Rights of Cultural Minorities and Women's Individual Freedom," informs of the conflict between multiculturalism and feminism.[39]

These multicultural diversions seem to have found their ways into our statute books as Section 7 of the Matrimonial Property Act[40] appears to have taken into consideration the beliefs and/or aspirations of some communities and their retrogressive cultural practices that never favored equality in spite of the said equality being at the heart of the constitutional principles in the CoK 2010.[41]

The debate on equality as this paper advances is not merely academic but of great concern that calls for and requires the collective will of the people in ensuring that the said principle as espoused under Article 27[42] is achieved and more particularly in so far as the question of matrimonial property is concerned.

Equality as will be seen in the discussion that follows here below calls for: drastic changes to our laws (legal dynamism), protection of women, settling the law on matrimonial property division to clarify the inconsistent judicial precedents, and encouraging feminist movements to champion for reforms.

A precise measurement of the characteristics of equality is necessary for all efforts to grasp the idea of equality and to apply the equality principles listed above. Therefore, it is important to understand the context in which the pursuit of equality is morally significant.

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[39] Ibid.
[40] Matrimonial Property Act, Section 7.
[41] Article 10 (equality is a national value and principle of governance).
[42] Constitution of Kenya 2010.

The argument that all human beings are born equal is a fallacy or rather only true biblically..

This, as the study identified, and the arguments to be thereafter presented identifies gaps in the lack of timelines in the realization of equality, equality of material goods and rights can as well lead to inequality or rather un-satisfaction and finally, from a moral perspective, individual characteristics and circumstances are not appropriately taken into account by a rigid and mechanical distribution of equality between people.

1.9.2 Legal dynamism

Under this theme, scholars argue that, the law should not be rigid or static, especially considering its origins, but must be able to change and reflect the modern social, political, economic and cultural trends. Secondly, that Kenyan family law, and in this context matrimonial property law, have not evolved as much as it should. In this case, there should be a benchmark with international standards and statutes, most of which Kenya is a signatory to as they consider that Kenyan family law has especially not evolved sufficiently to be able to protect the rights and freedoms of women within the family setting.

Lastly, there is advanced an argument that, one of the biggest reasons for this lack of progress has been the rigid perspectives of Kenyan culture, which have unfortunately also affected law reform. In particular, Kenya is a largely patriarchal culture, mediated by community standards and customary law. The patrilineal nature of customary law has disadvantaged women, leading to their subordination even in crucial areas as the right to ownership of matrimonial property.

According to Muriuki Muriungi,[43] he takes a feminist approach in the critique of the family law regime in Kenya. He establishes a need for reform in the Kenyan family law regime based on the

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[43] Muriuki Murungi, A Feminist Critique of the new Family laws in Kenya,(2020).

fact that law is inherently dynamic, and should change in order to cope with the dynamic socio-economic needs of the country.

Further, he propounds that, changes should be able to reflect an increasing egalitarianism, universalism and in some cases secularization of the country, especially in the family with respect to such issues as the equality of spouses in marriage. He further establishes the fact laws in Kenya have been largely patriarchal, establishing the need for a feminist approach to family law reform in Kenya.

Nancy Baraza[44] on the other hand also took a similar position in her review of family laws in Kenya, going as far as comparing the strength and progress of family law reforms in Kenya with other international standards. She also cites a national imperative for family law reform to match the modern social, political, economic and cultural trends in the international arena.

Patricia Kameri Mbote[45] also provides a useful historical overview of family and matrimonial property laws in Kenya, and their evolution over time and which she advances the argument for the change of laws to fit the societal needs especially women as regards the quest for equality.

The gaps identified herein range from, religious beliefs on matters equality, disability, ethnicity and gender. An argument might accrue as to why ethnicity for example should present a challenge in the distribution of matrimonial property in Kenya.

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[44] Nancy Baraza: An Overview Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi (2020)
[45] Patricia Kameri-Mbote, '*The land has its owners! Gender issues in land tenure under customary law in Kenya*' (2005–9)

1.9.3 Legal Protectionism

According to Smith et. al.,[46] they advance the argument that, women still lack protections and access to property rights, despite the fact that Kenya has shown commitment to gender equality by signing such international human rights conventions like Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).[47]

They mention the absolute sole ownership that the law has traditionally accorded men as a huge impediment to women's rights to property, housing, and credit. Further, they mention the fact that women's direct and indirect contributions are never acknowledged based on their lack of control of their matrimonial homes. The dismissal of these contributions is in direct violation of the right to equality in marriage. To their credit, they provide several suggestions for law reform looking to rectify historic disadvantages imposed on women.[48] They stress on feminist ideals (whcih approach is to be discussed in the proceeding arguments) like joint participation in registration as well as consent for acts that involve matrimonial property.

1.9.4 Jurisprudential inconsistencies

Baraza points out the inconsistencies of decisions determining spousal property rights, explaining the shocking lack of legislation on the subject of family reforms.[49] They also point out the fact that, the law though aimed at establishing the rights of women, has not had that effect. According to them, the country has traditionally had social and structural issues and deficiencies that prevent women from enjoying these rights. They point out such issues as land registration and arbitration

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[46] Smith (2009) *Georgetown Journal of International Law*.
[47] (CEDAW) adopted in 1979
[48] Smith et. al. 2009
[49] Nancy Baraza, 'Family Law Reforms in Kenya: An overview' (2009); Nairobi Gender Forum.

processes that are unfair to women, lack of knowledge among professionals in the legal profession and difficulties in the application of legal principles.[50]

While these researchers have mainly focused on the periods before the new constitution, there have been many researchers focusing on the legal deficiencies after the new constitution. Kirui and Odhiambo and Nnoko-Mewanu in different news articles rue the fact that despite new laws being enacted, a combination of constitutional amendments and various contextual factors mean that women are still disadvantaged when it comes to the division of matrimonial property.[51] They focus mostly on the Matrimonial Property Act (2013), whose amendments have resulted in a situation where the rights of women are still not upheld by the Kenyan Courts of Law.

1.10 RESEARCH METHODOLOGY

Examining the instances and root causes of inequities in the division of marriage property in Kenya was the goal of this study. For a study focused at understanding how feminist ideas and generational differences influence the imbalances women are confronting in society today, feminist scholars have offered a new paradigm for inquiry that is ideally suited. This study combines postmodern viewpoints that view experience and identity as created and situational with a feminist analytical framework.

In writing this study the desk review research methodology was utilized. This included both qualitative and quantitative research methodologies. In employing these methodologies, collection and analysis of the literatures, text books, academic papers, legal journals, discussion papers and reports that focus on inequality of distribution of matrimonial property will be made. Further, there

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[50] Ellis, A., Cutura, J., Dione, N., Gillson, I., Manual, C., & Thongori, J. (2007), 32.
[51] *Ibid*

was also an examination of the various court cases over the years that have shaped the jurisprudence and discourse on the spousal rights to matrimonial property.

Kenya, like any other African country has suffered from patriarchal prejudice where women have often been disadvantaged in the distribution of matrimonial property. However, this is not the case world over. To ascertain whether this inequalities experienced by women are global; this study will conduct a best practice analysis of socio-cultural factors of South Africa.

First, England, which colonized Kenya, introduced the first legislation on matrimonial property in 1882. It will be important to ascertain whether England itself has moved on and adopted a more inclusive approach on distribution of matrimonial property. It is critical to ascertain how the country manages matrimonial matters related to distribution of property and if there are any aspects that Kenya may adopt to ensure equality in the distribution of matrimonial property.

1.12 CHAPTER BREAKDOWN

Chapter one of this paper provides, the ground breaking for the study providing the historical background, defining the problem and providing the hypothesis that the objectives and research questions set will test and work towards achieving. In so doing, the research will be propelled by literary and scholarly works thematically discussed under the literature review with an identification of the gaps in each that shall justify the study herein.

Chapter two of the paper analyzed the historical challenges Kenya faced pre-2010 Constitution and how they have impacted on the distribution of matrimonial property today.

Chapter three provides a review of the feminist legal theory, the division of matrimonial property in South Africa for best practices that would assist Kenya rethink of her approach towards the subject of matrimonial property.

Chapter four discusses the jurisprudence emanating from our courts on the subject ‘distribution of matrimonial property in Kenya’ and how greatly have they been impacted by the international standards discussed in Chapter three above and as well test the feminist’s approach and its future impacts.

Chapter five of this study outlines the findings, the conclusion and give recommendations.

THE HISTORICAL ANALYSIS OF THE CHALLENGES FACING DISTRIBUTION OF MATRIMONIAL PROPERTY IN KENYA PRE-2010 CONSTITUTION

2.0 INTRODUCTION

During the colonial and post-colonial period, Kenya did not have a statute on matters division of matrimonial property. This therefore left the Courts with no option but to apply some fashioned principles from borrowed applicable principles from England and other commonwealth jurisdictions to provide the much needed know how on the distribution of matrimonial property upon separation or divorce.[52]

Of course, some of these decisions had societal (social, cultural, political and economic) underpinnings which were seen as challenges undermining and/or violating women's right to own, inherit, manage and/or dispose property.[53] This chapter seeks to address these challenges in answering research question on*;* what are the historical challenges Kenya faced pre-2010 Constitution and how have they impacted on the distribution of matrimonial property today?

2.1 DIVISION OF MATRIMONIAL PROPERTY DURING THE COLONIAL PERIOD

In 1897, soon as Kenya was declared a protectorate, the door was opened for an East African Order in Council whose *Article 2* provided for the application of the African Customary Laws on legal matters affecting the natives so long as they were not repugnant to justice and morality.[54] This

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[52] P.L.O, Mbondeyi Morris and Odero Steve, The Constitution of Kenya: *Contemporary Readings*, Law Africa, Nairobi, 2013, 113.

[53] *Ibid*.

[54] <http://www.ielrc.org/content/w0101.pdf> (accessed on 21st October, 2020).

order under *Articles 64* and *87* provided that, the said law was not applicable to Christians and Muslims respectively as they were deemed to have abandoned the African Customary ways.

The aforementioned regulations having universal application, it was necessary to regulate items pertaining to matrimonial property expressly. The Married Women's Property Act (MWPA) became a law of general application in England on August 12, 1897, and as a result, it was applicable to issues of property distribution in Kenya to the extent that Kenya's circumstances and its population permitted.[55]

The developments notwithstanding and at a time when there was a strong societal rooting on the recognition of duties and ownership of property, the husband, because of his management and control over the community property, still naturally occupied position of a trustee of the wife and the entire family.[56]

Stereotypical behavior and conditioning of women to believe they are not meant to own or inherit land or any other property contribute to the perpetuation of these customary rules and practices. As mentioned above, customary practices in Kenya typically gave women secondary rights to land. Additionally, women encountered significant challenges in asserting their property rights, either because they were uninformed of these rights or were unable to do so.[57]

2.1.1 The Married Women Property Act, 1882

Just before 1882, the applicable laws now in Africa on matters family, marriage and divorce were the customary laws and the East African Order in Council. According to the Judicature Act, the

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[55] International Environmental Law Research Centre n64 at 114-115.
[56] Deborah H. Bell, "Equitable Distribution: Implementing the Marital Partnership Theory through the Dual Classification System,"67 Miss. Law Journal (1997)
[57] Ibid.

MWPA took precedence over traditional law. It granted courts the authority to take into account each party's share of the marital estate in the event of a divorce. Courts took into account whether a claimant had contributed money to the purchase of matrimonial property. It's possible for this contribution to be direct or indirect.

As correctly captured by Kanjama and Katarina's book *Family Law Digest on Matrimonial Property,*[58] they state that, in the 1960's Kenya's family law was undergoing a lot of transformation. Just like England, the said transformation was being accelerated by the changing social expectations on the subject 'distribution of property'. While presiding of matrimonial property, judges attempted to legislate on a new social context but again led to uncertainty, unpredictability and vague.

They are also seen to depict the development of matrimonial property in Kenya since the Married Women Property Act's implementation, in addition to criticizing the contradictory decisions made by Kenyan courts regarding the partition of matrimonial property. The book acts as a review of these decisions relating to spousal property rights.[59]

Emphasis on the application of the Act in Kenya, **Trevelyan J**, in *I vs. I,*[60] declared that MWPA[61] was applicable in Kenya by virtue of the reception clause[62] On August 12, 1897, it became a law of broad application in England. The Court believed that joint ownership by itself would imply a desire that the beneficial interest in the property be divided between the spouses when it came to the distribution and/or ownership of property by a woman. It is evident here that indeed that, a

[58] Charles Kanjama & Katarina, Family Law Digest on Matrimonial Property, (2013) Pg. 4.
[59] Ibid.
[60] (1971) E.A.
[61] Married Women Property Act, 1882.
[62] See Section 3(1) of the Judicature Act, Cap. 8 Laws of Kenya.

woman only had secondary rights to ownership of property.[63] A deeper look at the MWPA is relevant. A discussion as regards its provisions and the holding of courts in knowing where the problems lied is presented.

2.1.2 The interpretation of Section 17 of the MWPA and its application in United Kingdom vs. Kenya

As has been noted, Kenya being a colony of the British relied on the interpretation of the English Courts in a bid to develop its principle on the subject distribution of matrimonial property. The MWPA never defined exactly what amounts to matrimonial property let alone if the said, should equitably be divided at the dissolution of marriage. In trying to address this issue, Section 17 provide as follows;

> "in any question between husband and wife as to the title to or possession of property, either party or any of such bank, corporation company, public body or society as aforesaid, in whose books of any stock, funds or share of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of justice… and the Judge may make such order with respect to the property in dispute and to the cost of the consequent in the application as it thinks fit."

Following the above, Courts took positions as to what is the exact interpretation. Below are some of the two key decisions from the English Courts as will be contrasted with the Kenyan Courts in the application of the same principles.

[63]Married Women Property Act 1882.

2.1.3 The English Courts interpretation

In ***Pettit v Pettit***,[64] The Court determined that married women had the same property rights as unmarried women, and as a result, they were entitled to retain ownership of prenuptial assets and to maintain separate ownership of assets obtained during the marriage. Then, this stance might be justified as a victory for the woman.

Lord Morris and Lord Reid in the ***Pettit case***, clarified that in as much as *Section 17* of the MWPA afforded parties to a dispute the right to approach the High Court, it did not grant the Court powers however, to vary property rights between spouses and insisted on applying the principles of contract law with the necessity of inferring common intention between spouses. This decision as can be seen does not address the question a situation where the common intention if the parties be-it from their conduct or express can be inferred and also, there being no clear-cut distinction between direct and indirect contribution by a spouses.

In other words, the House of Lords confirmed that Section 17 is solely procedural in nature and does not grant the court the authority to alter the parties' pre-existing proprietary rights. The marital status had no influence on any shared ownership or co-ownership of the property, and the term "family property" had no legal significance unless it related to assets that were separately owned by one spouse..

One year later, the case *Gissing v. Gissing*, which was founded on the quality principle "equality is equality," attempted to close the gaps created by Pettit and found a trust in favor of the

[64] [1969] All ER.

contributing spouse. Gissing brought the notion of trust into the determination of spousal property interest.In *Gissing* Lord Justice Reid was of the view that of the view;- [65]

> *"There is a wide gulf between inferring from the whole conduct of the parties that there was probably an agreement and imputing to the parties an intention to agree to share even where the evidence gives no ground for such inference"*

2.1.4 Kenyan Courts interpretation with impact of the English decisions

Between the years 1976 and 2007 in the pre-2010 Constitution, Kenyan Courts can be said to have been busy. Several decisions were made but of key importance to this discussion and context shall be the decisions in, *Karanja v. Karanja,*[66]*Njuguna v. Njuguna,*[67]*Kivuitu v. Kivuitu,*[68] *Essa v. Essa,*[69]and *Echaria v. Echaria*[70]

2.1.4.1 Karanja v. Karanja[71]

This case is the pioneer case in the application of the interpretations of the House of Lords in *Pettit* and Gissing. The Court was asked whether the wife was entitled to a share of the marital property, which included one property that she helped to directly purchase but was registered in the husband's name, as well as other properties that she helped to indirectly purchase but were still registered in the husband's name. Second, whether customary law would apply to preclude any trust imputation in favor of a married woman, particularly one who is employed on a salary.

[65] (1970) All ER 780.
[66] Karanja v. Karanja, (1976) KLR at 307.
[67] Njuguna v. Njuguna, (1986) KLR.
[68] Kivuitu v. Kivuitu, (1991) eKLR.
[69] Essa v. Essa, 91996) E.A.
[70] Echaria v. Echaria (2007) eKLR.
[71]*Ibid*

In response, the Court decided that regardless of whose name the property is registered in, it should be recognised as belonging to the spouses jointly in cases where the property was acquired via a combined effort. In this case, the husband made the choice to retain the disputed property in trust for himself and his wife in an equal distribution. (Emphasis)

2.1.4.2 Njuguna v. Njuguna[72]

In this case, a divorced spouse who was unemployed asked the court for an equal division of the assets, including those acquired during the marriage with the wife's financial support. He claimed that his participation was unintentional.

The Karanja case (supra) court concluded that the wife had satisfied the court of her direct and indirect financial contributions to the property as well as proved her entitlement to an equal portion by agreeing to him and deviating from the ratio of 2:1. The property was divided into equal shares when the court proclaimed shared ownership.

2.1.4.3 Kivuitu v. Kivuitu[73]

This can be seen as the case that tested the waters with what amounts to contribution of a house wife *vis-à-vis* the monetary contribution of a working wife who makes financial contribution to the acquisition of property.

In this case, the husband who went abroad left his wife in charge of securing an alternative matrimonial home.

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[72] *Ibid.*
[73] *Ibid.*

The wife paid the deposit using funds she received from a business that was jointly held by the husband and a third party. The husband then made the remaining payment from his wages, and the property was then registered in their names jointly.

Following the divorce, the wife requested an equal division of the marital estate based on Section 17 of the MWPA. She argued that the house ought to be sold, with the earnings being split evenly between them.

The property was registered in the joint names of the parties, which the court of appeals claimed demonstrated that each party had an undivided, equal interest in it. The court added that Section 17 did not grant the wife a right to a sale, only a finding and declaration of her share of the property.

2.1.4.4 Essa v. Essa[74]

In this case, the Court of Appeals agreed with the ruling in the Kivuitu case (previously mentioned), which stated that the law presumes that property acquired during a marriage and registered in the joint names of the spouses is held in equal shares by those spouses.

2.1.4.5 Echaria v. Echaria[75]

Back to default setting. This decision, negated the ground Kenyan women had celebrated to have gained under the ***Kivuitu*** decision. In this case, the property in question was only obtained by the husband through a loan and a monetary deposit made during the marriage.

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[74] *Ibid.*
[75] *Ibid.*

In a section 17 MWPA application, the wife claimed 50% of the property at the time of the dissolution. The trial court ruled that the parties should each get an equal share of the property in dispute. The spouse then filed an appeal with the Court of Appeal as a result..

In this sense, the Court of Appeal rejected the underlying presumption that the Kivuitu case had established a fundamental norm of equality applicable to all property disputes. Additionally, the Court ruled that legislation allowing for non-monetary contribution would need to be passed by Parliament in order for the courts to take it into account. Further, it stated that after considering the case's circumstances, the court determined that the wife's beneficial interest in the suit property was 25% and the husband's beneficial interest was 75%.

Essentially what the Court is saying in this case is, it cannot legislate and come up with a law that prescribes a spouse’s beneficial interest as that is a reserve of Parliament. Additionally, the decision of equal shares of property as seen in some of the foregoing decisions is not proper in law.

The Justice of Appeal lamented as regards MWPA, that “there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. The Court in other words noted the sad state of thing that we are 125 years down the line, we as a country are still shackling a foreign legislation which in fact the mother country found wanting in the late 70’s.

2.2 CONCLUSION

Looking at the development of laws in Kenya as regards ownership and division of matrimonial property, some of the key challenges as expressed in the foregoing discourse are;

a. **Customary law and practices:** Many are considered women not as men's equals and for the longest time, the man was not only the head of the house but the bearer of titles to property and land and sadly so, the aspect of a man marrying a woman rendered the woman his property;

b. **Lack of laws and/or legislation:** From the above history and more particularly with the remarks of the Justices of Appeal in ***Echaria's*** case is the lack of laws that would spell out exactly what happens to property at the dissolution of marriage;

c. **Economic inequalities**, For centuries, women did not have access to basic education and this limited their chances of getting employed, earning money and bringing the said income to the negotiating table to acquire either property in her name, jointly with the husband or any other way that would warrant her entitlement other than secondary rights;

d. Under representation: Arguably, this is still a challenge to date. Women representation to address their concerns in parliament was almost extinct at independence and still to-date.

CHAPTER THREE
JURISPRUDENCE EMERGING FROM KENYAN COURTS POST 2010
3.0 INTRODUCTION

The division of matrimonial property is an emotive issue that has been on the menu of Kenyan courts for very long. It has been deliberated by various courts with different outcomes. Much of the cases before 2010 were decided on the basis of section 17 of the Married Women Property Act. Due to the harsh decisions that were given that mainly disadvantaged women. There was need for a law that would set the guidelines for division of matrimonial property. This culminated in the enactment of the Matrimonial Property Act which came into force on 16th January 2014. The period after 2010 before the Act was enacted, courts relied on the rules of equality as espoused by our constitution through various esteemed articles. Much more jurisprudence can be gathered from 2014 after the Act became law. This Jurisprudence is the centerpiece of this chapter.

3.1 PRE 2010 JURISPRUDENCE

In a number of marital property disputes, the courts gave the wife almost an equal share to that of the husband. The precedent set by the Court of Appeal in *Kivuitu v. Kivuitu* [76] recognized a wife's indirect contribution to the household unit.[77] From 1991 to 2006, the courts followed the *Kivuitu v. Kivuitu* decision.[78] In that case, the parties' marriage lasted for more than 20 years. The husband argued that he solely contributed to the acquisition of marital property and that the wife was not entitled to a share.[79] However, the court held that the wife made indirect contributions and, as such, she was entitled to 50 percent. Similarly, the court in *Muthembwa v. Muthembwa*[80] adopted the same holding and recognized the woman's non-monetary contribution to the marital estate.

[76] Kivuitu v. Kivuitu (1991) Civil Appeal No. 26 of 1985, K.L.R. 6, 7 (C.A.K.) (Kenya).
[77] Ibid
[78] Ibid
[79] Ibid
[80]Muthembwa v. Muthembwa (2002) 1 E.A. 186, 194 (C.A.K.) (Kenya).

In contrast, the trial court in *Nderitu v. Nderitu*[81] overlooked the Court of Appeal Kivuitu decision. The court determined that the wife, who claimed non-monetary contribution, was entitled to only 30 percent of the marital property. Additionally, the judge declined to award the woman 50 percent of the property due to her incapacity after childbirth, stating, there is evidence that the caesarian deliveries reduced for those periods she was delivering, her capacity to exert herself in any gainful activity. I take note of the delivery condition and award the wife thirty percent. Here, the lower court viewed the dispute through the lens of a traditional marriage theory.[82] In an ideal approach, free of biased, traditional values, the court would have considered the wife's life-threatening risk as an extraordinary contribution. Instead, the trial court failed to consider women's unpaid work as work by devaluing the woman's non-monetary contribution.[83]

Then the Court of Appeal reversed the lower court's decision here and granted the husband and wife each 50 percent of the marital property.[84] The Court of Appeal noted that the wife's contribution amounted to an indirect contribution that allowed the marital estate to grow.[85]

In 2007, *Echaria v. Echaria*[86] reversed the weight accorded to women's uncompensated domestic work. In that case, the parties' marriage lasted for more than 30 years, and they accumulated a vast marital estate.[87] In settling the marital dispute, the Court of Appeal awarded the wife, who had provided non-monetary contribution, but had limited proof of such contribution, only 25 percent of the property. [88]

[81]Nderitu v. Nderitu (1998), Civil Appeal 203 of 1997, e.K.L.R. (C.A.K.) (Kenya).
[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid
[86]Echaria, Civil Appeal No. 75 of 2001, e.K.L.R.
[87] Ibid
[88] Ibid

From 2007 through 2010 (when Kenya adopted its new constitution), the Echaria decision bound the lower courts in Kenya. The Echaria standard required proof of non-monetary contribution as the basis for spousal contribution.[89] At the time the case was decided, Kenyan law did not recognize non-monetary contribution to marital assets.

3.2 PERIOD BETWEEN 2010-2013

The period between the promulgation of the Constitution in 2010 till the enactment of the Matrimonial Property Act 2013 was marked by path breaking jurisprudence in terms of gender parity in matrimonial property cases. Since the legislation on matrimonial property contemplated under Article 68 of the Constitution was yet to be enacted, the Kenya courts relied on the equality and non-discrimination provisions in the Constitution to determine the question.[90] The Courts particularly construed Article 45 of the Constitution as prescribing equal share (50-50) of matrimonial property between spouses upon divorce, notwithstanding their respective contributions. This was applied in the following determined cases.

In *ZWN v PNN*,[91] the High Court had this to say regarding the new constitutional dispensation and prevailing jurisprudence;

> *This court notes and appreciates that the principle of law set by the Court in Echaria v. Echaria stems from provisions of the legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property*

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[89] Ibid
[90]CoK 2010, Article 68
[91][2012] eKLR.

have primacy over the principle of law enunciated by the decision in Echaria v Echaria which stems from an ordinary legislation.

In the case of *J.A.O v N.P*[92] the parties had contracted a marriage under the African Christian Marriage and Divorce Act but later filed for and were granted orders for judicial separation. The plaintiff brought an application by way of originating summons vide section 17 of the MWPA for orders that property acquired during the pendency of their marriage but registered in the name of the defendant were owned equally and should be thus shared. The remarks of the Court in this case are worth quoting at length for our purposes:

When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in the form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property... There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.

[92][2013] eKLR.

The ray of hope espoused in our jurisprudence by the courts[93] regarding the provision of Article 45 (3) of the Constitution was also in effect in *CMN v AWM*[94] where the High Court stated:

> *The legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the property which matters …the legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property [matrimonial house] equally between the Plaintiff [husband] and the Defendant [wife].*

The Court of Appeal had occasion to provide judicial construction and guidance on the interpretation of the Constitution on division of matrimonial property in *Agnes Nanjala William v Jacob Petrus Nicola Vander Goes*.[95] In this case, the Court of Appeal held that both spouses were entitled to an equal share of property by dint of Article 45 (3) of the Constitution which provided for equality of spouses before, during and after marriage. The appellate court remarked thus of Article 45 (3) of the Constitution:

> *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….Pending such enactment, we are nonetheless of the*

[93] Also see *M.C. N v A.W.M*Exh No. 208 of 2012 where the Court applied the principle of equality.
[94][2013] eKLR.
[95]Civil Appeal No. 127 of 2011.

considered view that the Bill of rights in our Constitution can be invoked to meet the exigencies of the day.

3.3 POST 2013 JURISPRUDENCE

An assessment of emerging jurisprudence regarding the interpretation of the provisions of the MPA 2013 indicates that there has since been a shift from the 50:50 position interpreted from article 45 of the Constitution.[96] It should be stated that the courts have held that before making an application for division of matrimonial property, there must be proof of divorce or dissolution of marriage.[97]However, in *M.J.S.D v P.K.D*[98] the court was of the view that section 7 of the MPA required parties to have divorced before asking for a division of the matrimonial property while section 17 of the Act was merely for seeking declaratory orders as to the rights. This reasoning was also adopted in *P.W.M v E.M*[99] and in *MNW v WNM & 3 others.*[100]

Further, while the courts seem to appreciate that we have since moved on from Echaria especially with the Act defining contribution to include both monetary and non-monetary efforts, the courts have been unclear about the same. In *VWN v FN*[101], the court had this to say of the new law:

> "*In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution, Echaria [supra] is no longer good law.*"

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[96] Maina, Joseph, "Reconciling Echaria v Echaria with Article 45 of the Constitution" (2017) SSRN Electronic Journal
[97]*Rachel NgutaRiungu v Anderson ArgwingsRiungu*
[98]Civil Suit No. 18 of 2014.
[99]Civil Suit No. 1 of 2013.
[100]High Court Civil Case No. 46 of 2012.
[101]Application No. Sup 3 of 2014.

The shift from the position before 2013 was reflected by the sentiments of Justice Kiage in *P N N v Z W N*. [102] To Kiage, 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.[103] 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.[104]

The impact of the MPA 2013 in the sharing of marital property upon dissolution of marriage appears to have been foreseen by Justice Tuiyot in *UMM v IMM*[105] where he remarked thus of the MPA 2013:

> "*The provisions of that Statute ameliorate 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*

[102] [2017] eKLR
[103] Ibid
[104] Ibid
[105] Civil Suit No. 39 of 2012.

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, 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) ...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).[106]*"*

The post 2013 position was captured best by Justice Mativo in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*[107] who echoed the sentiments of Justice Tuiyott, the court in this case opined thus,

[106]Ibid para 21.
[107] [2018] eKLR

"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)"

The Weight of the Judicial Decisions on the Recognition of Non-Monetary Contribution

In deciding how much weight to give uncompensated domestic work when dividing property after a divorce, two schools of thought have emerged, according to an analysis of recent court rulings. The dominant school of thought criticizes the equality of spousal contribution, whereas the opposing school of thought applauds the equality of non-monetary contribution. Most courts have come to the conclusion that financial support weighs more heavily than non-financial support, rejecting the equality of spousal support and siding with the husbands. On the other hand, a small number of court decisions have determined that non-financial contributions were eligible for an equal distribution of the marital estate in the case of divorce. [108]

As was said above, the majority of court judgements rendered after 2010 have ignored the equal contribution of both spouses. For instance, the equitable distribution of marital property under Article 45 of the Constitution was rejected by the court in U.M.M. v. I.M.M. When the wife failed to give proof of

[108] [2014] eKLR

her financial contribution to the property, the court disregarded her non-financial contribution to one of the properties.[109]

This demonstrates that even when women claim non-monetary assistance, they must present written proof of such assistance. This reminds me of Echaria, which courts upheld until the 2010 Constitution was adopted. Documentary proof of groceries purchases made over a decade-long period is challenging to produce. Most women doing such job do not keep track of all the receipts or paperwork that could establish their contribution because people do not typically wed with the intention of providing proof in their divorce case. In addition, courts fail to balance monetary and non-monetary contributions even when women submit such information. Advocates contend that courts are unable to fully recognize the equality of spousal contribution because of patriarchal beliefs and the "breadwinner mentality."[110]

Similar to *U.M.M. v. I.M.M.*[111], the court in *M.A.A. v. A.R.*[112] Recognizing the wife's non-financial contribution over the course of a 36-year marriage, the court in A.W.N. v. F.M.N. rejected the wife's non-financial contribution during the course of a 14-year marriage, siding instead with the husband's financial contribution.,[113] stated:

> "She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property." [114]

Some courts have allowed spouses to transfer marital assets to limited liability companies to prevent the other spouse from acquiring the property following a divorce. In P.W.K. v. J.K.G., for instance, the lower court ignored the wife's contribution when dividing the marital estate. The parties had amassed 18 properties over their 34-year union. The spouse gave the majority of the assets as presents to a limited business, a

[109] Ibid
[110] M.G.N.K. v. A.W.G. (2016), Civil Appeal No. 208 of 2012, e.K.L.R
[111] [2014] eKLR
[112] [2018] eKLR
[113] [2018] eKLR
[114] [2015] eKLR

lawyer, and family members in an effort to keep them for himself. The wife, according to the husband, made little effort because she spent the money on cosmetics and clothing. According to the trial court's ruling, the business wasn't considered marital property. [115] The court directed that parties were not to share equally in the remaining property, either.[116]

The Court of Appeal disagreed with the trial court's findings, concluding that assets registered in the name of a married couple's business are included in the marital estate. Firm property is often considered to be distinct from marital property under the principle of distinctions; nevertheless, the court found that marital property that was transferred to the company underwent an alteration that rendered ordinary company law distinctions inapplicable. The lower court's patriarchal mindset resulted in injustice, which the Court of Appeal stepped in and overturned.

These patterns show that when sharing marital property in the event of a divorce, judges are hesitant to take a partnership approach to marriage. The partnership method may be used to interpret the principle of equality in marriage in diverse areas, such as decision-making, but not spousal contribution, according to certain Kenyan courts..[117] in *P.N.N. v. Z.W.N,[118]* stated, "The reality is that when a marriage fails, the process of dividing and distributing the marital estate must be handled on the basis of justice and conscience, not with a romantic grasping at the 50:50 mantra. Accordingly, the Court of Appeal views marital property division as an ownership determination process rather than a method of property distribution. Thus, the Kenyan system contrasts the partnership model's mandated equitable distribution strategy with a discretionary distribution method. The Court of Appeal's strategy contradicts the principles of equality and shared spousal support.[119]

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[115] Ibid
[116] Ibid
[117] Ibid
[118] P.N.N. v. Z.W.N [2017] eKLR
[119] CoK 2010, Art 45

In contrast, the courts have occasionally acknowledged the equality of spousal support. For instance, the court in M.W.G. v. T.K.G.[120] adopted an unconventional strategy. The judge came to the conclusion that the homemaker's labor was just as valuable as her monetary contribution. The court referenced both Section 7 of the MPA and Article 45 of the Constitution. The court acknowledged that when assessing spousal contribution, Section 7 of the MPA did not permit the monetary evaluation of uncompensated domestic work. However, the court did cite the Constitution and recognize equal spousal rights to marital property..[121]

3.4 CONCLUSION

Emerging jurisprudence from Kenyan courts indicates that the plight of women in Kenya as advocated for many years has been addressed through the Matrimonial Property Act. The recognition of non-monetary contributions is a huge relief for women in Kenya. It has been asserted that the act changed the landscape for women rights in Kenya and helped change traditions that were deemed repugnant to justice. However, the feminist movement still pokes holes into the act claiming that it should uphold the sharing of matrimonial property on an equal basis i.e. 50/50 criteria. This proposition continues to face opposition and as the court opined in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*[122] to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution.

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[120] [2016] eKLR
[121] [2018] eKLR
[122] [2018] eKLR

CHAPTER FOUR

BEST PRACTICES APPROACH ON THE DIVISION OF MATRIMONIAL PROPERTY LAW IN SOUTH AFRICA

4.0 INTRODUCTION

Due to its importance to women's rights, the division of matrimonial property is a matter of concern on a global scale. This is because different countries have distinct laws, case precedents, or even accepted practises that govern how they handle marriage property. These various strategies cover the ownership of matrimonial property, the matrimonial property laws in that state, and the disposition of matrimonial property. This chapter analyses the manner in which South Africa through its laws and judicial decisions have treated feminist concerns over matrimonial property. As such this chapter entails an analysis of the laws and jurisprudence in South Africa. The choice of this nation above is motivated by the fact that these nations have made great strides towards the recognition of the rights of women in division of matrimonial property.

The South African Matrimonial Property Experience

South Africa 's recognized systems of holding matrimonial property include: community property with accruals and community property without accruals. South African fits the best practice approach as it incorporates a mixed system in order to accommodate the cultural diversity of this state. Like the United States, there is a lot of jurisprudence flowing from South African Courts that would enrich the Kenyan experience. South African laws do not recognize customary marriages in terms of indigenous law[123]. People who were married using Hindu, Mohammedan, or South

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[123] Harcourts, "Legal Regime on Marriages in South Africa"(2019)

African common law procedures were similarly viewed as being single because these unions are not legally recognized.

In Gumede v. President of the Republic of South Africa, this Court stated: "The reason for not recognizing customary marriages was held as that:

Native American society has always been characterized by patriarchy, but the written or codified laws governing customary unions encouraged a particularly sexist and primitive type of inequality that singled out women and children for marginalization and vulnerability. Although patriarchy is pervasive around the world, in our country it was fostered by archaic laws and regulations that showed little to no knowledge of the values that underpinned the traditional law of marriage. The main challenge during colonial times was that customary law was completely precluded from altering and adjusting as the needs of the community demanded. Those who did not practice it or were not bound by it were the ones who recorded it and enforced it. Customary law could not be modified by those who were bound by it.[124]

The South African matrimonial property regime determines a spouse‘s proprietary interests during and after dissolution of the marriage either by death or divorce. In South Africa, couples selects their matrimonial regime and choose which matrimonial property holding regime will govern their marital assets prior to the marriage. This has an advantage of reducing the time consuming process of changing the regimes afterwards, which may also be expensive, and also to ensure that upon crumbling of their marriage, one party will not be unfairly disadvantaged.[125]

[124] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) para.17.
[125] *Ibid* 135

The South African communion bonorum with Accruals

The South African Matrimonial Property Act of 1984 is set up as community property with accruals, meaning that both spouses are still in charge of their individual obligations and retain ownership of their respective assets. The difference between the net valuations from the two estates will be shared equally between the parties, with the party with assets that have accrued less profit keeping half.[126]

However, this system only benefits spouses who have acquired wealth and property on their own; those without profit may suffer disadvantage in order to partake in the net value of their asset difference after marriage ends.[127]

The de facto communion bonorum marriage property rule in South Africa mandates that couples marry without first executing or registering an ante-nuptial agreement. According to S.17 of the South African Matrimonial Property Act, after a marriage has ended, the spouses' premarital assets typically become a part of their joint estate.[128]

The participants to a marriage are equal co-owners of all assets in the joint estate regardless of who purchased the matrimonial property or had already acquired property prior to the marriage in South Africa.:

Regardless of who paid for the matrimonial property or had previously accumulated property prior to the marriage in South Africa, the spouses are equal co-owners of all assets in the joint estate.

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[126]Matrimonial Property Act of South Africa No.88 of 1984, *S.4(1) (a).*
[127] Ibid
[128]*Ibid*, S.17 (5)

However, certain assets are not included in the joint estate upon dissolution of the marriage. These assets include those mentioned in ante nuptial agreements, if any; those excluded in wills or donation agreements, unless the parties have agreed otherwise; small gifts given by spouses to one another; costs associated with marital litigation; and funds received in connection with personal injury claims. This also applies to the application of debt; both couples are regarded as debtors even if the obligation was only incurred by one of them, so a creditor may pursue payment from either of them individually or jointly.[129]

According to Section 18 of the South African Matrimonial Property Act, money received as compensation or damages for an injury only belongs to the spouse who suffered it; as an injury is a personal matter that cannot be shared, anything that results from it is likewise regarded as personal.[130]

The South African Matrimonial Property system is based on equity and the requirement that each spouse contribute equally to the marriage and to the matrimonial property, whether through work or household duties, either directly or indirectly. As a result, each spouse is consequently entitled to a portion of the joint estate should the marriage end. This is demonstrated in S.14 of the South African Matrimonial Property Act, where parties to a communion bonorum matrimonial property holding regime exercise equal control over the management of the joint estate, despite the fact that each party still has the full authority to act and manage their own assets, which are part of the joint estate, independently.[131]

[129] Robinson JA, "Introduction to South African family law" (4th edition 2009) p.27.
[130] Ibid s, 18
[131] Ibid s, 14

This type of system has the drawback that events like debts, insolvency, and legal actions emerging from the joint estate all harm both spouses, even if one of them wasn't at fault for any or all of the aforementioned..[132]

The South African communion bonorum without Accruals

Prior to or after the wedding, the parties often must sign an ante nuptial agreement outlining their preferences for how their property—both separate and occasionally property acquired during the course of the marriage—will be handled. Prior to being married, spouses could still claim any property they had acquired. The parties' intention to exclude the community property system from their property arrangements must be expressly stated in the nuptial agreement. As a result, parties keep the assets they had before getting married, or in the event of postnuptial agreements, the assets they had at the time the contract was made. [133]

The benefit of this method is that the other spouse won't be impacted in any way if one spouse is in debt against their separate property, one spouse is bankrupt, or there is a legal battle involving one spouse's property.

One spouse may be left without any claim against the estate of the other spouse following dissolution of the marriage because the spouses were unable to share in each other's financial achievement during the marriage. This presents a serious drawback. One spouse may be left without any claim against the estate of the other spouse following dissolution of the marriage

[132]Mogammand Shamiel Jassiem, _Critical Overview of the Application of the Default System in South Africa's Matrimonial Property Regimes'. University of West Cape, Faculty of Law (2010)p.15 – 17.
[133] Ibid

because the spouses were unable to share in each other's financial achievement during the marriage. This is a significant disadvantage.[134]

Communion bonorum is the most common matrimonial structure in South Africa, as was previously mentioned. The parties must enter into nuptial agreements if they want to be subject to the separate property regime. According to S.21 of the South African Matrimonial Property code, a couple may ask the court for permission to alter the current matrimonial property regime after marriage as long as they offer convincing justifications and have given their creditors adequate notice. If the court is certain that no one else would suffer an adverse effect as a result of the modification, it may grant this request.

Conclusion and Benchmark Lessons for Kenya

In conclusion, this chapter perceived the possible solution for equitable apportionment of matrimonial rights as introduction of nuptial agreements in Kenya 's Marriage Legal Framework. As seen before, the system of marriage as a contract apportions matrimonial rights including property rights before the beginning of marriage. This is advantageous on many fronts including the obvious advantage of pre – determination of matrimonial property rights.

This chapter also concluded that Kenya is a dual matrimonial property holding regime – both the communal and separate matrimonial property holding regimes. This chapter concluded that the characteristics of a communal matrimonial property regime are:

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[134] *Ibid*

Property acquired during a marriage is presumed to be community property under a rebuttable presumption; as a result, if one spouse purchases property using the funds from the sale of separate property, the other spouse must establish the same.

Even though the country of nationality controls the administration and power of disposal, each spouse has a fiduciary duty to the other to protect their interests at all times, even in the event of a divorce.

Since the couple jointly owns the entire estate, no action involving the marital property may be taken without the other spouse's informed consent. The separation or division of the other spouse's half interest in the marital property is not in any way related to the marital property.

The property is owned by the spouses to be divided equally, therefore neither spouse may give the property to a third party..

Due to the doctrine of survivorship not being applicable to this form of matrimonial property, when one spouse dies, the other spouse automatically inherits the property.

Even after marriage, a spouse retains ownership of any property they held before being married. The same holds true for gifts or property received through inheritance, albeit this category also includes items obtained during a marriage. The benchmark lessons that emanate from the foregoing best practice jurisdictions were summarised by this chapter as follows:

The introduction of nuptial agreements – to Kenya‘s legal framework will do more good than harm since the rights and obligations of parties to marriage is consensually designated before the marriage relationship commences.

Marriage as a contract pre –determines matrimonial property rights – and should be considered as a possible way through which social stirs that have simmered on in Kenya around the topic of matrimonial property rights can be quelled.

Apportionment of matrimonial property rights whether by legislation or jurisprudence should consider the case – by case approach and underlying public policies to prevent absurdities and further social injustices.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

This study set out to explore the nature and aspects of the division of matrimonial property in Kenya and to further examine the adequacy of matrimonial laws in protecting the rights of women in Kenya. It also briefly sought to evaluate feminist concerns over the conduct of dividing matrimonial property in Kenya. This chapter concludes the study by providing a conclusion based on the findings of the study recommendations based on the best practices approach study.

The case that this study proffers is that marriage is an institutions heralded as a partnership of equals. The constitution 2010 and the marital laws in Kenya have advanced the position that each spouse at the entry, subsistence and dissolution of a marriage to be equal to each other. The feminist on the other hand has held a general feeling that due to the problems that women have faced and the marginalization witnessed, the laws should grant women an advantage over men in this process. This has led to divisions in the interpretation of laws on division of matrimonial property legislation which formed the subject of the study.

This study was guided by several key objectives. The first objective was to examine the history of distribution of matrimonial property in Kenya before the constitution 2010 and the matrimonial property act in 2014. As such the second chapter of the study covered this historical analysis. It was observed here that division of property was on the basis of Section 17 of the Married Women Property Act a statute of general application. Through the period when the act was applied in Kenya division of matrimonial property did not take much consideration of non-monetary contribution. This was a major source of criticism against the act. For centuries, women did not

have access to basic education and this limited their chances of getting employed, earning money and bringing the said income to the negotiating table to acquire either property in her name, jointly with the husband or any other way that would warrant her entitlement other than secondary rights. In *Echaria v Echaria*[135] the court observed that to divide property on a 50:50 basis there was need to have a change of legislation.

The second objective of the study was to analyze and test whether the Constitutional reforms brought about by the CoK 2010 particularly Article 45 (3) is adequate and can withstand the test of time and achieve equality in distribution of matrimonial property. This article reiterated that marriage is an institution of equal partners. The constitution further demanded that parliament enact laws to fulfil the objectives set under article 45. To meet this objective parliament enacted the Marriage Act and the Matrimonial Property Act. From the jurisprudence in Kenyan courts and against the feminist desire. What the constitution and marital laws envisaged was not a 50/50 sharing exercise but as according to Justice Mativo in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*[136] He shared the same views as Justice Tuiyott and believed that at the time of a divorce, each partner should receive what is fair. When determining what someone deserves, one must take into account all of their contributions, both financial and non-financial. The entitlement increases in proportion to the contribution. The courts should give regard to proof that a spouse is entitled to half of the marital estate as a result of a non-financial contribution. However, a ruling that Article 45(3) mandates a 50:50 split automatically could endanger the institution of marriage.

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[135] [2007] eKLR
[136] [2018] eKLR

The third objective of the study was to conduct a study of the International best practices to ascertain whether Kenya is making gains towards achieving equality. The study compared in chapter four laws applicable in Kenya with those in South Africa, Australia and the United Kingdom. The analysis of South Africa is insightful as it for various reasons. South Africa allows for settlement agreements which are similar with the pre-nuptial agreements in Kenya. the practice of in –community property has also been lauded as it advocates for the union of parties and their property thereby ensuring equal sharing during divorce. In the out of community regime, the settlement agreements move in to ensure that there is no conflict at the time of dissolution on the division of matrimonial property. In Australia, the court considers the parties' past monetary and non-monetary contributions to the family's welfare, the property, and the parties' individual future financial needs. However, before making a decision, the court considers whether the outcome of the aforementioned three steps is just and equitable under all the circumstances.

In the UK, a partner is said to have acquired a share or an enlarged share in a property if they have made a significant financial or in-kind contribution to its improvement. This can apply to either one or both civil partners. Any agreement reached between the parties will decide the size of the share. Alternatively, if there is no agreement, it will be decided by what may appear to be just in all the circumstances to any court if the issue of the existence or scope of either civil partner's beneficial interest arises.. Finally, this study aimed at providing suggestions for legal reform, this is fulfilled in this final chapter.

As the record shows Kenya has made major strides in reforming its marital laws in order to protect parties to a marriage and especially women. The valuable contribution of women towards the development of matrimonial property and the growth and welfare of the family is now recognized as non-monetary contribution. There still remain however ambiguities in the current legal

framework that still expose women especially those not educated and living in rural areas where there are still challenges in accessing justice. This study has showed the challenges and provided recommendations to successfully address the plight of women and especially the feminist school of thought. Family remains the basis of social order and the protection of the state through legal reform is still necessary.

5.2 RECOMMENDATIONS

It is necessary to revisit the question of how to divide marital property in the event of divorce and to take into account the pragmatic approach taken by Australian law, which embraces the notion that, in addition to the contribution factor (emphasized locally), the future needs of the divorced couples are also crucial.

Women must be fully involved in the creation and implementation of policies. It is best to avoid obstacles like sexism in society and traditional norms governing how and where women should be placed.

There should be additional changes made to the Matrimonial Property Act 2013 to include all property acquired by either spouse during and for the purposes of marriage.

Additionally, the Act has to be changed so that equal ownership of property is presumed rather than relying solely on the contributions of each husband. Additionally, polygamous marriages must be included in the need for spousal consent. This is related to the requirement to make sure that the right protections are in place to deal with the power dynamics and imbalances that are present in a family environment in order to ensure that the required spousal consent is obtained in the right way.

We suggest that the definition of matrimonial property under section 6(2) of the act, which excludes property held in trust under customary law, be changed to address the problem given the prevalent customs in Kenya, where men inherit things like land and women move in with their husbands and thus don't own any land. Additionally, we propose amending Section 7 of the Matrimonial Property Act to permit spouses to split their assets equally upon divorce, regardless of how much was contributed by each spouse to its acquisition.

Finally, the research poses a challenge to legal practitioners interested in spousal equality and constitutional law enthusiasts to test the constitutionality of some of the above highlighted provisions of the MPA 2013 in the courts.

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