

**LENDING ON THE SECURITY OF MATRIMONIAL PROPERTY IN KENYA: THE  
ISSUE OF SPOUSAL CONSENT**

**By**

**VAYONDA JEPCHUMBA SIRMA**

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## DECLARATION

The research project is my original work and has never been presented at any other university

VAYONDA JEPCHUMBA SIRMA - G62/64746/2010

Signed..... Date.....

This research project has been submitted for examination with my approval as University  
Supervisor.

PROF: ALBERT MUMMA

Signed..... Date.....

## **ACKNOWLEDGEMENTS**

Firstly I give glory to God for granting me grace, providence and protection, I am grateful to God for enabling me to complete this task.

I acknowledge the remarkable input of my supervisor, Prof Albert Mumma. His criticism, counsel and guidance were invaluable. You are greatly appreciated.

I acknowledge my family, for your support, prayers and encouragement.

## **DEDICATION**

I dedicate this work to my children Sandra, Martin and Kimberly, for always keeping me on my toes my Mother for being true to me, and my best friend and partner in life, David Tito Koross. Thank you all for supporting me I love you all.

## **ABBREVIATIONS AND ACRONYMS**

AC: Appeals Court.

ACHPR: African Charter on Human and People's Right.

AHRL: African Human Rights Law Reports.

Art: Article.

CA: Civil Appeal.

Cal: Carlifornia.

CAEA: Court of Appeal of East Africa.

CEDAW: Convention on the Elimination of all forms of Discrimination against Women.

Ch. D: Chancery Division Law Reports.

Co: Company.

DC: District Court.

E.A: East African Law Reports.

eKLR: Electronic Kenya Law Reports.

Eng: English

EWHC: High Court of England and Wales Decisions (Medium Neutral Citation).

GLAD: Gays and Lesbians Alliance against Defamation.

HCC: High Court Civil Case

ICCPR: International Covenant on Civil and Political Rights.

ICESCR: International Covenant on Economic, Social and Cultural Rights.

KAR: Kenya Appeals Report.

KLR: Kenya Law Reports.

LCPJ: Law Journal Privy Council

MWPA: Married Women's Property Act.

No: Number.

NZLR: New Zealand Law Review.

P: Page.

QB: Queens Bench.

RJR: Royal Journal Review

Rptr: Reporter.

S: Section.

SS: Subsection.

TLR: Tanzania Law Reports

UDHR: Universal Declaration of Human Rights.

UGHC: Uganda High Court

V: Verses.

VLR: Vermen Law Review

Vol: Volume.

Vt: Vermont

All ER: All England Law Report.

QSC: Queensland Supreme Court (Medium Neutral Citation).

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Convention on the Elimination of All Forms of Discrimination against Women.

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International Covenant on Economic, Social and Cultural Rights.

Universal Declaration of Human Rights.



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## CHAPTER ONE

*It was only after the passage of the Married Women's Property Act that women were even permitted to hold title to real property. These Act, however, only affected a woman's right to her separate property, acquired by gifts or by her own efforts and titled in her name. The Act did not create any property right in assets titled in her husband's name. The strict rule against title transfer applied even if the wife was the wage-earner or worked in the husband's business. Not surprisingly, under this system the husband, as the primary wage-earner and title holder, disposed the matrimonial property subject to his needs, terms and condition. This situation continued for a long time and it largely contributed to the objectification of women.<sup>1</sup>*

Deborah H. Bell

### 1.0 Introduction

Recognition of duty between spouses began a long time ago. This led to the development of fiduciary spousal duties.<sup>2</sup> The husband because of his management (*sic*) and control over the community property naturally occupied the position of a trustee for a wife and the family.<sup>3</sup> As such, based on the historical and traditional notions he was deemed the head of the family and tasked with the responsibility of executing important mandates on behalf of the family.<sup>4</sup> Particularly the husband was solely responsible for dealing with all issues pertaining to the matrimonial property.

Although land is the most valuable property, the laws regulating its ownership did not promote equality between men and women. This was manifestly clear especially with regard to land held under customary tenure.<sup>5</sup> This was the most dominant form of land ownership given that most land was not registered. The existing legal regime then provided that matters of land titling could be pursued by an individual or

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<sup>1</sup> Deborah H. Bell, "Equitable Distribution: Implementing the Marital Partnership Theory through the Dual Classification System," *67 Miss. Law Journal* (1997) p.115.

<sup>2</sup> Marshall Zola and Deborah Elizabeth Zolla, *Marital Duty*, London: Pitman Publishing (2006). Available at <<http://www.zollalaw.com/pdf/maritalduty.pdf>> (Last accessed on 12<sup>th</sup> July 2014).

<sup>3</sup> *Vai v Bank of America* 56 Cal 2d 329, 15 Cal Rptr. 71 (1961).

<sup>4</sup> *Ibid*1.

<sup>5</sup> Richard S. Strickland, *To Have and To Hold: Women's Property and Inheritance Rights in Post-Colonial Kenya*, International Center for Research on Women (2004) p.12.

household.<sup>6</sup>Unsurprisingly, the law was silent, however, on who could be named on the certificate of title if one was issued. In practice given, the lacuna in the law, the male persons as heads of the households always got the certificate issued in their names.<sup>7</sup>

Principally husbands were expected to carry out their spousal duties purely in good faith. However, because of patriarchal, macho and primitive cultural practices complimented by discriminative laws, strains of abuse and prejudice against women slowly crept in.<sup>8</sup>These led to the misuse and abuse of matrimonial property as a security. Consequently, this development created impetus on the need to recognize women as equal and able partners in marriage.<sup>9</sup> This was also catapulted by the need to recognize the rights of the women to own properties.<sup>10</sup>

Fundamentally, in order to protect matrimonial property as a security for lending, great need arose to ensure that the entire process was done without disenfranchising women.<sup>11</sup> This was particularly necessitated by the need to ensure that the interests of weaker parties residing in the matrimonial homes were adequately protected.<sup>12</sup> The promulgation of the Constitution and the introduction of the new land laws introduced far reaching

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<sup>6</sup>Coldham S., “The Effect of Registration of Title upon Customary Land Rights in Kenya,” *Journal of African Law Volume* 22(1978) p.91.

<sup>7</sup>*Supra* note 5. See also Human Rights Watch Report, Double Standards: Women’s Property Rights Violations, 10 (2003). Available at <<http://hrw.org/reports/2003/kenya0303/kenya0303.pdf>> (Last accessed on 5<sup>th</sup> of May 2014). According to the report conducted in 2003 women formed the bulk of the population at 60%. They also provided 80% of the Agricultural labour and about 60% of farm derived income. Yet only 5% of land in Kenya was registered jointly with women and only 1% was registered with women alone.

<sup>8</sup> E. Wangari, W. Kamau and A.M.Kinyua, “Globalization in The World: Impact on Women’s Land Rights and Education in Kenya,” Forum on Public Policy 2010. According to the authors, the previous legal regime was designed to deny women means of accessing land. This was largely because women were seen as subordinate to men. They were therefore not equipped with necessary mechanisms to advocate for their rights.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*

<sup>11</sup> Robert Home, “‘This Land Belongs to You and Me’: The Global Challenges of Land Management,” Skopje 2007.

<sup>12</sup>*Ibid.*

requirements which were aimed at protecting the matrimonial property altogether as a security for lending.<sup>13</sup> These laws led to the liberation of the women from the yoke of irrelevance and mediocrity they were previously struck in.<sup>14</sup>

The current matrimonial regime now unanimously provides that consent of women must be sought before any disposition can be done on a matrimonial property.<sup>15</sup> This requirement has not only empowered women through advocating for their active participation in marital engagement but it has also greatly set the standard compliance with the provision of equality in marriage. This has from the onset enabled mandatory incorporation of spousal input in mortgaging,<sup>16</sup> charging, sale and lease of matrimonial property especially land.

### **1.1 Statement of the Problem**

The introduction of spousal consent in disposition of matrimonial properties under the new land laws have introduced fresh concerns which needs to be implored. The chief concern arises from the fact that the inputs of female spouses are more or less ignored in issues in which financial responsibility are at stake.<sup>17</sup> This includes and extends to the management of matrimonial property. This emanates from the schema that men are deemed to be the decision makers in important issues of social and economic policies.<sup>18</sup>

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<sup>13</sup>*Infra* 21.

<sup>14</sup>Robert Home, "Rethinking Ownership, Occupation and Use in Land Law," Oakley 2009.

<sup>15</sup>C.Nyamu, "Achieving Equality for Women under the New Matrimonial Regime," Third World Legal Studies 2012.

<sup>16</sup> A mortgage arises where the mortgagor transfers to the mortgagee legal ownership or an interest in the property under the condition that the property shall be reconveyed or the estate transferred will automatically determine upon the performance of the condition on which it is given. A mortgage of a matrimonial home is not a discrete form of mortgage, but rather a distinct mortgage created using a matrimonial home. It can be an ordinary mortgage or an informal mortgage or a mortgage by a deposit of documents or a customary mortgage executed using a matrimonial home.

<sup>17</sup>L.M. Clements, "*Lending on the Security of Co-owned Homes, Suretyship and Undue Influence*" 3 Web JCLI (1995).

<sup>18</sup> K.Firmin Sellers, *The Transformation of Property Rights in the Gold Coast: An Empirical Analysis Analysing Rational Choice Theory*, Cambridge (1996).



Intriguingly, even in circumstances where the wife is consulted, her trust and confidence in the man in matters of business and finance, existing independently of the emotional bonds between couples, leads to a strong possibility of undue influence by the man.<sup>19</sup> Though the wife is now required to execute documents charging a matrimonial property, it does not necessarily follow that she has an equal involvement with her husband in planning the transaction.<sup>20</sup> Neither does it imply that the wife will make an informed decision.<sup>21</sup>

Closely related to this, great dilemma crop up as to whether private pressures and misunderstandings should automatically operate to invalidate a transaction against the creditor taking a charge.<sup>22</sup> This is prominently highlighted in circumstances where the wife has been coerced to append her signatures on documents she has not been briefed about.

Another critical aspect is that though it is important that matrimonial property should be used as a security to finance family ventures, concern arises from the fact that all the responsibility is placed on the borrowers to exercise due diligence before such a property is charged.<sup>23</sup> This is hinged on the fact that the borrowers are parties to the process hence

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<sup>19</sup>*Supra* note 17.

<sup>20</sup>*Supra* note 18.

<sup>21</sup>Belinda Fehlberg, "The Husband, the Bank, the Wife and Her Signature," *Modern Law Review*, Volume 59 Issue 5 (1996) p. 675–694.

<sup>22</sup>*Ibid.*

<sup>23</sup> It has been reported by a newspaper that "so dire are the consequence of missing this documentation that a mortgage charge is deemed to be incomplete and would be actually declared null and void by a court of law in the event that a husband or wife feels overlooked in the initial negotiation with the lender."The Business Daily. August 2, 2012. Available at <<http://www.businessdailyafrica.com/New-mortgage-laws-tie-down-spouses--/1248928/1469428/-/item/0/-/3ish0r/-/index.html>> (Last accessed at 29th July 2013).

raising an intricate question on conflict of interest.<sup>24</sup> The current system is therefore prone to abuse.

Notably, the legal status of the marital home cannot be gainsaid. This is because it is essential for the existence of the marriage, the family and the realization of the family relationships.<sup>25</sup> Almost all of the family functions are dependent or associated with its existence. Hence, it is not just an ordinary real estate, but it is also a place that provides peace, as well as psychological and emotional shelter to the family and its members. It is the place where the family life and the privacy of family members are accomplished.<sup>26</sup>

However, there is pronounced doubts as to whether the introduction of the new laws will introduce fundamental changes to the regime of matrimonial property management.<sup>27</sup> This is because matrimonial property ownership is conspicuously dominated by men. Characteristically, majority of married women are at a considerably weaker financial position in comparison to their male counterparts.<sup>28</sup> Most women are therefore victims of customs which have been in practice for years.<sup>29</sup> It is very unlikely that such women may resist a request from their husbands to consent to a disposal of an interest in their

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<sup>24</sup>*Ibid.*

<sup>25</sup> Angel Ristov, "The Legal Status of Marital Home in the Macedonian and Comparative Family Law". The author also notes that there is no unique term in comparative law defining the home where the spouses and the family members live. Certain legislations use the terms *marital home*, *matrimonial home*, *family residence* (U.S.A., U.K.), while some others use the terms *le logement de la famille*, *logement familial* (France, Switzerland, Quebec). Despite the variety, these terms represent the same object – the family home, the home of the family or the family habitat.

<sup>26</sup>*Ibid.*

<sup>27</sup>*Ibid.*

<sup>28</sup> Institute of Economic Affairs, "Profile of Women's Socio-Economic Status in Kenya," Nairobi: IEA 2008. The author, in furtherance of this argument, points out that an analysis carried out by the think-tank Institute for Economic Affairs, for instance, shows that there is low female representation in post primary education, formal employment, enterprise ownership outside wholesale and retail trade, and political decision making processes.

<sup>29</sup> Akiiki Asiimwe Florence, "Gender Dynamics in Homeownership: A Gender System and Contract Theoretical Framework For Analyzing Gender Inequality in Homeownership in Urban Uganda." *International Journal of Social Inquiry* Volume 2 Number 2 (2009) p.75-104.

matrimonial home.<sup>30</sup> Related to these are situations where men are asked to sign documents relating to the security of the home owned by the female partner. Questions arise whether men in these circumstances should be treated differently merely because they are male.<sup>31</sup>

In the end, the task for the law would appear to seek to achieve a balance between the competing interests of protecting the vulnerable and the need to use the matrimonial home for security in relation to loans for businesses.

## **1.2 Objectives**

This research undertakes to look at two objectives. These are the overall objective and the specific objectives. The precise objectives are as stated:

### **1.2.1 Overall Objective**

The overall objective of this study is to investigate the extent to which the clauses introduced by the new land laws on the requirement of spousal consent before disposal of matrimonial property will offer protection to female spouses in Kenya.

### **1.2.2 Specific Objectives**

The specific objectives of the study are:

- i. To interrogate the legal regime for securitized lending using matrimonial property in Kenya.
- ii. To investigate the effect of securing a loan using matrimonial property without the consent of the wife.

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<sup>30</sup>*Ibid.*

<sup>31</sup>*Ibid.*

- iii. To examine the efficacy of the new land laws in so far as they attempt to offer protection to female spouses when the matrimonial property is used to secure a loan by the husband.
- iv. To make recommendations on the current matrimonial property regime which ensures that the rights of the spouses are adequately protected.

### **1.3 Research Questions**

In order to meet the objectives specified above, this study seeks to answer the following questions:

- i. Does the new land law in Kenya address the issue of using matrimonial property as a security in obtaining loans?
- ii. Are the mechanisms enshrined in the law adequate to ensure that spousal consent must be obtained before disposition of the matrimonial property?
- iii. How effective are the mechanisms already in place in so far as they seek to offer protection over the matrimonial home and how do they address circumstances where spousal consent is procured through undue influence?
- iv. What mechanisms does the court apply to ensure that genuine and informed consent has been sought and obtained from the spouse before disposition of matrimonial property?

### **1.4 Hypothesis**

This study will proceed on the premise that the existing legislation does not adequately protect women against instances of undue influence hence it has exposed them to abuse.

## **1.5 Justification of the Study**

This study is justified by three reasons. First, given that these are new provisions in the laws, there is need for a research to investigate whether they are effective, and to ignite debate that will lead to the improvement of the relevant legislations, if need be.

Secondly, the provisions that were introduced by the Land Act 2012 have two potential consequences. Whereas the intended result is the protection of spouses who may be left homeless if their matrimonial home is used to secure a loan without their consent, there is the possibility that lenders may shy away from accepting matrimonial homes as security for loans. As such there is need, therefore, to come up with ways in which these provisions can be applied so that they offer the protection they are intended to give, while not inhibiting the use of matrimonial homes as security for loans.

Thirdly, there is no research that has been carried out in Kenya on these provisions since they came into force. The protection of matrimonial property is novel in comparison to the provisions on the division of matrimonial property which has been the subject of several court cases<sup>32</sup> and research papers. This research will therefore contribute to the pool of literature that will be used by scholars and policy makers in future discussions on the subject matter.

## **1.6 Theoretical Framework**

The socio-political and economic framework in Kenya has traditionally placed higher value on men than women. It is only recently that affirmative action by feminists started

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<sup>32</sup>See, for example, *Echaria v Echaria* (2001) eKLR, *Muthembwa v Muthembwa* (1994) Civil Suit No. 2562, *Kivuitu v Kivuti*(1991) KLR Civil Appeal No. 26 of 1985, and others in the long line of cases on the division of matrimonial property upon divorce.

to mainstream gender rights and the equality of the sexes.<sup>33</sup>This thesis is based on feminist legal theoretical approach. Feminist legal theory considers ways in which gender influences both the development and impact of law on men and women.<sup>34</sup>

This theory of gender as advanced by Simone de Beauvoir presents and challenges the assertions and assumptions of gender-neutrality and objectivity.<sup>35</sup> It is credited with inserting the “woman question” into disciplinary dialogue. Feminism has broadened and complicated the traditional framework of a variety of disciplines. Because gender is theoretically relevant to almost all human endeavours, it is also relevant to almost all disciplines.<sup>36</sup> This study adopts this theory because it adequately addresses the issue of inclusion of women rights in the legal discipline. The theory more or less advocates for equality which is a fundamental principle entrenched in our Constitution.

According to the Stanford Encyclopaedia of Philosophy, Feminist philosophy of law identifies the pervasive influence of patriarchy on legal structures, demonstrates its effects on the material condition of women and girls, and develops reforms to correct gender injustice.<sup>37</sup> To these ends, feminist philosophy of law applies insights from feminist epistemology, relational metaphysics, feminist political theory, and other developments in feminist philosophy to understand how legal institutions enforce dominant masculinist norms.<sup>38</sup>Today, feminist legal theory has evolved into four major schools: formal equality theory, cultural feminism, dominance theory, and post-modern

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<sup>33</sup>Fida Kenya, “Kenyan Laws and Harmful Customs Curtails Women’s Equal Enjoyment of ICESCR Rights,” Fida 2008.

<sup>34</sup> Martha Chamallas, *Introduction to Feminist Legal Theory*, New York: Aspen Law & Business (1999) p.1.

<sup>35</sup> Martha Albertson Fineman, “Feminist Legal Theory,” Baxendale 2010.

<sup>36</sup>*Ibid.*

<sup>37</sup> Francis, Leslie and Smith, Patricia, *Feminist Philosophy of Law*, The Stanford Encyclopedia of Philosophy, Spring (2013).<<http://plato.stanford.edu/archives/spr2013/entries/feminism-law/>>(Last accessed on 24<sup>th</sup> June 2014)

<sup>38</sup>*Ibid.*

or anti-essentialist theory. Formal equality theory, grounded in liberal democratic thought as advanced by Catherine MacKinnon, argues that women should be treated the same as men, while cultural feminists emphasize the need to take account of differences between men and women. Dominance theory sidesteps both of these approaches, focusing instead upon the embedded structures of power that make men's characteristics the norm from which "difference" is constructed. Anti-essentialism, by contrast, contends that there is no single category of female pointing instead to the varying perspectives resulting, for example, from the intersection of gender, race and class.<sup>39</sup>

The last three approaches are all theoretical critiques of formal equality which emerged from the contradictions and political struggles that developed in the course of efforts to implement formal equality in practice and addressed the limits of formal equality in redressing sex discrimination.<sup>40</sup>

Matrimonial law is based on the principle of partnership that initially introduced a departure from the patriarchal principle, where the husband was considered to be the head of the family, towards a partnership principle, according to which both spouses are equal and have the same rights and duties.<sup>41</sup> While most societies idealize the role of the mother, her domestic work is consistently undervalued or unpaid. As a result, often when mothers seek divorce, child custody, and property settlements they are gravely disadvantaged.<sup>42</sup>

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<sup>39</sup> Mary Becker et al., *Feminist Jurisprudence: Taking Women Seriously*, Northern Illinois University Press (1994) p.1-14.

<sup>40</sup> Cynthia Grant Bowman and Elizabeth M. Schneider, "Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession," *Fordham Law Review Volume 24 Issue 12* (1998). Available at: <<http://ir.lawnet.fordham.edu/flr/vol67/iss2/2>> (Last accessed on 24<sup>th</sup> June 2014) (Last accessed at 14<sup>th</sup> July 2014).

<sup>41</sup> Rechberger, W., *National Report Austria: Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, European Commission (2003) p.6. Available at <[http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/regimes/austria\\_report\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/austria_report_en.pdf)> (Last accessed on 14<sup>th</sup> June 2014).

<sup>42</sup> *Supra* note 34.

This research adopts the formal equality theory advanced by MacKinnon. It emphasises on the need to advocate for democratic ideals which ensures that women are not disenfranchised in the community. It embraces the liberal manner of doing things in which every person has the right to exercise reason and independence before doing certain things. This theory advocates for equality which is a critical feature in the ownership and disposition of matrimonial property. This study greatly relies on this theory to advance the argument of equality.

### **1.7 Literature Review**

One of the key limitations of this research is the lack of relevant literature from Kenya on the issue of spousal consent before using the matrimonial home as security. Nevertheless, several works are indicative.

One such piece is Diana Lee's paper titled *My house is my husband - A Kenyan Study of Women's Access to Land and Housing*<sup>43</sup> a thesis which explores women's access to property in Kenya. The author examines how women in Kenya get access to real property. Specifically, she studies the social mechanisms that govern men's and women's relationships to each other and to property and the processes through which these relationships change. She analyses the concept of subsistence gender contract<sup>44</sup> and market gender contract<sup>45</sup> as social mechanisms at play in the Kenyan property landscape. Accordingly both advocate that women cannot inherit property.<sup>46</sup>

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<sup>43</sup> Diana Lee-Smith, *My House is my Husband – A Kenyan Study of Women's Access to Land and Housing*, Lund University Press (2010).

<sup>44</sup>*Ibid.* According to the author this is a set of invisible agreements found in every society about how men and women should behave.

<sup>45</sup>*Ibid.* According to the market gender contract, women may buy property while men control property which they inherit as free capital.

<sup>46</sup>*Ibid.*



The Kenyan gender contracts for example she posits delineate a power relationship in which women's lack of access to property keeps them in a subordinate position to men and requires them to provide subsistence. Women see the provision of subsistence as a basic human value although many resent their lack of property rights.<sup>47</sup> To illustrate this she presents a model showing how micro level change take place by means of women's responses to the situations in which they find themselves. She asserts that women's actions are based on their strategies for improving their lives. She concludes that a gendered housing policy is needed which recognizes women's access to property as a basic human right and which builds upon their proven housing production capability.<sup>48</sup> This research looks at fundamental attributes which can be enforced into law to ensure that the principle of equality is properly entrenched in a manner which supports the values and objectives of women.

Lorna Fox in her article "*Re-Possessing "Home": A Re-Analysis of Gender, Homeownership, and Debtor Default for Feminist Legal Theory*,"<sup>49</sup> argues that the credit crisis brought the subject of subprime and other problematic debt to the forefront of many agendas, both political and personal. This thesis explores some of the underlying legal, theoretical, and economic issues associated with default and foreclosure, particularly as they affect women home-owners. The analysis is embedded in feminist discourse on home, from traditional critiques of the association between women and home to evolving conceptions of the benefits and the burdens of home for contemporary feminist theory. This thesis traces the ideas of home and homeownership for women and considers how it

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<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*

<sup>49</sup>Lorna Fox, "Re-Possessing "Home": A Re-Analysis of Gender, Homeownership, and Debtor Default for Feminist Legal Theory," *14 Wm. & Mary J. Women & L.* 423 (2008). Available at <<http://scholarship.law.wm.edu/wmjowl/vol14/iss3/2>> (Last accessed at 14<sup>th</sup> July 2014).

might be appropriate to respond to the risks associated with challenges to affordable homeownership through the lens of feminist legal theory.

Another author RegGraycar in his article “*Matrimonial Property Law Reform and Equality for Women: Discourses in Discord*” has scrutinized some of the underlying concepts which have structured law reform debates about matrimonial property.<sup>50</sup> His article evaluates aspects of matrimonial property law by reference to debates about the meaning of equality for women and suggests that any successful matrimonial property law reform must move beyond the rhetoric of formal equality in redressing the economic disadvantage currently experienced by women and children after marriage breakdown.<sup>51</sup>

John Mugalula in his article “*Mortgaging Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda*” posits that if the freedom of homeowners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's or a husband's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign.<sup>52</sup> Without this assurance, the author argues, banks will not be willing to lend money on the security of a jointly owned house or a matrimonial home, or family land. In his paper he cautions, however, that given the various forms of marriages existing in Uganda, it would prove rather difficult for the mortgagee to establish/prove a mortgagor's marital status and his/her rightful spouse the existence of a marriage certificate or a statutory declaration notwithstanding.<sup>53</sup> To deal

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<sup>50</sup>RegGraycar, “*Matrimonial Property Law Reform and Equality for Women: Discourses in Discord?*” Sydney Law School Legal Studies Research Paper No. 07/38. 2007.

<sup>51</sup>*Ibid.*

<sup>52</sup> John Mugalula, “*Mortgaging a Matrimonial Home: Unveiling the Law and Practice of Banks and Other Financial Institutions in Uganda,*” Occasional Paper Series No.3/2010.

<sup>53</sup>*Ibid.*

with instances of fraudulently acquired spousal consent, this paper explores possible changes which can be made to make the current laws water tight. This would prevent commission of fraud.

Belinda Fehlberg in her article “*The Husband, the Bank, the Wife and Her Signature*”<sup>54</sup> grapples with the all too common scenario of a wife signing a document offering the matrimonial home as security under some form of undue influence, and the United Kingdom’s courts’ reaction to the problem. Her paper appreciates the difficulties in encouraging people to refrain from making financial decisions on the basis of emotional relationships, and recommends publicity of the requirement for spousal consent because when the issue is brought into the public domain and addressed as a real social problem, the vulnerable will gain a more fundamental protection from private pressure, in the form of community support for their decision not to sign.<sup>55</sup> This paper on the other hand focuses in highlighting the challenges associated with enforcing documents signed under undue influence and comes up with a raft of possible solutions which can be enacted to combat the aspect of undue influence.

Margaret Rugadya, Esther Obaikol and Herbert Kamusiime in *Gender and The Land Reform in Uganda*<sup>56</sup> acknowledges the fact that despite land being a core factor of production in Uganda, history, traditions and customs have connived to deprive women of the actual ownership of land. The underlining concept of the book is pegged on the idea that women have historically and systematically been elbowed out of ownership of key properties like land because of combined issues of inheritance, patrilineal and

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<sup>54</sup>Belinda Fehlberg, “The Husband, the Bank, the Wife and Her Signature,” *Modern Law Review, Volume 59 Issue 5*(1996) p. 675–694.

<sup>55</sup>*Ibid.*

<sup>56</sup> Margaret Rugadya, Esther Obaikol and Herbert Kamusiime, *Gender and The Land Reform Process in Kenya: Assessing the Gains and Losses for Women in Uganda*, Associates for Development 2004.

cultural practices which have been deeply entrenched as ways and life of the Ugandan people.

Whereas this book focused on setting the jumping pad for land reforms in Uganda as a catalyst for equitable redistribution of land and enhancing equal access to land as a factor of production, this study on the other hand attempts to establish defined parameters upon which the critical right to ownership of land by women especially in marriage unions can be actualized in circumstances where land as a matrimonial property is to be used as a security for lending money.

S.Kawamara-Mishambi and Irene Ovonji-Odida, in an article “*The Campaign to Advance Women’s Property Right in Uganda*,”<sup>57</sup> examines women’s right to property in marriage, upon divorce, and the death of a spouse in Uganda, highlighting the problematic aspects in both the statutory and customary laws. The article generally presents the argument that even where the relevant statutory laws are protective of women’s rights to property, their implementation is hindered by retrogressive customary law practices, socialization, and the generally weak economic capacity of many women. The article also delves into the even weaker position of women’s right to matrimonial property at customary law and religious laws. This thesis adopts a rather limited scope. It is mainly concerned with appraising the rights of women as regards lending on the strength of a matrimonial property. It scrutinizes the pertinent issues which have contributed to this status quo. It also addresses pressing matters which can be reviewed to ensure that better mechanisms are entrenched in law to protect married women and the matrimonial properties.

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<sup>57</sup>S. Kawamara-Mishambi and Irene Ovonji-Odida, “The Campaign to Advance Women’s Property Right in Uganda,” in Anne Marie Goetz and ShireenHassim ,*No Shortcuts to Power African; African Women to in Politics and Policy Making*, Zed Books: London 2003.

## **1.8 Research Design, Methodology and Methods**

This is a qualitative research work. Secondary method of data collection will be heavily used as it will be the most effective method of obtaining data in this study. Reference will be made to published books and articles. Document analysis will be made of the Constitution, the Land Act, the Land Registration Act, the Marriage Act and the Matrimonial Property Act amongst other Acts. Data analysis will also be made of various data about related to the subject. Qualitative approach will be used to understand how the matrimonial property regime promotes equality in marriage through the requirement of spousal consent in disposal of matrimonial property. Internet sources as well as the case law will be heavily used to justify some concepts. In addition, this paper will also adopt a comparative approach of drawing a parallel analysis from other jurisdictions on this subject.

## **1.9 Limitations of the Study**

This study is exclusively limited to the rights of spouses who are in marriage relationships. It is particularly limited to the plight of the female spouses only. It does not reflect on the rights of spouses whose marriage relationships have come to an end. Issues of the rights of divorcees on the charging of matrimonial property are therefore beyond the scope of this study.

## **1.10 Chapter Breakdown**

This study is broken down into five thematic chapter all addressing the issue of spousal consent in lending on the security of the matrimonial property.

Chapter one marks the introduction of the research topic and an overview of the research problem and background of the study is highlighted. This chapter also outlines the way

the research is conducted and clearly defines the boundary of the research topic. It also entails the theoretical and literature review. A general outlook of how the research is organized is also laid out in a chronological order.

Chapter two traces the historical and judicial development of land law in Kenya with specific regard to matrimonial property. It explores the factors which led to the disentitlement of women to own properties in Kenya. It also looks at the legal framework of the matrimonial property law in Kenya. It pays a keen interest on the ownership and usage of land as a matrimonial property.

Chapter three explores the concept of spousal consent in administration of land as a matrimonial property. It canvasses on various issues related to the concept of spouse and matrimonial property. Particularly it examines at the institution of marriage in its attempt to determine what constitutes the term “spousal consent.” It analyses the types of marriage relationships available and the impact matrimonial legal regime has on them. It also contextually discusses the spousal rights available to the parties in a marriage.

Chapter four undertakes to discern the concept of consent. In regard to this the chapter implores what properly counts as consent within the purview of lending. It also dwells on the effects of obtaining consent through underhand means. The aspects of duress and undue influence are also critically looked at. This chapter also delves in conducting a comparative study with a jurisdiction which has effectively implemented the aspect of spousal consent in its laws so as to access what improvements can be imported into Kenyan laws to bring improvement. Lastly, chapter five provides an overall conclusion of the research topic. It highlights the general overview of the topic. It also enumerates the proposed recommendations that can be applied to improve the existing legal regime.

## CHAPTER TWO

# HISTORICAL AND JUDICIAL DEVELOPMENT OF LAND LAW IN KENYA WITH SPECIFIC REGARD TO MATRIMONIAL PROPERTY

*Women's right in, access to, and control over land, housing and property is a determining factor in women's overall living conditions, particularly in developing countries. It is essential to women's everyday survival, economic security, and physical safety and, some would argue, it is the most critical factor in women's empowerment and their struggle for equality in gender relations.*

United Nations Centre for Human Settlement, Nairobi, 1999.

### 2.0 Introduction

This chapter traces the historical and judicial development of land law in Kenya from the pre-colonial period through the colonial period and the post-independence period. It focuses on the development of land laws within the context of matrimonial property and specifically traces the development of the laws in regard to land ownership and usage by married women. In addition, this chapter examines the legal framework of Kenya which underscores the use of land as a matrimonial property. It also looks at various international conventions which underpins the right of women to own property.

### 2.1 Historical Development of Land Laws in Kenya

The ownership and usage of land as an economic resource in Kenya has been biased particularly because of deep culture of gender inequality.<sup>58</sup> There is little doubt that women have been historically accorded less favourable treatment in the sphere of land ownership and usage. This culture stemmed from mere sexual or biological distinction between men and women. This distinction has been used as the basis for ascription of roles and entitlements to these sexes. In a patriarchal society the sex based assignment of

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<sup>58</sup>See Ruth Aura Odhiambo and Maurice Oduor, "Gender Equality in the New Constitution of Kenya" in Constitutional Law of Kenya. Available at <[https://www.academia.edu/3050883/Gender\\_in\\_the\\_new\\_constitutional\\_dispensation\\_of\\_Kenya](https://www.academia.edu/3050883/Gender_in_the_new_constitutional_dispensation_of_Kenya)> (Last accessed on 13<sup>th</sup> June 2014). According to the authors only 5% of the land in Kenya is registered jointly with women and only 1% is registered with women alone.

roles projected the spectre of inferiority over women while casting the characteristic of superiority onto men. While this role-assignment sprung from the inherently patriarchal nature of the Kenyan society,<sup>59</sup> it found good nurturing ground in institutions, such as, and especially the law which re-imprinted inherent gender imbalances and reinforced women's exclusion from the mainstream society by denying them ownership of land.<sup>60</sup>

However, with advance in time the ownership, control and management of property in a marriage situation or under circumstances akin to marriage have evolved as one of the critical areas in gender development.<sup>61</sup> In the pre-colonial world, women were basically beholden to patriarchal customary norms which treated them less equally with men. During these time women were not entitled to own land.<sup>62</sup> All land was deemed to be community land. Community land was controlled by the Councils of Elders' who were guided by customary norms which notably objectified women.<sup>63</sup>

In the colonial period, women's marginalization became more profound because of their subjection to at least two legal norms both of which were debilitating.<sup>64</sup> While customary norms discriminated women, the colonial legal system, itself an inherently exclusionary system reinforced the supposed inferiority of women. The colonial legal order exacerbated an already bad situation.<sup>65</sup> If women were prejudiced in the pre-colonial time the new legal order doubly reinforced their exclusion. Suffice to say, the colonial legal

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<sup>59</sup> *Ibid.* According to the authors patriarchal societies are forms of social organizations in which head and control the family and women are seen as subordinate to men.

<sup>60</sup> *Ibid.*

<sup>61</sup> See J Kenyatta, *Facing Mount Kenya: The Traditional Life of Gikuyu*, Vintage Books (1938) p.21.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Alliot, A. N. (Ed.), *Judicial and Legal System in Africa*, 2<sup>nd</sup> ed. Oxford: Clarendon Press (1982) p.43.

<sup>65</sup> Y P Ghai & J P W B McAuslan, *Public law and political change in Kenya: a study of the legal framework of government from colonial times to the present*, Footprints (1970) chapter I generally.



system was also premised on gendered notions of the roles of men and women in society.<sup>66</sup>

The British colonial land policy began when Kenya became a crown colony in 1920. All the land was assumed to belong to the crown.<sup>67</sup> The acquisition of African land took place through the Crown Land Ordinance of 1915 and imposed English tenure of land. In 1932, the Kenya Land Commission was appointed and charged with responsibility of appropriating land to Kenyans and British settlers in accordance to the British colonial laws.<sup>68</sup> In order to address issues of ownership the colonialists later imposed the Married Women's Property Act of 1882 onto the Kenyan courts to provide an avenue through which married women could access matrimonial property.<sup>69</sup> The Act, an antiquated British law, was the only sole legislation which provided that women could own properties.<sup>70</sup> However, the truth of the matter was that the majority of rural marriages were polygamous and the Act hindered many women from accessing and owning matrimonial property. Further, the non-existence of any other law which defined and addressed control and management of matrimonial property led to flourish of ideology that women did not have the right to own property.<sup>71</sup>

Contrary to expectations, when Kenya attained independence it continued with policies left by the colonialists. This was the colonial policy of individualization which

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<sup>66</sup>See P McAuslan, 'Only the Name of the Country Changes: The Diaspora of "European" Land Law in Commonwealth Africa', in C. Toulmin, and J. Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa*, Vintage Books (2000) p.75-95.

<sup>67</sup>Holdsworth, W.S., *An Historical Introduction to the Land Law*, Oxford Clarendon (1927) p.22.

<sup>68</sup>Jemaiyo Chabeda-Barthe, "How European Concepts of Marriage and Land Ownership Excluded Women in Kenya from Accessing and Owning Property" in Archives of Rural History, *Institutional Encounters: European Property Rights in Colonial Contexts*, Bern 2013 p.27.

<sup>69</sup>*Ibid.*

<sup>70</sup>*Supra* note 56.

<sup>71</sup> Claris Ogaangaet. al., Women's Land and Property Rights in Kenya- Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation. A paper presented at the International Women's Human Right Clinic at Georgetown University Law Center on behalf of the Federation of Women Lawyers in Kenya.

transformed land from a shared form of property to individual ownership through registration.<sup>72</sup> However by design women were excluded from land ownership. Land was registered in the man's name.<sup>73</sup> The post-independence government found dismantling the colonial framework of governance to be inimical to their own individual interest. This led to the retention of status quo.

The decade following independence saw little change in the foundational attribute of the law and therefore the women's status remained the same. Women were still under the triple yoke of local culture, domestic law and the European cultural values which did not propagate for their usage and ownership of land as a matrimonial property.<sup>74</sup> The government failed to implement the social reforms strategies such as fair land distribution. It became less responsive to address the attendant desires of the citizen and particularly ignored reforms in the land law which concerned the rights of women to own land.<sup>75</sup>

Realisation that law had been transformed into a tool of discrimination against women led to various initiatives to change and conform it to aspirations of equality for all citizens regardless of sex.<sup>76</sup> These changes while undoubtedly instigated from within were also significantly informed by drifts in the international platform especially with respect to human rights.<sup>77</sup> Reform of the law sought to achieve both formal and

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<sup>72</sup>*Ibid.*

<sup>73</sup> For example Section 27 of the Registered Land Act Cap 300 (Repealed by the Land Registration Act, Act No. 3 of 2012) provided that the first person to register title to a portion of land retained "absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto". This provision largely locked women out of co-owning matrimonial land as they were all registered in men's name.

<sup>74</sup>*Supra* note 56.

<sup>75</sup> *Supra* note 63.

<sup>76</sup>*Supra* note 69.

<sup>77</sup>*Supra* note 56. The authors illustrate that since the first international women's conference in Mexico in 1975 legal systems all over the world have focused on the inequalities of the sexes and embarked on

substantive equality. The former case involved textual changes in the law to secure the recognition and enforcement of fundamental guarantees of women, such as the constitutional amendment that barred discrimination on the basis of sex.<sup>78</sup>

As the country slowly ambled towards the path of democracy certain allowances were made in favour of women. In the 1990's the legal status of whether women could own properties started to gravitate albeit at a less than desirable pace. For example legislators began measured reforms allowing women to own property.<sup>79</sup>

These changes necessitated restructuring of the laws and ultimately led to the adoption of a new constitutional framework. The new Constitution 2010 has dismantled the longstanding legal barrier previously imposed on women by hitherto addressing the equality difference through entrenching express provisions which prohibit discrimination based on gender one way or the other. This foray has stopped cultural, philosophical and macho underpinnings which played a critical role in disempowering women of properties. The Constitution 2010 attempts to address traditional exclusion that Kenyan women have faced and the attendant "second-class" treatment that the exclusion wrought over them. In its avowed goal of securing social justice for all, the Constitution 2010 seeks to provide a framework that will lead to inclusion of women in the mainstream Kenyan societies.

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procedures of removing them. This can be discerned from the many conferences held subsequently and the resultant instruments. Examples include conferences such as the Nairobi Forward Looking Strategies Conference of 1985, the Beijing conference that culminated in the Beijing Declaration and Platform of Action of 1995, and lately Africa's own blueprint conference on the Launch of the African's Women's Decade in Nairobi in 2010. The common theme for these conferences has been the quest for gender equality. In addition many governments, including that of Kenya have signed and ratified or merely endorsed by signature various United Nations Conventions and Declarations that promote gender equality and mainstream gender perspectives in all spheres of life

<sup>78</sup> See Act No. 9 of 1997, section 9 amending s 82(3) of the 1963 Constitution (now repealed).

<sup>79</sup> *Supra* note 56.

## 2.2 Judicial Development of Land Laws in Kenya

The lack of a statute spelling out applicable principles meant that courts had to fashion some guidelines.<sup>80</sup> Being common law jurisdiction, Kenyan courts had to import English law for assistance.<sup>81</sup> The English Married Women Property Act of 1882 was imported as a statute of general application to fill the lacuna.<sup>82</sup> The Act affirmed a married woman's capacity to own property in her own name separately from her husband.<sup>83</sup> It granted power to the court to consider the respective shares of the parties to the property following a divorce.<sup>84</sup> Using the Act and applicable English cases Kenyan courts developed a set of principles to be applied in matrimonial property matters through a careful pruning of English cases, and use of principles of contract and equity to lay down rules that would be applicable generally in matrimonial property issues.<sup>85</sup>

The courts however largely used customary law to determine cases. Customary law provided that a woman on marriage was wholly subsumed by her husband's culture.<sup>86</sup> Any insinuation that such practice was discriminatory was rejected by the court.<sup>87</sup> Court synonymously held rulings that women were not entitled to inherit land.<sup>88</sup> Notably, in the

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<sup>80</sup> Kenyan courts long ago decided that they would use the English Married Women's Property Act of 1882. In the case of *I v I* (1971) EA 278 Justice Trevelyan held that the said statute was applicable in Kenya as statute of general application as ordained by s 3 of the Judicature Act. Since then Kenyan courts resorted to the Married Women's Property Act particularly s 17 thereof as the statutory basis for determining the respective entitlements of parties in a failed marriage. See e.g. *Karanja v Karanja* (1975) KLR 307.

<sup>81</sup> Kenyan courts have relied on a long line of English decisions to develop their own jurisprudence on the division of matrimonial property. See e.g. the *Karanja* case (n 78 above)

<sup>82</sup> See the case of *I v I* (n 78 above)

<sup>83</sup> Married Women's Property Act 1882 s 1

<sup>84</sup> Married Women's Property Act s 17

<sup>85</sup> See the *Karanja* case (n 67 above) (discussing several English cases on matrimonial property).

<sup>86</sup> See *Otieno v Ougo & Another* (1982-1988) 1 KAR.

<sup>87</sup> Courts rejected discrimination on the ground that section 82(4)(b) of the Constitution allowed the application of customs even in situations where they would otherwise be discriminatory.

<sup>88</sup> *Supra* note 62.

case of *Gichuru v Gichuhi*<sup>89</sup> the court affirmed and applied the Kikuyu custom of inheritance which it expressed to be patrilineal that only sons inherited their father's land. The Court of Appeal in determining the applicability of the custom relied on the case of *Wambugu v Kimani*<sup>90</sup> where the court upheld the Kikuyu custom that a married woman could not inherit her father's land. In both the cases a principle of custom was applied to prevent a woman from inheriting her father's property.

In *Kamau v Kamau & Another*<sup>91</sup> the court in dismissing the requirement of consent of a spouse in sale of land held that it had never been the practice nor a legal requirement that before the legal proprietor<sup>92</sup> of a piece of land disposes of it he or she had to consult any third party be it his wife/wives. Even in instances where wife's interest had been established in matrimonial property like in *Kagiri v Kagiri*,<sup>93</sup> the court went further ahead to disregard the issue of contribution in matrimonial property clearly denying the wife/wives of any locus in the property.<sup>94</sup>

### **2.3 Overview of Factors which led to Disentitlement of Women**

A historical analysis of Kenya throughout the pre-colonial, colonial and post-independence period suggest rather distinct pattern with respect to the legal status of women to own land as a property.<sup>95</sup> The general trend has been that women have been subtly discounted from ownership of land as a property due to outright discrimination of

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<sup>89</sup>*Gichuru v Gichuhi* Civil Appeal No 76 of 1998 (Unreported).

<sup>90</sup>*Wambugu v Kimani* [1988-1992] 2 KAR 292.

<sup>91</sup>*Jacinta Wanjiku Kamau v Isaac Kamau Mungai & Ndirangu Gitigi* Court of Appeal Civil Appeal No.59 of 2001 at Nairobi.

<sup>92</sup> According to Blackstone Law Dictionary proprietor means in relation to land or a lease, the person named in the register of the land or lease as the person whose favour the charge is made.

<sup>93</sup>*Margaret Mumbi Kagiri v Kagiri Wamairwe & 3 others* (2007) 181 K.L.R 8 (C.A.K) (Kenya).

<sup>94</sup>*Supra* note 62.

<sup>95</sup> See Akinyi Nzioki, "The Effects of Land Tenure on Women's and Control of Land" in Kenya, In Abdullahi A., *Cultural Transformation and Human Rights in Africa*, Concur (2002) p.218. According to the author women only had customary rights to access and cultivate land and even those rights were dependent on men.

the law.<sup>96</sup> In order to understand this, it is important to properly put into context the specific factors which led to disempowerment of women.

It is important to note that while the 1963 Constitution protected the right of everyone to acquire and own property of whatever description,<sup>97</sup> this was not tenable and it remained rather quite elusive for women who sought to acquire and own land as a matrimonial property.<sup>98</sup> This was due to a myriad of issues as highlighted below:

### **2.3.1 Issues of Inheritance**

In both testate and intestate succession Kenyan law routinely reinforced gender discriminative cultural practices.<sup>99</sup> This was given a legal fiat by the 1963 Constitution which allowed individuals to elect to be governed by personal law in matters such as inheritance. These prevented women from owning land as they were simply excluded.<sup>100</sup> In other communities a married woman would only be given life interest in land that ended as soon as she remarried.<sup>101</sup>

In intestate succession the Act provides that where a deceased is survived by a spouse and a child or children, the surviving spouse inherits absolutely the personal and household effects of the deceased but only acquires a life interest in the residue of the estate.<sup>102</sup> If the surviving spouse, a woman, remarries, then life interest ends.<sup>103</sup> There is

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<sup>96</sup>*Ibid.*

<sup>97</sup> Section 75 of the 1963 Constitution (repealed).

<sup>98</sup>*Ibid*95.

<sup>99</sup>*Ibid*95. The Courts were guided by the Law of Succession Act, Cap 160, Laws of Kenya.

<sup>100</sup>*In the Matter of the Estate of Mutio Ikonyo (deceased)* Machakos High Court Probate and Administration Number 203 of 1996 (unreported). See also the Court of Appeal decision of *Mary Wanja Gichuru v Esther Gachuhi* Civil Appeal No 76 of 1998 (unreported) where the court affirmed the Kikuyu custom of patrilineal inheritance

<sup>101</sup> *Supra* note 3. The author describes inheritance pattern among the Gikuyu community.

<sup>102</sup> Section 36 of the Law of Succession Act, Cap 160, Laws of Kenya.

<sup>103</sup>*Ibid.*

no such termination if the surviving spouse is a man who remarries.<sup>104</sup> The Act further provides that if no spouse or children survive the deceased, the property devolves first to the father of the spouse and then to the mother only if the father is dead.<sup>105</sup> Intriguingly the Act provides that if the interstate was polygamous the personal and household effects shall devolve to all the houses proportionately to the number of children in each house except that the surviving wives will also be included as “an additional unit to the number of children.”<sup>106</sup>

### 2.3.2 Customary Law and Practices

The discrimination on ownership of property was given legal application by s 82 of the old Constitution. The provision stated that “no law shall make any provision that is discriminatory either of itself or in its effect,”<sup>107</sup> it however, exempted laws that made provision “with respect to matters of personal law.”<sup>108</sup> Considering that customs was the locale of women’s discrimination in Kenya, their constitutional and statutory bases simply legitimized the gender biases inherent in them.<sup>109</sup> The above provision was given statutory fiat by the Judicature Act which directed that the courts:

Shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.<sup>110</sup>

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<sup>104</sup>This section is directly discriminatory against women and hinders them from inheriting matrimonial property. It amounts to “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ... sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.” See s 82(3) of the repealed Constitution.

<sup>105</sup>Section 39 of the Law of Succession Act, Cap 160, Laws of Kenya.

<sup>106</sup>Section 40 of the Law of Succession Act, Cap 160, Laws of Kenya.

<sup>107</sup>Section 82(1) of the 1963 Constitution (repealed).

<sup>108</sup>Section 82(4) of the 1963 Constitution (repealed).

<sup>109</sup>*Supra* note 53.

<sup>110</sup>Section 3(2) Judicature Act, Cap 8, Laws of Kenya.

Similarly, although women's right to access and use land were *de facto* recognized in some circumstances,<sup>111</sup> they could not however seek legal redress if men encroached upon their customary rights because such rights were neither registrable nor protected as overriding interests under the Registered Land Act.<sup>112</sup>

### **2.3.3 Inequalities in Marriage**

The claw back clauses in the 1963 Constitution allowed the application of personal law in marriage among other matters.<sup>113</sup> This coupled with the statutory framework on marriage allowed practice of customary marriage. Customary marriage provided a platform for the perpetuation of various discriminative practices against women.<sup>114</sup> Theoretically, the law saw the parties to a marriage in equal terms but in reality and depending on the regime in question the parties were not equal during marriage.<sup>115</sup>

Customary law practices in particular embody polygamy and therefore subordinate women hence create a situation where women are treated as less than equal members of the society.<sup>116</sup> This, coupled with the institution of bride price, greatly accentuated the gendered power imbalances and bred inequalities.<sup>117</sup>

Married women were nothing more than silent marriage partners in issues of matrimonial property. Married women were denied equal status with their husbands in regards to

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<sup>111</sup>*Infra* 119.

<sup>112</sup>*Infra* 127.

<sup>113</sup>*Supra* note 106.

<sup>114</sup>*Supra* note 56 p.3.

<sup>115</sup> For example a system that allows polygamy potentially exposes women to certain distinct imbalances that may result in discrimination.

<sup>116</sup>T Brooks, "The problem with polygamy," Trailblazer (2009). The author notes that "Polygamy... fails to treat wives as equals with their husbands, denying women the same rights, liberties, and opportunities available to men. Therefore, polygamy represents an unjustified asymmetry of power between men and women: polygamy should be banned"; see also S Nakitto, 'Polygamy in the Domestic Relations Bill 2003: A Barrier to the Women's Human Rights in Uganda?' Unpublished LLM Thesis University of Nottingham 2007.

<sup>117</sup>*Ibid.*



matrimonial property. The husband maintained the stereotypical role of “manager of property,” while the wife was viewed as subordinate in her role as a “caretaker.”<sup>118</sup>

### **2.3.4 The Process of Land Adjudication, Consolidation and Registration**

The Kenyan legal system did not provide clear and equal access to the use, management and control of matrimonial property.<sup>119</sup> The existing land statutes discriminated against women by failing to recognize women’s land rights. Numerous land laws<sup>120</sup> relied on customary laws under which men controlled the land to determine and govern land rights. This crystallized men’s absolute ownership and control of land. As a result women rarely owned land titles either individually or jointly with their husbands.<sup>121</sup>

The 1963 Constitution<sup>122</sup> and the Trust Land Act<sup>123</sup> explicitly stated that trust land was to be governed by customary law. This therefore meant that majority of the women were excluded from accessing trust land on which majority of the Kenyan population lived hence denying them opportunity to own land.<sup>124</sup>

The customary rights of men to control trust land formed the basis of rights to registered land<sup>125</sup> when land underwent the adjudication and consolidation process under the Land

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<sup>118</sup> *Supra* note 56.

<sup>119</sup> *Supra* note 62.

<sup>120</sup> These include Trust Land Act, the Land Adjudication Act, the Land Consolidation Act and the Land Disputes Tribunal Act. (All now repealed).

<sup>121</sup> Kenya Land Alliance & FIDA Kenya, Policy Brief: Women, Land and Property Rights and the Land Reforms in Kenya 1 (2006). Available at <[http://www.kenyalandalliance.or.ke/women\\_percent20policy\\_percent20brief.pdf](http://www.kenyalandalliance.or.ke/women_percent20policy_percent20brief.pdf)> (Last accessed on 17<sup>th</sup> June 2014). According to the report only 5% percent of land in Kenya is registered jointly with women and only 1% is registered with women alone).

<sup>122</sup> Section 115(2) of the Constitution provided that: “Each county council . . . shall give effect to such rights, interests or other benefits in respect of the land as may, under . . . African customary law . . . be vested in any tribe, group, family or individual. . .”

<sup>123</sup> Section 69 of the Trust Land Act Cap 288 provided that “In respect of the occupation, use, control, . . . and disposal of any trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law. . .”

<sup>124</sup> *Supra* note 69.

<sup>125</sup> Under Section 116(1) of the Constitution, when trust land is registered, it ceases to be trust land.

Adjudication Act or the Land Consolidation Act.<sup>126</sup> The Land Adjudication Act<sup>127</sup> and the Land Consolidation Act<sup>128</sup> were enacted to determine the existing customary rights to land and to consolidate fragmented, non-contiguous holdings and convert them to single, registered, freehold parcels of land.<sup>129</sup> Because customary law prescribes that men controls land and property, the bodies that determined these rights did not recognize women's claim.<sup>130</sup> The Acts were therefore bound to exclude women from acquiring titles to land since they only had rights of use while men retained those of allocation under customary law.<sup>131</sup>

The registered land statutes, particularly the Registered Land Act<sup>132</sup> insulated the rights men gained through adjudication and consolidation process by vesting them with absolute ownership of the land and failing to acknowledge even the derivative rights of women to land.<sup>133</sup> The land bodies also failed to protect women's right to land. The Land Control Board<sup>134</sup> and the Land Dispute Tribunals<sup>135</sup> as were previously instituted did little

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<sup>126</sup> *Supra* note 56.

<sup>127</sup> The Land Adjudication Act (Cap 284) (repealed). Section 3 empowered the minister to designate an area of trust land to undergo adjudication. Section 19 read together with section 20 provided that the recording officer and the adjudication committee were to determine claims to land under customary law. Section 23(2)(a) provided that the recording officer would designate any person "who had, under recognized customary law, exercised rights in or over land which would be recognized as ownership" as the owner of the land. The land would then be registered accordingly under section 28.

<sup>128</sup> The Land Consolidation Act (Cap 283) (repealed). Section 2 provided that the Minister could designate an area of Trust land to undergo the consolidation process. Section 9(1) provided that an Adjudication Committee consisting of "person's resident "in the area would be constituted. The Committee would then adjudicate and determine "in accordance with African Customary law the claim of any individual person to any right or interest in land" within the area as per Section 11 of the Act.

<sup>129</sup> Lorenzo Cotula, Food and Agriculture Organization (FAO) Legislative Study No. 76, Gender and Law: Women's Rights in Agriculture 34–35 (2002). Available at <<http://ftp.fao.org/docrep/fao/005/y4311E/y4311E00.pdf>> (Last accessed on 17<sup>th</sup> July 2014).

<sup>130</sup> *Supra* note 66.

<sup>131</sup> *Ibid.*

<sup>132</sup> The Registered Land Act (Cap 300)(repealed). Although some titles were governed by the Land Titles Act (Cap 282 and the Registration of Titles Act (Cap 281), most of the land titles were created under the Registered Titles Act.

<sup>133</sup> Section 27 of the Registered Land Act (repealed).

<sup>134</sup> Formed in 1967 by the Land Control Act to approve all sales, gifts, sub-divisions and mortgages of land.

<sup>135</sup> It was formed by the Land Disputes Tribunal Act Cap 287(repealed).

to help women acquire land.<sup>136</sup> This was chiefly because in resolution of most of the land disputes they resorted to apply customary law for arbitration.<sup>137</sup> Secondly, although most transactions affecting sale of agricultural land had to be approved by the land control board, they did not require the consent of spouses.<sup>138</sup> Thus, a spouse could sell the land without the knowledge, much less consent of the other spouse, as was shown in *Kamau v Kamau*.<sup>139</sup> However in 1980's a non-binding Presidential decree, directed all land control boards to take all adult family members interest into account, but boards may disregard the decree, and some husbands presents 'fake' wives to give their consent to the boards.<sup>140</sup>

## **2.4 Spousal Consent; Legal Framework**

Discussed below is the legal framework which provide for the requirement of spousal consent before disposal of matrimonial property in Kenya.

### **2.4.1 The Constitution of Kenya, 2010**

Kenya is in a new Constitutional dispensation.<sup>141</sup> The new Constitution has introduced fundamental changes in the use and ownership of matrimonial property.<sup>142</sup> The provisions of the Constitution is analysed in terms of the general framework it lays for the protection of the women and their rights particularly to land as a matrimonial property and the specific framework it highlights for protection of the matrimonial properties.

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<sup>136</sup>McAuslan, P., *Bringing the Law in: Essays in Land, Law and Development*, Ashgate (2003) p.24.

<sup>137</sup> Section 3(9) of the Land Dispute Tribunal Act provided that "notwithstanding any other written law no magistrate's court shall have or exercise jurisdiction or powers in cases involving (a) the division of land or determination of boundaries (b) claim to occupy or work land . . ."

<sup>138</sup> See Section 6 of the Land Control Act (Cap 302)(repealed).

<sup>139</sup>*Supra* note 78.

<sup>140</sup>*Supra* note 119

<sup>141</sup> The Constitution of Kenya, 2010, was promulgated on 27<sup>th</sup> August, 2010. Available at <[http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Constitution\\_of\\_Kenya\\_2010.doc](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Constitution_of_Kenya_2010.doc)>(Last accessed on 15<sup>th</sup> June, 2014).

<sup>142</sup> Provisions of Chapter Four (Bill of Rights) and Chapter Five (Land and Environment) will suffice).

## 2.4.2 Spousal Consent; General Framework

The 2010 Constitution is steeped in the values of social justice and respect for human rights.<sup>143</sup> Some of the standards recognized as forming the national values and principles include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”<sup>144</sup> Though the preamble and the national values and principles do not create justiciable rights they however, clearly point out the fundamental values that underlie the Kenyan constitutional dispensation.<sup>145</sup> As such inclusion of that provision in the Constitution allows for a wholesome construction of constitutional rights and entitlements not to mention their standard setting function.

The Constitution primarily states that it is the supreme law of the Republic and it binds all persons and all state organs at both levels of government.<sup>146</sup> Any law, including customary law that is inconsistent with it is void to the extent of the inconsistency and any act or omission in contravention of it is invalid.<sup>147</sup> This implies that all laws in the republic should conform to the provisions of the Constitution lest they are declared unconstitutional. Due to the progressive nature of this basic and fundamental document, there is renewed hope that the rights of women in matrimonial property will be protected.

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<sup>143</sup>The preamble recognizes that Kenyans “aspire for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of the law.”

<sup>144</sup>*Ibid*, Article 10.

<sup>145</sup> It may be argued that to the extent that the preamble and the national values and principles correspond with many of the rights in the Constitution then they may be used to interpret certain provisions of the law. In any event the Kenyan Constitution does not explicitly state that the national values and principles may not be the subject of litigation. To the extent that the Constitution provide that all state organs, state officers and public officers or every other person are required to have regard to the national values and principles of government whenever they apply or interpret the Constitution, or enact, apply or interpret any law or when they make or interpret public policy decisions, the court use them as a point of interpretation when there is a lacuna in law.

<sup>146</sup>*Ibid*, Article 2(1).

<sup>147</sup>*Ibid*, Article 2(4).

The Constitution from a point of departure clearly acknowledges the application of the general rules of international law as part of the laws of Kenya.<sup>148</sup> It also allows the use of any treaty or convention ratified by Kenya as part of the laws of Kenya.<sup>149</sup> These twin provisions allow the application of international legal instruments, which are by themselves progressive, within the context of the matrimonial property.<sup>150</sup>

The protection of human rights and fundamental freedoms, including economic and social rights, is safeguarded under the Constitution.<sup>151</sup> From the onset, the Constitution encapsulates principles of social justice and inculcates a culture of respect for human rights.<sup>152</sup> Fundamentally, the Constitution sets out a progressive and a more nuanced Bill of Rights with a rather expanded list of fundamental rights and freedoms. The Bill of right transcends the classical notions of human rights that were limited to civil and political rights only and embraces the concept of social, economic and cultural rights.<sup>153</sup>

The Constitution also provides fundamentally that “every person is equal before the law and has the right to equal protection and equal benefit of the law.”<sup>154</sup> This equality includes the “full and equal enjoyment of all rights and fundamental freedoms.”<sup>155</sup> For the avoidance of doubt it provides that: “Women and men have the right to equal

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<sup>148</sup> *Ibid*, Article 2(5).

<sup>149</sup> *Ibid*, Article 2(6).

<sup>150</sup> For example the ICCPR, ICESCR, ACHPR, CEDAW and the UDHR and other international and regional legal instruments all of which Kenya has ratified has fundamental provisions which entrench the rights of the women in the context of ownership and usage of matrimonial property as will be highlighted below.

<sup>151</sup> For a comprehensive discussion of the Bill of Rights, look at Chapter Four of the Constitution. Specifically Art.19 provides that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. It further underscores that the purpose of recognizing and protecting human rights is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Resoundingly the Article states that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the senate.

<sup>152</sup> See for example Constitution of Kenya, preamble.

<sup>153</sup> *Ibid*, Article 43 of the Constitution.

<sup>154</sup> *Ibid*, Article 27(1).

<sup>155</sup> *Ibid*, Article 27(2).

treatment including the right to equal opportunities in political, economic, cultural and social spheres.”<sup>156</sup> This is clearly intended to reverse the historical exclusions that women have endured in the society.

### **2.4.3 Property Relations Including Matrimonial Property**

The Constitution affirmatively declares that “every person has the right, either individually or in association with others, to acquire and own property” of any description and anywhere in Kenya.<sup>157</sup>

With respect to family property the Constitution provides for rights of equality of a husband and wife “at the time of marriage, during the marriage and at the dissolution of marriage.”<sup>158</sup> This equality of rights while encompassing many other matters particularly applies to the parties’ entitlement to matrimonial property. This basically means that while the husband’s name may appear in the register as the proprietor of family property he cannot make unilateral decisions in regards to disposing the property without the wife’s knowledge. This equality requirement also prohibits any action which could limit the wife’s access or use of the property or any interest arising therein.

Beyond these general provisions the Constitution has set out specific obligations that apply to land ownership and practices related to it.<sup>159</sup> The Constitution provides that land shall be held, used and managed on the basis of principles including equitable access, security of rights and importantly, “elimination of gender discrimination in law, customs and practices related to land and property in land.”<sup>160</sup>

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<sup>156</sup>*Ibid*, Article 27(3).

<sup>157</sup>*Ibid*, Article 40(1).

<sup>158</sup>*Ibid*, Article 45(3).

<sup>159</sup>*Ibid*, Article 60.

<sup>160</sup>*Ibid*.

The Constitution also requires parliament to “revise, consolidate and rationalize existing land laws” in accordance with the principles set out in Article 60(1) and to enact legislation to *inter alia*, “regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.”<sup>161</sup> This provision culminated to the enactment of the new laws namely the Land Act, Matrimonial Property Act which contains provisions which protect women’s rights in matrimonial properties.

#### **2.4.4 Matrimonial Property Act**

This Act<sup>162</sup> came into effect on January 2014 in operation of Article 68 of the Constitution.<sup>163</sup> It repealed the Married Women Property Act.<sup>164</sup> It legislates on the rights and responsibilities of spouse in relation to the matrimonial property.

The Act expressly states that a married woman has the rights as a married man to acquire, administer, hold, control, use and dispose of any property.<sup>165</sup> For the avoidance of doubt, the Act defines matrimonial property to include any movable and immovable property jointly owned and acquired during the subsistence of the marriage.<sup>166</sup>

The Act entrenches the provision for consent when it explicitly state that an estate or an interest<sup>167</sup> in any matrimonial property shall not be alienated in any form whether by way of sale, gift, lease or mortgage in a monogamous marriage without the consent of both

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<sup>161</sup>*Ibid*, Article 68.

<sup>162</sup> The Matrimonial Property Act No.49 of 2013, Laws of Kenya.

<sup>163</sup> Article 68(c) (iii) of the Constitution provided that parliament should enact legislation “to regulate the recognition and protection of the matrimonial property. . .”

<sup>164</sup>*Ibid*, Section 19.

<sup>165</sup>*Ibid*, Section 4.

<sup>166</sup>*Ibid*, Section 6(1) (c). According to this Section, matrimonial property can be personal and real property owned by either or both spouse and used for family purposes.

<sup>167</sup>*Ibid*, Section 9. According to Section 9, there are interests gained automatically in matrimonial property during the subsistence of a marriage and interests acquired in property of a spouse solely owned through independent acquisition during marriage or acquisition before marriage through contribution by the other spouse. This is called a beneficial interest.

spouses.<sup>168</sup> The same applies in a polygamous marriage and the spouses have an interest capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.<sup>169</sup> To consolidate this, the Act provides that the matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.<sup>170</sup>

Further, the Act states that in circumstances where a matrimonial property acquired during marriage is registered in the name of a single spouse, then it would be assumed that the property is held in trust for the other person.<sup>171</sup> But if registered in joint names, then it shall be assumed that their beneficial interests are the same unless proved otherwise.<sup>172</sup>

#### **2.4.5 Land Act**

The Act<sup>173</sup> came into force in 2012 in operation of 68 of the Constitution, to revise, consolidate and rationalize land laws. The Act defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.<sup>174</sup> It has specific provisions in regard to the administration of land as a matrimonial property which are aimed at protecting women as equal partners in marriages.

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<sup>168</sup>*Ibid*, Section 12(1).

<sup>169</sup>*Ibid*, Section 12(2).

<sup>170</sup>*Ibid*, Section 12(5).

<sup>171</sup>*Ibid*, Section 14(a).

<sup>172</sup> *Ibid*, Section 14(b).

<sup>173</sup> Land Act No. 6 of 2012, Laws of Kenya.

<sup>174</sup>*Ibid*, Section 2 of the Act. According to this Section Matrimonial home refers to the place where the family ordinarily resides. The definition can also encompass other properties owned elsewhere used by the family occasionally or otherwise as family residence.



Notably, the Act states that a charge of a matrimonial home, shall be only valid if the documents or forms used in applying for that charge is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented by all such persons.<sup>175</sup>

#### **2.4.6 Kenyans Obligations Arising from International Law**

The Constitution expressly provide for the application of the International law. Discussed below are some of the rights granted to women under international law in regard to ownership, usage and disposition of matrimonial property.

#### **2.4.7 Rights of Women under International Law**

International Conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and People's Right (African Charter) which Kenya has ratified without reservation all provides for the Right to property.<sup>176</sup> Under international human rights law, women have a right to own and

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<sup>175</sup> *Ibid*, Section 79(3).

<sup>176</sup> See Art 15 of the Convention on the Elimination of All Forms of Discrimination against Women (entered into force Sept. 3, 1981, ratified by Kenya Mar. 9, 1984). Available at <<http://www2.ohchr.org/english/law/cedaw.htm>> (Last accessed on 17<sup>th</sup> July 2014); Art 16 of the International Covenant on Civil and Political Right (entered into force Mar. 23, 1976, ratified by Kenya May 1, 1972). Available at <<http://www2.ohchr.org/english/law/ccpr.htm>> (Last accessed on 17<sup>th</sup> July 2014); Art 3 International Covenant on Economic, Social and Cultural Rights (entered into force Jan. 3, 1976, ratified by Kenya May 1, 1972). Available at <<http://www2.ohchr.org/english/law/cescr.htm>> (Last accessed on 17<sup>th</sup> July 2014); Art 14 of the African Charter on Human and Peoples' Rights (entered into force Oct. 21, 1986, ratified by Kenya Jan. 23, 1992). Available at <[http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html)> (Last accessed on 17<sup>th</sup> July 2014). Art 17 of the the Universal Declaration of Human Rights, a non-binding but important international instrument, proclaims that "[e]veryone has the right to property." Available at <<http://www.un.org/Overview/rights.html>> (Last accessed on 17<sup>th</sup> July 2014).

administer property without discrimination.<sup>177</sup> CEDAW further provide that within the family both spouses have equal rights in the “ownership, acquisition, management, administration, enjoyment and disposition of property.”<sup>178</sup>

The “right of recognition everywhere as a person before the law” under Article 16 of the ICCPR includes the equal capacity of women to own property.<sup>179</sup> Article 3 of the ICESCR, which provides for the equal rights of men and women to enjoy the rights under the Covenant, in conjunction with Article 11, which provides for the rights to an adequate standard of living, “requires that women have a right to own, use or otherwise control land and property on equal basis with men . . .”<sup>180</sup> Article 14 of the African Charter states that “the right to property shall be guaranteed.”<sup>181</sup>

#### **2.4.8 Equality within Marriage**

The right to equality within marriage and family relations is a protected right. Both CEDAW<sup>182</sup> and the ICCPR<sup>183</sup> require equality of rights and responsibilities of spouses during marriage and at its dissolution. The African Charter<sup>184</sup> also incorporates the equality-in-marriage standard requiring states to “ensure the elimination of all discrimination against women and also ensure the protection of the rights of woman . . .” as stipulated in international declarations and conventions.

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<sup>177</sup> Articles 2 and 17 of the UDHR and Article 14(2)(g) of CEDAW.

<sup>178</sup> Article 16 CEDAW.

<sup>179</sup> Human Rights Committee, General Comment No. 28, Equality of Rights between Men and Women (68th Sess., 2000). Available at <<http://www2.ohchr.org/english/bodies/hrc/comments>> (Last accessed on 17<sup>th</sup> July 2014).

<sup>180</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (34th Sess., 2005). Available at <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>> (Last accessed on 17<sup>th</sup> July 2014).

<sup>181</sup> *Supra* note 82.

<sup>182</sup> Article 16(1).

<sup>183</sup> Article 23(4).

<sup>184</sup> Article 18(3).

The UN Human Rights Committee, which enforces the ICCPR, clarified in its General Comment 28 had this to say:

State parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to . . . ownership or administration of property, whether common property or property in sole ownership of either spouse . . . state parties should review their legislation to ensure that married women have equal rights in regards to the ownership and administration of such property.<sup>185</sup>

## **2.5 Conclusion**

The laws relating to the ownership and acquisition of matrimonial has greatly changed in Kenya from the pre-colonial time up to date. This has been traced from the era when women were not allowed to own property to the reign where their consent has been entrenched in law as one of the necessary requirements in any transaction dealing with land. The culmination of this transformation has been marked by the promulgation of the new Constitution. The Constitution created the impetus for this reform through specifically providing for the enforcement of new land laws and matrimonial property law. This change now conforms to the international requirements regarding the right of the women to own property and even more profoundly the underlying principle of equality in marriage. As a result therefore the importance of the women in any sale, transfer or lease relating to matrimonial property cannot be gainsaid as has been demonstrated. The next chapter undertakes to implore the kinds of marriage relationships available so as to decipher who can grant consent. It further identifies relationships in which the right to grant spousal consent has not been extended under the Kenyan matrimonial regime. The chapter also delimits the meaning of matrimonial property so as to enable easy understanding of the term within its context. It also underlines matrimonial rights available to spouse.

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<sup>185</sup>*Supra* note 93.

## CHAPTER THREE

# THE CONCEPT OF SPOUSAL CONSENT IN THE ADMINISTRATION OF MATRIMONIAL PROPERTY

*In the postcolonial world, there has been concerted effort on the parts of many nations to provide protection for cultural groups, even to the extent of allowing cultural and religious groups to define the personal laws that will govern their members. Often, however, the efforts to provide freedom for cultural groups to practice their belief conflicts with the ideals of equality and choice for women that are central to the liberal feminist movement. This is particularly envisaged in the rights of women to equally own property as one of the fundamental development of gender equality.<sup>186</sup>*

Catherine A. Hardee

### 3.0 Introduction

The coming into effect of various Acts in operation of Article 68 of the Constitution has greatly changed the regime of land laws by making it a requirement that such laws must correspond to the principles of land policy.<sup>187</sup> Especially so, the Constitution in setting out the parameter of matrimonial laws, tethered the usage of land to the principles of land policy in order to protect matrimonial property.<sup>188</sup> This has essentially culminated to the entrenchment of the principle of equality in marriage and the requirement of spousal consent in administration of land as a matrimonial property.<sup>189</sup> However, in order for us to fully comprehend the meaning of spousal consent within the domain of matrimonial

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<sup>186</sup> Catherine A. Hardee, Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law, New York University Law Review (2004). Available at <<http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-79-2-Hardee.pdf>> (Last accessed on 6<sup>th</sup> July 2014).

<sup>187</sup> Article 68 (b) shall revise sectoral land use laws in accordance with the principles set out in Article 60(1). Article 60(1) provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles –

- (a) Equitable access to land;
- (b) Security of land rights;
- (c) Sustainable and productive management of land resources;
- (d) Transparent and cost effective administration of land;
- (e) Elimination of gender discrimination in law, customs and practices.

Article 68c(iii) further envisioned that the Parliament in enacting new laws must take into account the interest of the spouses in actual occupation of the land and the dependents of deceased person holding interest in land.

<sup>188</sup> Article 68(c) (iii) of the Constitution.

<sup>189</sup> Expressly provided for in Section 93(3) of the Land Registration Act, Section 12 of the Matrimonial Property Act and Section of the Land Act. The purpose of these provisions is to recognize equal positions of spouses in marriage, to recognize marriage as a form of partnership and also to provide for the orderly usage and management of matrimonial properties.

property it is necessary for us to delineate and delimit the concept within its applicable tenets. This part will therefore define the terms marriage, spouse and matrimonial property within the realms of securitized lending and the new land laws. It will also endeavour to look at the different concepts of marriage, unions and relationships existing in the society and the effect of the new laws on these kinds of arrangements.

### 3.1 Definition of Matrimonial Property

It is important to define matrimonial property<sup>190</sup> within the context of securitized lending in order to enable us set the parameters of the discussion. Matrimonial property is distinct from other forms of properties. According to the Matrimonial Property Act matrimonial property is defined as:<sup>191</sup>

- (a) The matrimonial home or homes;
- (b) Household goods and effects in the matrimonial home or homes; or
- (c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

In order to properly put this into perspective with regard to the new land laws, much emphasis will be paid to the matrimonial home as a marital property. Both the Land Act and Matrimonial Property Act define in resonance that the matrimonial home is “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”<sup>192</sup> The critical elements which must be present are ownership, occupation and the existence of a lease.<sup>193</sup> This provision qualifies rural homes, urban

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<sup>190</sup> Matrimonial Property, also referred to as marital property, is any property acquired during marriage.

<sup>191</sup> Section 6 of the Matrimonial Property Act. As per subsection 2, properties held in trust do not arise

<sup>192</sup> Section 2 of both the Matrimonial Property Act and the Land Act. In instances where families live on a piece of land separate from that which they derive sustenance, these provisions still imply consent clause as both qualifies as marital property. See the case of *Nakiyingi v Merekizedeki* [1998] 1 AHRL.

<sup>193</sup> The rules regarding co-occupancy (co-ownership) whether joint occupancy or occupancy in common apply in regard to dealing in a matrimonial home. Joint occupancy (joint tenancy) arises if the matrimonial home is jointly owned by the spouses, and the parties have acquired the property at the same time, and have the same interests in the right of occupancy or lease as the case may be. On the other hand, occupancy in common arises where occupiers hold undivided shares in the property which has not been divided among

homes and holiday homes as matrimonial property so long as the critical elements of ownership and occupation have been met.

### **3.2 Definition of Marriage and Spouse**

The terms marriage and spouse are melded together in the context of matrimonial relationships. Any meaningful discussion of the word spouse would not be complete without a proper examination of the term marriage.<sup>194</sup> This is because of the significant importance marriage has under the legal regime. Marriage confers a variety of rights, privileges and obligations that are unique in the institution of matrimonial relationships.<sup>195</sup> Prominently, marriage transforms a private agreement into a source of significant public interests and protection.<sup>196</sup>

Definition of the term marriage emanates from the Constitution which stipulates that “every adult has the right to marry a person of the opposite sex, based on the free consent of both parties.”<sup>197</sup> This provision underscores that marriage is the genesis of a family, which is the natural and fundamental unit of the society.<sup>198</sup> Thus, as per the Constitution, a marriage is a union of two adults of the opposite sex in relation to each other and with no exceptions.<sup>199</sup> This definition raises three critical issues. The issues of age, gender and consent immediately spring up.

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the occupiers. This for instance applies where the land is registered in the name of one spouse and later the other spouse acquires an interest in the property by contributing to its improvements, development or general upkeep, the spouse who contributes to the matrimonial home is entitled to an interest in the property in the nature of occupancy in common.

<sup>194</sup> Sue Wise and Liz Stanley, “Beyond Marriage: The Less Said about Love and Life-Long Continuance Together The Better” in *Feminism and Psychology Vol. 14 No.2* (2004) p.340.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Baker v State*, 744 A 2d.864, 883 (Vt. 1999).

<sup>197</sup> Article 45(2) of the Constitution.

<sup>198</sup> Article 45(1) of the Constitution.

<sup>199</sup> *Supra* note 194.

The Constitution distinctly suggests that parties to a marriage have to be adults. The general understanding is that an adult is a person who has attained the age of majority. The Age of Majority Act<sup>200</sup> explicitly provides that a person shall be of full age and ceases to be of disability by reason of age on attaining the age of eighteen years.<sup>201</sup> Consequently, a spouse can only be understood to constitute at a very general level a subset of persons who are above the age of eighteen years.<sup>202</sup>

Consensually, the issue of gender provision seems definite that marriage is only possible within the context of a man and a woman.<sup>203</sup> The Constitution however does not out rightly state that gay unions and transgender unions which are increasingly becoming evident in the society do not constitute marriage.<sup>204</sup> More concern particularly arises in the context of African customs which permit the practice of woman to woman marriage.<sup>205</sup> By implication these arrangements cannot be said to be marriages, as such, they cannot claim legitimate interests in property owned jointly or by one of the parties.<sup>206</sup>

The aspect of free consent is equally fundamental in order for a union to be legally recognized as a marriage.<sup>207</sup> This provision however came into force to stop amongst

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<sup>200</sup> Age of Majority Act, Cap 33 Laws of Kenya.

<sup>201</sup> *Ibid*, Section 2. Equally Section 4 of the Marriage Act provides that a person shall not marry unless he has attained the age of eighteen years.

<sup>202</sup> Section 11(1) of the Marriage Act provides that a union is not a marriage if at the time of the marriage a party was below the age of eighteen years.

<sup>203</sup> *Supra* note 98.

<sup>204</sup> Article 27(1) and 27(2) prohibits any form of direct or indirect discrimination against any persons on any ground including sexual orientation.

<sup>205</sup> Regina Smith, "Is the Female Husband a Man? Woman to Woman Marriage among the Nandi of Kenya," University of Pittsburgh, *Ethnology* Volume 19, No.1 (Jan 1980) p. 69-88. Available at <<http://www.jstor.org/stable/373320>> (Last accessed on 27<sup>th</sup> June 2014).

<sup>206</sup> *Ibid*.

<sup>207</sup> According to the Report by Plan Kenya, a Non-Governmental Organization, underage marriages are still rampant in Kenya. Available at <<http://plan-international-org/where-we-work/africa/kenya/about-plan/news/under-age-marriages-rampant-in-kenya-despite-being-outlawed/>> (Last accessed on 27<sup>th</sup> June 2014).

others the practice of child marriages within some Kenyan communities.<sup>208</sup> This practice got its legitimacy from various cultural, traditional and religious underpinnings which sanctioned child marriages.<sup>209</sup> An under-age spouse therefore does not have the legal capacity to vitiate a contract in which her consent has not been sought.

The concept of marriage is also deducible from the Marriage Act.<sup>210</sup> The Act offers more clarity on the issue of the marriage. The Act states that marriage means the voluntary union of a man and a woman intended to last for a life time.<sup>211</sup> This, in tandem with the Constitution further embolden the fact marriage is meant for parties of the opposite sex. Importantly, according to the Act there are different types of marriages. These are monogamous marriages and polygamous marriages.<sup>212</sup>

Where it is a monogamous marriage there never is doubt really as to who the parties of the union are. The case however is potentially problematic where it is polygamous or potentially polygamous union. This therefore raises the question of who a spouse is. According to the Act, a spouse properly so called is a husband or wife.<sup>213</sup> However, pursuant to the recognition of different types of marriage, the Act recognizes polygamous marriages of which a man can have more than one wife.<sup>214</sup> The various women, for purposes of marriage are therefore regarded as spouses of the man. Pursuant to the Matrimonial Act, the different spouses have interest in matrimonial property of their partners capable of protection.<sup>215</sup>

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<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> Marriage Act, Cap 8, Laws of Kenya.

<sup>211</sup> *Ibid*, Section 3.

<sup>212</sup> *Ibid*, Section 4.

<sup>213</sup> *Ibid*, Section 2.

<sup>214</sup> *Ibid*, Section 6.

<sup>215</sup> *Supra* note 169.



It is however important to note the fact that the rights which accrue to a party during a marriage are not diminished when the parties are separated. Separation is a temporary state of affairs. The rights are only severed if the parties to a marriage go through a divorce. As such consent must be duly sought from a spouse during the separation if disposition of a matrimonial property is to be done.

### **3.3 Importance of Definition of the Term Spouse**

Defining a spouse is vital in the sense that the new land laws: Land Act, Land Registration Act and the National Land Commission Act embrace the spirit of equality in land ownership. For instance, the Land Registration Act 2012<sup>216</sup> embraces joint titling and co-tenancy among spouses as a means to securing to women land rights.<sup>217</sup> On the death of one of the spouse, the interest shall be vested in the surviving spouse or spouses. This in essence will save many women from the lengthy and relatively costly succession process which has been a huge hindrance to many women.<sup>218</sup>

Secondly, defining a spouse enables us to establish certain parameters within which the law can be enforced as regard to the aspect of spousal consent. This is in light of the fact in Kenya, as is everywhere else, there is increasing upsurge of same-sex unions.<sup>219</sup> This particularly refers mainly to the existence of lesbians and gays and by extension to the bisexual, transgender and intersexed unions and the attendant desire for them to be legally recognized as spouses in the context of marriage.<sup>220</sup> However, the Kenyan legal

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<sup>216</sup> The short title of the Land Registration Act states that it is an Act of Parliament meant to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration and for connected purposes.

<sup>217</sup>Section 93 of the Land Registration Act.

<sup>218</sup>*Ibid.*

<sup>219</sup>*Infra* note 265.

<sup>220</sup> According to the Gay and Lesbian Alliance against Defamation, GLAAD Media Reference Guide, "Transgender: Glossary of Terms", GLAAD, USA (2010).

umbrella, as clearly outlined, recognizes only two different types of marriages. That is, monogamous and polygamous relationships.<sup>221</sup> The legal system does not recognize same-sex unions as a nature of marriage. This is despite the fact that advocates of the same-sex marriage portrays gays and lesbians couples as similar to one another and portrays both as similar to heterosexual couples.<sup>222</sup> Clearly, according to the law, “spouses” in same-sex unions do not qualify for joint titling, co-ownership of properties and neither do they have matrimonial rights in properties as spouses properly defined have.<sup>223</sup>

### **3.4The Institution of Marriage**

The institution of marriage refers to the umbrella of marriage relationships. This part seeks to explore the different marriage institutions in practice in Kenya.

#### **3.4.1 Polygamy and its Implications on Matrimonial Property**

The practice of polygamy is still profound in the African set-up.<sup>224</sup> It draws its validity from the concept of an African traditional family.<sup>225</sup> African native law and custom espouse polygamy, both as a religious fact and as a cultural facet of African traditional life.<sup>226</sup> Polygamy in the African context is the practice in which a man gets married to more than one spouse at the same time. Properly put, it is the legal marriage of one man

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Transgender is the state of one’s gender identity (self-identification as woman, man, neither or both) or gender expression not matching one’s assigned sex (identification by others as male, female or intersexed based on physical and genetic sex).

<sup>221</sup> Section 6 of the marriage Act provides that these are the only two natures of marriage legally recognized in Kenya. This stems from the Constitution which provides that a marriage can only be composed of a man and a woman (two adults of opposite sex).

<sup>222</sup> Douglas W. Allen, “An Economic Assessment of Same-Sex Marriage,” *Harvard Journal of Law and Public Policy* Volume 29 (2008).

<sup>223</sup> *Supra* note 265.

<sup>224</sup> Lucy P. Mair, “African Marriage and Social Change”, in Arthur Philips (eds) *Survey of African Marriage and Family Life*, London: Oxford University Press(1953) p.1.

<sup>225</sup> *Ibid.*

<sup>226</sup> M. L. Marasinghe, Polygamous Marriages and the Principle of Mutation in the Conflict of Laws, 24 *Model Law Review*(1961).

to more than one woman at the same time.<sup>227</sup> Polygamy is considered primarily a legal concept, giving rise to a particular legal status. Polygamy symbolizes a particular cultural and religious heritage.<sup>228</sup>

. . . Polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage.<sup>229</sup>

Courts have consistently held that parties to a polygamous or a potentially union cannot seek matrimonial relief from the common law. According to Lord Penzance dictum in *Hyde v Hyde*,<sup>230</sup> all parties to a polygamous or to a potentially polygamous marriage are precluded from seeking relief from common law court. His basis was hinged on the fact that:

He conceived marriage as understood in Christendom, to be a voluntary union for life of one man and one woman, to the exclusion of all others.<sup>231</sup>

Contrary to this, the practice of polygamy has been prominent in Kenya. Previously it emanated from the cultural values. The Marriage Act has however validated this practice.<sup>232</sup> The Act for example recognizes the existences of two different types of marriage. That is, monogamous and polygamous marriages.<sup>233</sup> The offense of bigamy does not apply to polygamous men under these two systems. The Act explicitly states that at the beginning of a marriage, parties must clearly indicate that their marriage is

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<sup>227</sup>*Ibid.*

<sup>228</sup> James Fenske, *African Polygamy: Past and Present*, University of Oxford (2011). The author illustrates that in essence the type of polygamy practiced in Africa is polygamy where only men can marry more than one spouse.

<sup>229</sup> Law Reform Commission of Canada, Bigamy, Ottawa Law Reform Commission of Canada Working Paper No.42 (1985) p.13.

<sup>230</sup> *Hyde v Hyde* (1886) L.R 1 P&D. 130. As recently as 1961, the English Court of Appeal in *Sowa v Sowa* (1961) P. 70 (C.A.) observed that “if the ceremony is polygamous, then it does not come within the word ‘marriage’ for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words ‘wife’, ‘married woman’ or ‘husband’.

<sup>231</sup>*Ibid.*

<sup>232</sup> Section 6(3) of the Marriage Act.

<sup>233</sup> Section 6(1) read together with Section 6(3) of the Marriage Act and Section 9 of the Act.

potentially polygamous. In order for polygamous unions to be registered and recognized by the law, they have to possess certain elements. These elements are: voluntariness, validity in the community, exclusivity and permanence.<sup>234</sup>

Spouses in the polygamous marriages just like in monogamous marriages must be duly consulted for their consent before any transaction on marital property can be done.

#### **3.4.1.1 The Law on Polygamy in Australia**

Australia practices a strict monogamous system. A marriage in Australia is not legally recognized if one of the parties is, at the time of marriage, already lawfully married to someone else.<sup>235</sup> This constitutes the offence of bigamy. It is therefore an offence in Australia for a person who is married to purport to marry another person.<sup>236</sup>

The objective of the of the Australian law is to promote equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians, in this case, women.<sup>237</sup>

Under the Australian system therefore, a party purporting to conduct a subsequent marriage while still in an existing marriage can be prosecuted. As such he does not

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<sup>234</sup> These elements were set out in the famous case of *Connolly v Woolrich & Johnson* where the Canadian Court recognized Aboriginal customary law relating to marriage as an important aspect relating matrimonial property law. The court in a nut shell accepted and sanctioned the polygamous unions practiced by the Aboriginal custom and recognized resulting rights and claims associated with it.

<sup>235</sup> Brenda Crossman and Carol Rogerson, "Family Law: Cases and Material", Faculty of Law, University of Toronto, 2005-2006 p.174. Available at <[http://www.immi.gov.au/multicultural/\\_inc/publications/agenda/agenda89/toc.htm](http://www.immi.gov.au/multicultural/_inc/publications/agenda/agenda89/toc.htm)> (Last accessed on 5<sup>th</sup> July 2014).

<sup>236</sup> Department of Justice, Polygamy and Canada's Obligation under International Human Rights Law, Research Report (2006) p.54. Available at <<http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/poly.pdf>> (Last accessed on 5<sup>th</sup> July 2014).

<sup>237</sup> *Ibid.*

acquire any right in the matrimonial property as a spouse because that right is not enforceable as it cannot accrue in the face of the law.<sup>238</sup>

### 3.4.2 Place of Customary Marriages

Customary marriages refer to marriages which take place under customary rules and tradition.<sup>239</sup> It encompasses both the monogamous and polygamous unions.<sup>240</sup> Under the current legal regime, these marriages have direct impact on the use of matrimonial property.

Due to the unique nature of which these arrangements are done, questions however arise as to the manner in which the existence of these marriages can be established in order to protect the matrimonial rights of the spouses who have been married under this system.<sup>241</sup>

According to the law of succession, an objector alleging the existence of marriage under a customary law must prove the facts to the required standard.<sup>242</sup> In instances where a spouse married under customary law seeks to protect her matrimonial rights, then the onus is on her to prove the occurrence of a customary law marriage. This is done on a balance of probabilities.<sup>243</sup>

Previously spouses were expected to establish the custom or customary rules upon which they relied on in order to prove the existence of marriage so as to guide the court on such issues.<sup>244</sup> However, as time went by, the court relied largely on Eugene Contran's book *Restatement of African Law: Law of Succession*<sup>245</sup> to resolve probate matters where a customary law marriage was alleged. Concern later arose upon the realization that the

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<sup>238</sup> *Ibid.*

<sup>239</sup> Eugene Contran, *Restatement of African Law: Law of Succession II*, Sweet & Maxwell, London, 1969.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> William Musyoka, *Law of Succession*, Law Africa (2006) p.6.

<sup>243</sup> See the case of *Mwagiru v Mumbi* (1967) EA 639.

<sup>244</sup> See the case of *Kimani v Gikanga* (1965) EA 735.

<sup>245</sup> *Ibid* 236.

book did not contain customary succession laws of all communities in Kenya. The Court of Appeal in *Atemo v Imujaro*<sup>246</sup> cautioned that Contran's *Restatements* should not be treated as the only source of customary succession law. This development compounded the problems of spouses who intended to rely on the authority to establish their status upon the demise of their husbands.<sup>247</sup>

The coming into force of the Marriage Act provided a sigh of relief for spouses who conducted their unions under the customary laws. The marriage Act now explicitly provides that unions contracted under customary law can now be registered.<sup>248</sup> This resolves the problem and burden of having to prove marriage in order for a spouse to have her rights enforced. More specifically, the Act provides verbatimly that:

Both parties to a subsisting marriage contracted under customary law or the Hindu Marriage and Divorce Act (now repealed) or the Mohammedan Marriage and Divorce Registration Act (now repealed) before the commencement of this Part, which has not been registered under the provision of any other law, may apply to the Chief Registrar or District Registrar or to a registration assistant for the registration of that marriage under the Act.<sup>249</sup>

Notably, this provision is a major breakthrough, particularly, to couples who got married under customary laws and never converted<sup>250</sup> their marriage to the now repealed African Christian Marriage Act.<sup>251</sup> A majority of Kenyans who hold property fall under this class, as such they are clearly the target group. The Act further to underscore the requirement for registration of marriage provides that all marriages are to be registered.<sup>252</sup>

The Act also empowers the married parties to move fast within sixty days after marriage to apply for registration with the registrars or registration assistants in instances where the

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<sup>246</sup> See the case of *Atemo v Imujaro* (2003) KLR 435.

<sup>247</sup> *Ibid.*

<sup>248</sup> Section 40 Marriage Act.

<sup>249</sup> *Ibid.*

<sup>250</sup> Section 8 of the Marriage Act.

<sup>251</sup> Repealed by the Marriage Act.

<sup>252</sup> Section 39(1) of the Marriage Act stipulates that ...the registrar, minister for religion, Kadhi, priest or other person to whom the marriage is contracted or celebrated, as the case may be, shall forthwith register it.

marriage was contracted in Islamic form or according to customary rites in the absence of the Kadhi, registrar or registration assistant present.<sup>253</sup> This is geared to ensure that all celebrated unions are registered in order to protect the matrimonial rights of the parties to the union.

Finally, the Act offers remedy to the question of proof of marriage by providing that a marriage certificate issued under the Act shall be admissible as prima facie evidence of marriage without proof in any court or before any person having by law or consent of the parties' authority to receive evidence.<sup>254</sup>

Pursuant to the provisions of the Act, if a lending institution, in exercising due diligence, wants to satisfy itself as to the existence of a marriage between a chargor and a third party, in this case a spouse, a marriage certificate will suffice.<sup>255</sup> The inverse is also true when a court of law wishes to void a charge and thus save matrimonial property in instance where due diligence was not done all they have to inquire is whether there exists a valid marriage certificate.<sup>256</sup> This will undoubtedly come to the rescue of spouses who have conducted marriage unions under customary law the rigours previously associated with the clamour for the protection of matrimonial rights and properties.<sup>257</sup>

### **3.4.3 The Case of the Other Woman**

The case of the other woman or better known as a cohabitee has a special place in the Kenyan society.<sup>258</sup> This statement can be attributed to a myriad of case law emanating from the courts. The Courts have expanded the idea of customary marriage to include

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<sup>253</sup>Section 39(2) of the Marriage Act.

<sup>254</sup>Section 47 of the Marriage Act.

<sup>255</sup>*Supra* note 56

<sup>256</sup>*Ibid.*

<sup>257</sup>*Ibid.*

<sup>258</sup>*Supra* note 239.

instances where the formal requirement for a customary marriage has not been met.<sup>259</sup>

The courts have recognized that marriage can be created through cohabitation and repute.<sup>260</sup> In *Njoki v Mutheru*<sup>261</sup> the Court recognized that “[I]ong cohabitation as man and wife gives rise to a presumption of marriage in favour of the party asserting it.”<sup>262</sup> Hence, it does not matter that all the ceremonies and rituals of a customary marriage are not performed.

The principle for determining presumption of marriage from prolonged cohabitation was also reaffirmed in the famous case of *Hortensia Wanjiku Yawe v Public Trustee*.<sup>263</sup> The presumption does not depend on any law or system of marriage. It is an assumption pegged on very long cohabitation and repute that the parties are married. Other pertinent factors to be considered include: children fathered by the deceased, valuable property acquired jointly, and performance of some ceremony of marriage. Essentially, there has to be quality cohabitation and not mere friendship. It should be beyond concubinage.<sup>264</sup>

In *the Matter of Estate of Gerishon John Mbogo*<sup>265</sup> the Court held that presumption of marriage is a rebuttable presumption, it can be rebutted by evidence to the contrary. Be that as it may, where during cohabitation a man acquire properties with or without

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<sup>259</sup> Perpetua Wambui Karanja, “Women’s Land Ownership Rights in Kenya” *Third World Legal Studies: Volume 10 Article 6* (1991).

<sup>260</sup> Lawrence Juma, “Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Process,” *14 SR. Thomas. Law Review* (2002) p.459-460.

<sup>261</sup> *Njoki v Mutheru*, 6 Decisions Ct. App. Kenya 30 (Civil Appeal No. 71 of 1984).

<sup>262</sup> *Ibid.*

<sup>263</sup> *Hortensia Wanjiku Yawe v Public Trustee* CACEA CA No. 13 of 1976.

<sup>264</sup> According to Oxford Dictionary 10<sup>th</sup> edition concubinage *refers to the relationship* between a woman and a married man who has a wife or wives where the parties stay together but the woman is considered socially less important than the wife or wives of the man. Similarly Section 2 of the Marriage Act defines cohabitation as an arrangement in which unmarried couples lives in a long-term relationship that resembles a marriage.

<sup>265</sup> *The matter of Estate of Gerishon John Mbogo* Nairobi HCSC No. 989 and 1110 of 1909.



contribution from the “spouse” then it follows as that his/her consent must be sought on any dealings touching on the property.<sup>266</sup>

### 3.4.4 The Question of Gays and Transgender Unions

The question of gays and transgender unions is a contemporary legal issue in Kenya. It draws its locus from an ensemble of rights in the Bill of Rights. The Bill of Rights guarantees for everyone the right to equality, human dignity and freedom.<sup>267</sup> These rights specifically are the rights of association,<sup>268</sup> freedom of conscience, religion, belief and opinion,<sup>269</sup> and the freedom to marry. Particularly so, the proponents of the rights of the gay assert that the right to marry<sup>270</sup> whoever one wishes is an elementary human right which should not be derogated from.<sup>271</sup> Acknowledging the existence and the practice of the gay and transgender unions question arise as to whether provision on the protection of the right to property evinced in the Constitution should be extended to them.<sup>272</sup>

However, due to cultural, societal and religious moral standards, Kenya is yet to determine the fate of the rights of the same-sex couples to benefit from the rights granted to matrimonial parties in the context of matrimonial property ownership and the associated right to consent which heterosexual couples enjoy. The genesis of this uncertainty flows from the Bill of Rights which provides that every person is equal before

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<sup>266</sup> *Supra* note 69 p5. Further, in the case of *Barclays Bank plc. v O'Brien* (infra) the House of Lords held inter alia that: “where a cohabitee entered into an obligation to stand as a surety for the debts of the other cohabitee including the debts of a company in which the other cohabitee (but not surety) had a direct financial interest and the creditor was aware that they were cohabitees the surety obligation was valid and enforceable by the creditor unless the surety was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor.”

<sup>267</sup> See the Constitution, Articles 27 and 28 respectively.

<sup>268</sup> See the Constitution of Kenya, Article 36.

<sup>269</sup> See the Constitution of Kenya, Article 32.

<sup>270</sup> See the Constitution of Kenya, Article 45.

<sup>271</sup> Jacob Bernard and Pierre De Vos, Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflection on an Ongoing Saga, *The South African Law Journal*. Available at <[http://www.privatelaw.uct.ac.za/usr/private\\_law/attachments/Barnard%20AJ%20&%20De%20Vos%20P%20Same-sex%20marriage%20SALJ%202007%20.pdf](http://www.privatelaw.uct.ac.za/usr/private_law/attachments/Barnard%20AJ%20&%20De%20Vos%20P%20Same-sex%20marriage%20SALJ%202007%20.pdf)> (Last accessed on 6<sup>th</sup> July 2014).

<sup>272</sup> See the Constitution of Kenya, Article 40.

the law and has the right to equal protection and equal benefit of the law.<sup>273</sup> It further underpins that equality include the full and equal enjoyment of all rights and fundamental freedoms.<sup>274</sup> Even more resoundingly, the Constitution does not permit discrimination based on sexual orientation.<sup>275</sup>

Intriguingly, the lack of express provisions in both the Constitution and municipal laws envisaging the rights of the same-sex couples have been used as the ground to deny them their matrimonial rights. This extends to seeking of consent in any transaction touching on matrimonial property as they do not properly come within the meaning of the term spouses as provided for in the various land laws.

#### **3.4.4.1 Comparative Analysis: The Question of Gays in USA**

In America legally, politically and culturally, same-sex marriage has gone mainstream. Public opinion has shifted dramatically in recent years and a majority of Americans now support equal marriage rights for gays and lesbians.<sup>276</sup> Seven states in America recognize same-sex marriage as legal, an additional nine states provide state-level spousal rights in the form of civil unions or registered domestic partnerships.<sup>277</sup> Pursuant to these laws the spouses in these relationships are entitled to own property and their consent must be sought in any issue dealing with the disposition of the property.<sup>278</sup>

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<sup>273</sup> See the Constitution, Article 27(1).

<sup>274</sup> See the Constitution, Article 27(2).

<sup>275</sup> Article 27(4) of the Constitution read together with Article 27(8).

<sup>276</sup> See Nate Silver, Gay Marriage Opponents Now in Minority, NYTimes.com reporting on the fourth credible poll in the past eight months to show that an outright majority of Americans are in favour of gay marriages. Available at <<http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriageopponents-now-in-minority/>> (Last accessed on 8<sup>th</sup> May 2014).

<sup>277</sup> See Marriage Equality & Other Relationship Recognition Laws, Human Rights Campaign. Available at <[http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf)> (Last accessed on 5<sup>th</sup> July 2014).

<sup>278</sup> This is in recognition of the fact that the definition of spouse has since changed to include common law relationships registered as “domestic partnerships.” Previously matrimonial property legislation applied to only married couples and not to common law relationships. This followed the case of *Novia Scotia (Attorney General) v Walsh*(2002) 297 N.R 203 (S.C.C) in which it was challenged that the discrimination

If Kenya are to address the contemporary legal issues posed by the question of gay rights it can adopt some of the legislations which are pro-gays so as to not discriminate against a class of people in the society.

#### **3.4.4.2 Comparative Analysis: A Look at the Position in Uganda**

Homosexuality is illegal in Uganda.<sup>279</sup> The Anti-Homosexuality Act<sup>280</sup> creates the offence of Homosexuality.<sup>281</sup> It also creates the crime of “aggravated homosexuality” which makes engaging in homosexual sex while living HIV, or repeatedly engaging in homosexual activity, a crime punishable by death.<sup>282</sup> The crime of aggravated homosexuality is punishable by life sentence.<sup>283</sup> The Act even imposes prison sentences on anyone who fails to report homosexual activity within 24 hours.<sup>284</sup>

The Ugandan law constitutes crass, blunt, cruel, severe and harsh laws which are meant to guarantee near zero prospects of the practice of gay unions within its boundaries. The law does not tolerate gay unions, as such it does not even in the slightest way attempts to address the rights of the gays pertaining to matrimonial property or otherwise.<sup>285</sup> As such the gay partners cannot give consent over transfer of matrimonial property. The Ugandan position is bad law, it legislates strong and rigid laws against the gays. If Kenya is to legislate gay laws to address the contemporary legal issues it should look elsewhere in

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of Common Law relationships was a violation of Charter of Equality Rights. This led to the development in some jurisdictions which extended their matrimonial property law to include common law relationships and same-sex relationships.

<sup>279</sup> Gwen Thompson, Taboos Silence Opponents of Uganda Anti-Gay Act, NPR (Dec. 16, 2009). Available at <<http://www.npr.org/templates/story/story.php?storyId=121485018>> (Last accessed on 5<sup>th</sup> July 2014).

<sup>280</sup> The Anti-Homosexuality Act 2014, Laws of Uganda.

<sup>281</sup> Section 3 of the Act

<sup>282</sup> Section 7 of the Act creates the offence of aiding and abetting homosexuality.

<sup>283</sup> Section 4 of the Act.

<sup>284</sup> According to Section 7 of the Act, the offence is punishable by imprisonment of up to 7 years.

<sup>285</sup> *Ibid* 276.

jurisdictions which have enacted laws which do not discriminate upon a class of people in the society.

### 3.5 Spousal Rights over Matrimonial Property

Although, the Land Registration Act does not expressly state the meaning of the term matrimonial property, it however contains provisions relating to the spousal rights over matrimonial property.<sup>286</sup> It states that the right over matrimonial property is an overriding interest.<sup>287</sup> It also precisely state that spousal consent must be sought if the land<sup>288</sup> in question is a matrimonial property before any charge,<sup>289</sup> transfer<sup>290</sup> or assignment can be effectuated.<sup>291</sup>

Essentially, this delimitation of the term matrimonial property is important because it enable us to determine which properties cannot be sold, leased or mortgaged without the consent of both spouses.<sup>292</sup> Further, Matrimonial Property Act provides that in any marriage, a spouse or spouses (in a polygamous marriage) have an interest in matrimonial property capable of protection by caveat, caution<sup>293</sup> or any law in force on registration of title deeds.<sup>294</sup> The protection by caution or caveat basically prevents any dealing<sup>295</sup> which

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<sup>286</sup>Sections 28 and 93 of the Land Registration Act.

<sup>287</sup>Section 28 of the Land Registration Act. The case of *Williams & Glyns' Bank v Boland* [1981] AC 487, is an authority which proves that overriding interest binds on a mortgagee who claims possession of a matrimonial home under a mortgage granted by a single spouse alone.

<sup>288</sup> The definition of land in this context is summed up in a maxim *quicquid plantatur solo solocedit* which means that whatever is attached to the ground becomes part of the land. This principle also includes "fixtures." A fixture refers to anything that has become so affixed to land as to form part of the land.

<sup>289</sup> Section 2 of the Land Registration Act defines a charge as (a) an interest in land or a lease securing the payment of money(s) worth or the fulfillment of a condition; (b) a sub-charge and (c) the instrument creating a mortgage or other charge.

<sup>290</sup> Section 2 of the Land Registration Act defines transfer to mean the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law.

<sup>291</sup>Section 93 of the Land Registration Act.

<sup>292</sup> Section 11 of the Matrimonial Property Act

<sup>293</sup> Section 2 of the Land Registration Act defines caution to mean (a) a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gives the notice; or b) a caveat.

<sup>294</sup>*Ibid*, Section 12(2).

can be done on the land without the notice of a spouse. Most importantly, the Act provides that the matrimonial home shall not be mortgaged or leased without the written and informed consent of spouses.<sup>296</sup>

To consolidate the rights of the spouse, the Land Registration Act states that no other written law, practice or procedure relating to land shall apply to land registered or deemed to be registered under the Act so far as it is inconsistent to the Act.<sup>297</sup> This also extends to disposition or dealings in land which are geared to create leases, charges or any other interests in land.<sup>298</sup> The Act further states that all registered land is subject to overriding interests which includes amongst others, spousal rights over matrimonial property.<sup>299</sup> To further underscore the importance of seeking consent, the Act provides that it does not exclude a proprietor from any duty or obligation to which the person is subject to as a trustee.<sup>300</sup> This goes a long way to protect spouses whose partners hold title for the family land as a custodian for the family in trust for the wife and children.

In addition, in instances where a spouse obtains land for the co-ownership and use for both spouses, or all the spouses, the Act clearly outlines that, it shall be presumed that the spouses shall hold the land as joint tenants unless the contrary is stated so in the

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<sup>295</sup> Section 2 of the Land Registration Act defines dealing to include any disposition and transmission while disposition means (a) a sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, usufructuary right, or other servitude or any other interest in land or a lease and any other act by an owner of land or under a lease whereby the person's right over that land or lease are affected (b) an agreement to undertake such disposition.

<sup>296</sup> *Ibid*, Section 12(5).

<sup>297</sup> Section 5 of the Land Registration Act.

<sup>298</sup> Section 36(1) of the Land Registration Act provides that a lease, charge or interest in land shall not be disposed or dealt with except in accordance with the Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with the Act or any other law shall not extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

<sup>299</sup> Section 28 of the Land Registration Act.

<sup>300</sup> Section 25(2) of the Land Registration Act.

certificate of ownership.<sup>301</sup> Be that as it may, if land is held in the name of one spouse only but the other spouse or spouses has contributed by their labour or other means to the productivity, upkeep and improvement of the land, then that spouse by virtue of that contribution automatically acquires an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered.<sup>302</sup> The rights gained by contribution of the spouse or spouses shall be recognized as if they were registered.<sup>303</sup>

The Act also places a duty and an obligation on the lender respectively. This, it deliberately does to seal all the loopholes which can lead to the disenfranchisement of a spouse. The act expressly places a duty on the lender to inquire from the borrower if the spouse has or spouses have consented to the charge, assignment or transfer.<sup>304</sup> If the spouse undertaking the disposition deliberately misleads the lender or the assignee or transferee then that disposition is void at the option of the spouse who was or spouses who were not consulted.<sup>305</sup> The Act further specifically provides that the registrar on making an order for partition should where the tenants are spouses who do not agree on the partition not make a spouse or defendants of the tenants in common homeless by the

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<sup>301</sup> Section 93(1) provides that subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all spouses –

- a) There shall be a presumption that the spouses shall hold the land as joint tenants unless-
  - i. a provision in the certificate of ownership clearly states that one spouse is taking the land in, his or her, own name only, or that the spouses are taking the land as joint tenants.
  - ii. the presumption is rebutted.

<sup>302</sup>Section 95(2) of the Land Registration Act.

<sup>303</sup>*Ibid.*

<sup>304</sup> Section 95(3) provides that where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house (a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse or spouses have, as the case may be, have consented to the charge; or (b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land.

According to Section 2 of the Land Registration Act a “dwelling house” means a house, a part of a house used as a dwelling in any building and includes a garden or other premises within the cartilage of and used as a part of any such dwelling house.

<sup>305</sup>Section 95(4) of the Land Registration Act.

partition.<sup>306</sup> This provision also underlines the right of the spouses in view of the matrimonial property.

### **3.6 Conclusion**

This chapter from a point of departure began by noting that the right of women in matrimonial properties is now a protected right. This is provided for in various legislations which state that the consent of a spouse particularly in transactions dealing with land as a matrimonial property must be sought before any disposition can be done. This chapter has exhaustively defined the terms spouse, marriage and matrimonial properties. It has also looked at the existence of various types of family relationships in which rights accrue and the divergent contemporary unions which do not attract the provisions of the consent requirement.

The next chapter addresses the issue of consent. It undertakes to ventilate about the issues surrounding the spousal consent in order to determine the tenability of the provisions requiring consent in transactions dealing with matrimonial property.

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<sup>306</sup> Section 93(3)(e) of the Land Registration Act.

## CHAPTER FOUR

### SPOUSAL CONSENT IN LENDING OF MATRIMONIAL PROPERTY AND THE ASPECT OF UNDUE INFLUENCE

*Regardless of actual ownership (whether one or both spouses' names are on the title to the matrimonial home), provincial/territorial legislation recognizes the right of possession of both spouses to the matrimonial home. This usually means that neither spouse can sell the house or have an encumbrance placed on the title without the other's agreement or a court order to that effect. The agreement obtained from the spouse must be given in good faith and in good understanding of the prevailing circumstances. If it is compromised then the entire transaction is vexed and is voidable at the behest of the spouses who was duped.*

Wendy Cornet and Allison Lendor.<sup>307</sup>

#### 4.0 Introduction

Spousal consent is a critical element in as far as lending of the matrimonial property is concerned. It is the fulcrum upon which the entire disposition is pegged.<sup>308</sup> It does not only empower women through ensuring that they are consulted during the disposition process but it also goes a long way in ensuring that women are actively involved in making crucial decisions about the usage and management of the matrimonial properties.<sup>309</sup> Ideally, this can only be achieved if consent is properly sought from women through legal means. In circumstances whereby consent of a spouse is compromised through undue influence the whole essence of this provision will be defeated.<sup>310</sup> This chapter undertakes to canvass the concept of spousal consent as envisioned in the current legal regime. It also transcends beyond this provision and examines the duties imposed on the husbands to disclose their spouses and particularly focus on its relevance and

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<sup>307</sup>Wendy Cornet and Allison Lendor, *Matrimonial Real Property Issues on Reserve*, Thompson Educational Publishing Inc. (2013) p.15. Available at [http://apr.thompsonbooks.com/vols/APR\\_Vol\\_2Ch7.pdf](http://apr.thompsonbooks.com/vols/APR_Vol_2Ch7.pdf) (Last accessed on 10<sup>th</sup> July 2014).

<sup>308</sup> George Nathan Mwaisondola, *The Modern Law of Mortgages in Tanzania: The Role of the Land Act, 1999*, The University of Birmingham School of Law (December 2007) p.140. Available at [http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID\\_Land\\_Tenure\\_Tanzania\\_Profile.pdf](http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Tanzania_Profile.pdf) (Last accessed on 10<sup>th</sup> July 2014).

<sup>309</sup>*Ibid.*

<sup>310</sup> Antony Luyirika Kafumbe, *Women's Right to Property in Marriage, Divorce and Widowhood in Uganda: The Problematic Aspects*, Springer Science (2009) p.20. Available at <http://www.rolc.sc.edu/sites/sc.edu.rolc/files/attachments/Women's%20Rights%20to%20Property%20in%20Marriage.pdf> (Last accessed on 10<sup>th</sup> July 2014)



tenability. These will be mirrored against the concept of undue influence. This thesis also looks at the closely related doctrines of duress and unconscionability and the substantial overlap between these three doctrines. In order to properly demonstrate the principle of spousal consent as envisioned in our legal regime, a comparative study will be conducted with a jurisdiction which has properly implemented this principle as part of its legal system.

#### **4.1 Definition of Consent**

The term consent is invariably used on numerous occasions within the Land Registration Act. Of importance, however, the Act makes it a requirement that spousal consent must be sought in any disposition of land under a charge, assignment or transfer.<sup>311</sup> The Land Act on the other hand provides that a charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or if there is evidence from the document that it has been assented to by all such persons.<sup>312</sup> Matrimonial Property Act further emboldens the requirement for consent when it provides that an estate or an interest in any matrimonial property cannot be alienated in any form whether by way of sale, gift, lease, mortgage or otherwise without the consent a spouse or spouses.<sup>313</sup>

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<sup>311</sup> Section 93(3) states that where a spouse who holds land or a dwelling house in his/her name individually undertakes a disposition of that land or dwelling house –

- (a) The lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, consented to the charge; or
- (b) The assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

<sup>312</sup>Section 79(3) of the Land Act, Act No.6 of 2012, Laws of Kenya.

<sup>313</sup> Section 12(1) of the Matrimonial Property Act explicitly states that an estate or an interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

These provisions clearly underscore the requirement of consent of a spouse in the administration of the marital property. Despite the repeated usage of this term, the various Acts fail to define it both as a concept and what it means in its usage. According to Webster's II New College Dictionary, "consent" (noun) is a "[v]oluntary allowance of what is planned or done by another."<sup>314</sup> The dictionary further defines "voluntary" as "[a]rising from one's own free will."<sup>315</sup> Therefore, consent ought to be an autonomous choice free from any manipulation whatsoever.<sup>316</sup> However, before choice is made certain prerequisites must exist for one to make an informed consent that reflects exercise of individual autonomy.<sup>317</sup> Under the informed consent analysis, in order to give consent, one needs volition (the power to use one's will), information and comprehension.<sup>318</sup>

The volition requirement of consent "requires conditions free of coercion and undue influence."<sup>319</sup> Coercion occurs when one person threatens to harm another person in order to obtain consent.<sup>320</sup> Undue influence, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overtures in order to obtain compliance.<sup>321</sup> Conditionally, "inducements that would ordinarily be acceptable may become undue influence if the subject is especially vulnerable."<sup>322</sup>

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<sup>314</sup>Webster's II New College Dictionary (3<sup>rd</sup> ed. 2005) p.245.

<sup>315</sup>*Ibid*, p.1267.

<sup>316</sup> See Peter A. Alces, *Contracts Reconceived*, 96 *U.L. Rev* 39 (2001) p.102. The author emphasizes that "[e]ven the most committed proponents of free markets and freedom of contract recognize that certain information preconditions must be met for a given exchange to be efficient."

<sup>317</sup>Julia A. Perdoni and Kenneth D. Pimple, *A Brief Introduction to Informed Consent in Research with Human Subjects* (2001) p.3-4.

<sup>318</sup>*Ibid*.

<sup>319</sup>*Ibid*.

<sup>320</sup>*Ibid*.

<sup>321</sup>*Ibid*. See also *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 539 (Ct. App. 1966). The court said in orbiter that "[a] person's will may be overborne without misrepresentation."

<sup>322</sup>*Ibid*.

Another requirement of informed consent requires access to information.<sup>323</sup> For one to be adequately informed, he needs to have the necessary information, in order to assist him or her to evaluate all the options available.<sup>324</sup> Consent based on limited information cannot be consent that promotes individual autonomy.<sup>325</sup>

Equally importantly, mere physical possession of information without comprehension will not result in informed consent either. Comprehension is thus an important requirement for meaningful consent. The ability to understand depends on intelligence, rationality, maturity, and language. Comprehension is also influenced by internal constraints such as cognitive ability and decision-making biases and external constraints such as cultural practices and market place manipulations.<sup>326</sup>

#### **4.2 Spousal Consent and the Duty to Disclose**

As already espoused above spousal consent is now a critical requirement in any transaction in which matrimonial home is intended to be used as a security. This requirement carries with it an obligation on the Lendor/purchaser to exercise due diligence during the transaction and inquire as to the existence of a spouse before the transaction can be finalized.<sup>327</sup> As a standard procedure, a Lendor/purchaser is now under a duty to specifically inquire whether the consent of the spouse or spouses has been sought and obtained.<sup>328</sup> In fact, the Act expressly provides that if the spouse undertaking

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<sup>323</sup>*Ibid.*

<sup>324</sup>*Ibid.*

<sup>325</sup>*Ibid.*

<sup>326</sup>*Ibid.*

<sup>327</sup>Section 93(3) of the Land Registration Act.

<sup>328</sup>*Ibid.* Even before the adoption of the new laws the courts had already recognized the need to ensure that consent was properly sought from women in transactions dealing with disposition of matrimonial property. In *Anjanaben Anil Shah v Akiba Bank Limited* (2005) eKLR the court held that if a bank knows that the wife's consent to the transaction has been procured by undue influence or misrepresentation and it has shut its eye to it, then it may not rely on her apparent consent to charge a matrimonial property if evidence is adduced to show that that consent was obtained through undue influence.

the disposition misleads the lender or purchaser or other transferee as the case may be, the sale, transfer, charge, lease or other disposition shall be void, at the option of the spouse who did not consent to the transaction.<sup>329</sup>

Even more notably, the new laws in their attempt to make financial dealings less obscure in the family setting applies to both existing and new mortgages.<sup>330</sup> The advent of this provision has led to thousands of home loan borrowers to re-draft their loan agreements to comply with the legal requirement which demands that consent of the spouse is necessary in accessing credit.<sup>331</sup>

#### **4.3 Importance of the Duty to Disclose**

The importance of the duty to disclose the existence of a spouse is twofold. Chiefly, as highlighted before, a spouse under the new laws has beneficial interest in matrimonial property which is recognized in law.<sup>332</sup> This is clearly illustrated in the case of *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau*<sup>333</sup> where the court declared in its holding that the plaintiff, a spouse, had beneficial interest though not registered in the deed. This emanated from her spousal rights over the matrimonial property enshrined in Land Registration Act which enlisted matrimonial status as one of the overriding interests.<sup>334</sup>

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<sup>329</sup>*Ibid*, Section 93(4). It provides that “if the spouse undertaking the disposition deliberately misleads the lender or the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

<sup>330</sup> Moses Macharia, New Mortgage Laws Tie Down Spouses, Business Daily, 2<sup>nd</sup> August 2012. Available at <http://www.businessdailyafrica.com/New-mortgage-laws-tie-down-spouses--/1248928/1469428/-/6kcg3bz/-/index.html> (Last accessed on 13<sup>th</sup> May 2014).

<sup>331</sup>*Ibid*.

<sup>332</sup>Section 28(b) of the Land Registration Act No. 3 of 2012.

<sup>333</sup>*Virginia Wanjiku Mwangi v David Mwangi Kamau* [2013] eKLR.

<sup>334</sup>Section 28 of the Land Registration Act.

Secondly, the Act provides that subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use by both spouses then there is a presumption that the spouses shall hold the land as joint tenants.<sup>335</sup> In respect of instances where land is fully owned by the other spouse, the Act recognizes acquisition of interest in land by a spouse who though is not registered as an owner, has contributed to the same through labour or other means of productivity, upkeep and improvement on the land, then that spouse is deemed by virtue of contribution to have acquired an interest in the land in the nature of an ownership in common of the said land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered.<sup>336</sup> The rights<sup>337</sup> gained by contribution of the spouse shall be recognized in all cases as if they were registered.<sup>338</sup>

On the strength of these provisions it is only prudent and pragmatic for the lender to exercise due diligence and ensure that a chargor makes full disclosure as to the existence and approval for consent from his spouse or spouses, whichever case applies, before charging such a land.<sup>339</sup>

#### **4.4 Consequences of Non-Disclosure**

Pursuant to the Land Registration Act the lender has a duty to inquire from the borrower if consent has been sought from the spouse or spouses as the case may be.<sup>340</sup> This provision creates a duty on the lender to inquire of the marital status of the borrower.<sup>341</sup> It

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<sup>335</sup>Section 93(1) of the Land Registration Act.

<sup>336</sup>Section 93(1) of the Land Registration Act.

<sup>337</sup> According to Bina Agarwal in her book *are not Peasants Too? Land Rights and Women's Claim in India*, she defines rights (in any form of property) as claims that are legally and socially recognized and enforceable by an external legitimized authority.

<sup>338</sup>*Supra* note 303.

<sup>339</sup>*Ibid.*

<sup>340</sup>*Supra* note 325.

<sup>341</sup>*Ibid.*

also places an obligation on the borrower to accurately inform the lender if such consent has been sought and obtained.<sup>342</sup> This can be confirmed by either the spouse or spouses appending signature on the consent form or expressing consent through some other verifiable means.<sup>343</sup>

However, in instances where this has not been done the Act strictly spells out that the disposition shall be void at the option of the spouse or spouses who were not consulted.<sup>344</sup> The Land Act<sup>345</sup> further reiterates this position by outlining that a charge of matrimonial home shall only be valid if any document or form used in applying for such a charge, or used to grant the charge, is executed by the charger and any spouse of the charger living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.<sup>346</sup>

The requirement for consent therefore operates as a condition precedent which if not observed shall operate to vitiate the contract. Clearly, it is a major stipulation. It therefore operates to foil a contract, hence is a big consequence of non-disclosure.<sup>347</sup>

Fundamentally, the Matrimonial Property Act operates to create a trust in a matrimonial property.<sup>348</sup> It does this through registering a presumed share of interest in the

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<sup>342</sup>*Ibid.*

<sup>343</sup>Section 45 of the Land Registration Act. Section 6(4) of the Matrimonial Property Act on the other hand operates to vitiate agreements made before marriages which entail usage of matrimonial property if such agreements were obtained through fraud, coercion or manifestly unjust.

<sup>344</sup>*Ibid.*, 330. This has also been previously underscored in the case of *Anjanaben Anil Shah v Akiba Bank Limited* (2005) eKLR civil case 374 of 2005 where the court set aside a disposition on ground that the spouse was not properly informed of the effects of the charge.

<sup>345</sup>Section 79(3) of the Land Act.

<sup>346</sup> The case of *Zakaria Barie Bura v Theresa Maria John Mubiru* [1995] TLR 211 better illustrates the weight of this provision. This was a case involving a house jointly owned by the spouses. In an action by the wife for a declaration that the sale of the house by the husband without her consent was void, the court held that the husband had no power to sell the house because it was jointly owned by the two spouses. Similarly in *Mtumwa Rashid v AbdallahIddi and SalumOmari* Civil Appeal No. 22 of 1993 (unreported) the Court of Appeal held the sale of a matrimonial home jointly owned without the Knowledge and consent of the other spouse void.

<sup>347</sup> Antony Luyirika Kafumbe, *Women's Right to Property in Marriage, Divorce and Widowhood in Uganda: The Problematic Aspects*, Springer Science (2009) p.23.

matrimonial property where as a spouse he/she is not entered in the register as an owner of the property.<sup>349</sup> This is also restated in the land laws. The import of this provision is twofold.

Firstly, a person who is a trustee is personally held liable to account for the trust for any loss suffered as a result of a dishonest deed.<sup>350</sup> The test for “dishonesty” in this context inquires as to whether or not the person acted as an honest person would have acted. This notion of dishonesty extends beyond straightforward deceit and fraud into reckless habit of risk-taking with the trust property.<sup>351</sup>

Secondly, a person who is neither a trustee nor beneficiary will be personally held liable to account to the trust for any loss suffered in a situation in which he/she/it receives trust property with knowledge that the property has been passed to him/him/it in breach of trust.<sup>352</sup>

Essentially, if loss has been suffered by the beneficiaries as a result of some breach of trust the liability of the strangers is then to account to the beneficiaries for that loss, provided that “knowing receipt” or “dishonest assistance” has been demonstrated.

#### **4.6 Severance of Interest in the Matrimonial Home vis-à-vis the Requirement for Spousal Consent**

Severance of interest in the matrimonial home refers to a situation where a spouse deals with his or her interest in the house without the consent of the other. According to the case of *Thames Guarantry Ltd v Campell and Others*,<sup>353</sup> a party has the right to sever, without his spouse’s concurrence, the beneficial joint tenancy and to dispose of his/her

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<sup>348</sup>Section 8(1) of the Matrimonial Property Act.

<sup>349</sup>*Ibid.*

<sup>350</sup> Keeton W. and L. Sheridan, *Equity and Trust*, 2<sup>nd</sup> ed. London: Professional Books Limited (1974) p.12.

<sup>351</sup>*Ibid.*

<sup>352</sup>*Ibid.* This form of liability is referred to as “knowing receipt.” Knowledge in this context includes actual knowledge or failing to make inquiries which a reasonable person would have made in the circumstances.

<sup>353</sup>*Thames Guarantry Ltd v Campell and Others* (1985) QB 210.

severed beneficial interest in such a manner as he thinks fit. However this is subject to the other joint tenant.<sup>354</sup> If he/she is likely to suffer irrevocable harm or endure exceptional hardship then that disposition can be set aside.<sup>355</sup> In taking into account all relevant facts the courts must also consider the existence of children.<sup>356</sup>

The right to sever interest is also further compounded by the doctrine of overriding interest.<sup>357</sup> In *William & Glyns' Bank v Boland*<sup>358</sup> it was held that a mortgagee cannot enforce a mortgage where a spouse invokes the doctrine of overriding interest.<sup>359</sup>

#### **4.7 Consent Free of Duress and Undue Influence**

Given the understanding of the power relationship between spouses in a marriage, it can be said without a doubt that consent may be obtained through some improper and excessive pressure exerted by one party over the other.<sup>360</sup> This can be chiefly attributed to the patriarchal nature the society is and the general perception that men are the financial managers of their families. Men are thus able to effectively manipulate, coerce or threaten their spouses in order to obtain consent.<sup>361</sup> This raises the dual issues of duress and undue influence as adverse factors which may lead to procedural impropriety.<sup>362</sup>

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<sup>354</sup> One of the main advantages of joint tenancy is that a party cannot sell their property without the others agreement. It is the most secure form of ownership for parties in a marriage compared to tenancy in common where parties own distinct shares in the property.

<sup>355</sup> See *Holiday (A Bankrupt), in re, Ex parte Trustee of the Property of the Bankrupt v Holiday* (1980) 3 All ER.

<sup>356</sup> *Ibid.*

<sup>357</sup> Provided in Section 28 of the Land Registration Act, Laws of Kenya.

<sup>358</sup> *Ibid.*, 280.

<sup>359</sup> This argument is further enforced by the right of occupancy. It states that a married person is entitled to live in the matrimonial home unless there is a court order requiring him to leave, regardless of whose name is on the title.

<sup>360</sup> M D J Conaglen, "Duress, Undue Influence and Unconscionable bargains: The Theoretical Mesh," NZULR (1999) p.527.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*



The requirement for spousal consent entrenched in the Matrimonial Property Act, Land Registration Act and Land Act pursuant to Sections 12(5), 93(3) and 79(3) respectively is principally expected to be a free and informed consent devoid of any manipulation.

#### **4.7.1 The Doctrine of Undue Influence**

It is important to consider the position of the law in the event of a challenge by the wife to an attempt by the bank or any other creditors to enforce the mortgage or charge over a home jointly owned by the parties.<sup>363</sup> In this regard, the wife may pray for the court's assistance pleading undue influence of the husband or misrepresentation of the full implication of the transaction by the husband.<sup>364</sup>

The Concept of undue influence is well established. This concept developed as a result of the narrow scope of the common law doctrine of duress. Undue influence itself is the:

... the gaining of an unfair advantage by an unconscientious use of power by a stronger party against a weaker party in the form of some unfair and improper conduct.<sup>365</sup>

In *Union Bank of Australia Limited v Whitelaw*,<sup>366</sup> the Court defined undue influence thus;

"Influence"... is the ascendancy acquired by one person over another. "Undue influence" is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts.<sup>367</sup>

This was also echoed in the landmark case of *Royal Bank of Scotland v Etridge*<sup>368</sup> where it was held that "undue influence has a connotation of impropriety. In the eye of the law, undue influence is influence that has been misused."<sup>369</sup>

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<sup>363</sup> C. Adomako-Kwakye, "Enforcing Guarantees in Ghana-Time for All to Act," *KNUST Law Journal Volume 3* (2006). Available at <<http://dspace.knust.edu.gh/jspui/bitstream/123456789/526/1/Binder1.pdf>> (Last accessed on 24<sup>th</sup> July 2014).

<sup>364</sup> *Ibid.*

<sup>365</sup> *Contractors Bonding Ltd v Snee* (1992) 2 NZLR 157, p.165.

<sup>366</sup> *Union Bank of Australia Ltd v Whitelaw* (1960) VLR per Hodges J at p. 720.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Royal Bank of Scotland v Etridge* (2001).

The concept of undue influence has been entrenched in common law legal system<sup>370</sup> because the law considers it necessary and appropriate to save people from being victimized by the over-arching reach of certain individuals with whom they are in relationship with.<sup>371</sup>

The legal position is that a wife who has been induced to enter into a transaction by undue influence or misrepresentation of her husband, in certain cases, may be entitled set aside that transaction against the wrongdoer husband. The case of *Barclays Bank Plc v O'Brien and Another*<sup>372</sup> illustrates this matter better. The court held that where it is manifestly clear that the creditor had notice, actual or constructive, of the circumstances leading to the suit in question, then it would assist the wife.

Where there is relationship between parties and to an extent there is a level of dependency so that consent will likely be obtained by one person over another without any overt act of persuasion, then a case of presumed undue influence arises. In instances where there is presumed undue influence<sup>373</sup> a party only need to prove that there is a

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<sup>369</sup> The case defined that “any improper use by one contracting party of any form of oppression, coercion, compulsion, abuse of power or authority for the purpose of obtaining consent of the other party may result in avoidance of the resulting contract on the ground of undue influence.”

<sup>370</sup> Tina Yee, *The Etridge Influence of Undue Influence: Attempts at Fusion with Duress and Unconscionability*, Masters Thesis, University of Canterbury School of Law. Available at <<http://www.courts.ca.gov/documents/UndueInfluence.pdf>> (Last accessed at 9<sup>th</sup> July 2014). She argues that Lord Eldon in *Huguenin v Baseley*[1803-13] All ER,<sup>370</sup> clarifies that undue influence is a doctrine utilized in common law by the courts of equity to set aside a transaction that has been obtained by the use of influence, in the sense that the said transaction is not the pure voluntary and well understood act of the influenced party, but a transaction entered into without knowledge of the effect, nature and consequence. As such it is a transaction against public policy.

<sup>371</sup> *Allcard v Skinner* (1885) 36 Ch. D 145, at p 182. In this case it was reiterated that there are two types of undue influence. That is, actual undue influence and presumed undue influence. Actual undue influence arises in instances where there is no need to establish that any special relationship between the parties, the party alleging it only need to prove that undue influence occurred at the time of the transaction. In presumed undue influence, the influence derives from the “relationship between two persons who has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.”

<sup>372</sup> *Barclays Bank plc v O'Brien and Another* (1993) 4 All ER 417.

<sup>373</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealings*, London: Butterworth (2006).

relationship of trust and confidence between the parties in order to have the contract set aside.<sup>374</sup>

The law is protective of the non-owning spouse's rights. Basically, the law treats the grants of consent similarly to the grant of a guarantee or independent security. The consent of a spouse may be set aside for presumed undue influence.<sup>375</sup> Independent legal advice for the non-owning spouse may be desirable in some circumstances. For example it is advisable, where there is no obvious or proportionate benefit for the spouse.<sup>376</sup>

This arises from an obligation to ensure that the spouse understands the risks concerned. The spouse should be explained and understand, the amount of the loan, the security, the advances covered, the total exposure, the consequences of non-payment and a recommendation to take an independent legal advice.<sup>377</sup>

#### **4.7.2 The Doctrine of Duress**

Duress is a common law concept which if established renders a contract voidable.<sup>378</sup> In most instances it entails threat to use physical violence or inflict harm. Where threat to use violence or inflict physical harm has been used courts have been keen to invalidate consents given under such scenarios.<sup>379</sup>

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<sup>374</sup> *Ibid.*

<sup>375</sup> Lavelle Coleman, *Family and Similar Rights: Analysis of the Family Home Protection Act*, Footprints (1980). Available at <<http://www.lavellecoleman.ie/wp-content/uploads/2013/04/13.-Family-and-Similar-Rights.pdf>> (Last accessed on 10<sup>th</sup> July 2014). According to the author, the germ of the doctrine of undue influence is whether or not a party has entered into the contract freely... If presumed undue influence is successfully proved, the security so taken cannot be enforced.

<sup>376</sup> An example of this scenario would be where the non-owning spouse consents to a mortgage over the family home for the other spouse's pre-existing business debts.

<sup>377</sup> *Ibid.*, 220.

<sup>378</sup> *Barton v Armstrong* (1975) 2 All ER 465.

<sup>379</sup> Holding in *Latter v Bradell* (1880) 50 LCJP 166.

The ingredients of actionable duress are that there must be pressure.<sup>380</sup> In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person exerting the pressure has acted in bad faith and whether the victim had any practical alternative but to succumb to the pressure and whether the victim protested at the time.<sup>381</sup> If it emerges that there are elements of duress then a court is likely to set the agreement aside.

#### **4.7.3 The Doctrine of Unconscionability<sup>382</sup>**

This doctrine is a counterpoise to absolute freedom of contract.<sup>383</sup> It is established on the contract law's limiting or policing doctrine in circumstances where there is inherent bargaining power between the parties during the formation of a contract.<sup>384</sup>

This doctrine is closely intertwined with the issue of seeking spousal consent. It essentially arises in instances where a spouse who has a less bargaining power is led to

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<sup>380</sup>According to the case of *Adam Opel GMBH and Renault SA v Mitras Automotive (UK) Ltd* [2008] EWHC 3205 QB, there must be pressure:

- a) whose practical effect is that there is compulsion on, or a lack of a practical choice for, the victim;
- b) which is illegitimate; and,
- c) which is a significant cause inducing the claimant to enter into the contract.

<sup>381</sup>See also, R Bigwoods, *Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?* 16 Oxford J Legal Studies (2003).

<sup>382</sup>Unconscionable means unfair or oppressive, involving procedural abuses relating to terms of contract where the terms of contract violate reasonable expectations of the parties.

<sup>383</sup>Often cited for the principle of unconscionability is the English case of *Earl of Chesterfield v Janssen*, [1750] 28 Eng. Rep. 82 (Ch.). In this case the court set the general parameters for non-enforceability as the bargaining being "such as no man in his sense and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains; and of such even the common law take notice."

<sup>384</sup>Larry A. DiMatteo and Bruce Louis Rich, "A Consent Theory of Unconscionability: An Empirical Study of Law in Action," Florida State University Law Review Volume 33: 1067 (1977) p. 5. According to the authors:

"... [T]he law developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms in which one party is able to impose on the other because of a significant disparity in bargaining power."

sign a contract whose terms are largely skewed.<sup>385</sup> Where it is manifestly clear that the terms consented to by the spouse of the mortgagor are unconscionable, the consent can be set aside and the mortgage reopened afresh.<sup>386</sup>

#### **4.8 The Concept of Security**

Conventionally, the law empowers any person holding land under any form of land tenure, through the use of any instrument in the prescribed to sale, charge or mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or a condition. This informs the concept of security.

The word "security" means an interest which the debtor confers on the creditor in an item of property owned by himself or, by arrangement, in the property of some third party.<sup>387</sup>

The important fact is that the interest acquired by a creditor must confer on him a right to satisfy the debt out of the proceeds of the property in question.<sup>388</sup> In this context matrimonial property qualifies as a security and an important one therefore owned by the family, which can be used to access credit from the bank.

Matrimonial property as a form of real security can be categorized into proprietary security and possessory security.<sup>389</sup> Possessory securities are pledges or liens. They

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<sup>385</sup>In *Williams v. Walker-Thomas Furniture Co.* [350 F. 2d 445(D.C Cir. 1965)] the court held that where there is a consent founded in the absence of a meaningful choice by one party to the contract, then that contract is unconscionable.

<sup>386</sup> For example Section 7(3) of the Mortgage Act of Uganda provide that the mortgagor under a mortgage may apply to a court for the mortgage to be reopened on the ground that the terms of the mortgage are:

- a) unconscionable; or
- b) disadvantageous to the interests of the dependants of the mortgagor.

<sup>387</sup> The word "security" is sometimes used to mean shares or debentures furnished by the borrowers to a lender to secure a loan or an advance, or used to describe a negotiable instrument issued to secure installments due under a credit facility. See Ellinger E.P. and Lomnicka, E., *Modern Banking Law*, 2<sup>nd</sup> ed. Oxford: Clarendon Press, 1994, p.632.

<sup>388</sup> Joyce Mkinga, "Barclays Loan Scheme Promotion Targets Employees". Available at <<http://www.ipppmedia.com>> (Last accessed on 12<sup>th</sup> July 2014).

<sup>389</sup> Megarry, R., *A Manual of the Law of Real Property*, 7<sup>th</sup> ed. London: Sweet & Maxwell (1993) p.438.

confer on the creditor only possession of the property with or without power of sale. They entirely depend on the creditor obtaining possession of the property. It is not common in the context of matrimonial properties. On the other hand, proprietary security vests on the creditor proprietary rights over the subject matter of the security without him obtaining possession of the security. The debtor or owner retains possession of the property, but the creditor has power to realize the subject matter in the event of the debtor becoming insolvent or failing to fulfil his obligation. It is the most common way a family can use matrimonial property to obtain loan from the bank.<sup>390</sup>

Matrimonial home can be used as a mortgage. The law imposes conditions when a matrimonial home is subject to mortgage.<sup>391</sup> Fundamentally, the law requires the signature of the mortgagor and spouse or spouses of the mortgagor living in that matrimonial home for the mortgage to be valid.<sup>392</sup> Alternatively, the provision requires evidence to be furnished that the mortgagor and spouse or spouses living in the home have consented to the use of home as security.<sup>393</sup> The responsibility is imposed on the mortgagee to take steps to ascertain whether the home offered as security is a matrimonial home and investigate whether the mortgagor has a spouse or spouses.<sup>394</sup> If due diligence is not done then the mortgage agreement is voidable at the behest of the spouse who was excluded.<sup>395</sup>

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<sup>390</sup> See Tan L.G.L., *The Law Relating to Bank Finance of Companies*, Ph. D thesis, University of Birmingham, 1992, p.68.

<sup>391</sup>Section 93 of the Land Registration Act.

<sup>392</sup>*Ibid.*

<sup>393</sup>*Ibid.*

<sup>394</sup> The regulations require the applicant to sign a form stating that he or she is not married and, if he or she is married, it requires the applicant to disclose the name and address of the spouse. Though this step will not guarantee the discovery of the matrimonial status of the applicant, it is however meant to act as sufficient proof that the mortgagee did take steps to discover whether the applicant is married or not.

<sup>395</sup>Section 93(4) of the Land Registration Act.

#### **4.9 Comparative Study: The Aspect of Spousal Consent**

Lending on the security of matrimonial property is not a new concept in Kenya. However, the introduction of the new land laws has greatly changed the legal terrain by introducing fundamental requirements which to an extent has posed new challenges for the stakeholders of the land matters. The most evident controversy touches on the requirement of spousal consent before matrimonial property can be used as a security charged to a lending institution. Questions particularly arise as to the objects of the requirement, the practical enforcement techniques it demands and whether it meets the objects for which it was intended to achieve in the first place. In order to properly ventilate on these issues, there is need to conduct a comparative study of a jurisdiction which has seamlessly enforced this provision so as to adequately understand the mechanisms they have put in place to ensure that the object of this provision is achieved. This thesis conducts a comparative analysis of the situation in Uganda given that Uganda enacted this law earlier than Kenya and has supposed superior legislation favouring women.

##### **4.9.1 Justification for the Study in Uganda**

Land in Uganda like in Kenya is the core factor of production. It is the backbone of the economy. However, much development has occurred in Uganda which has been geared to protect the rights of female spouses in as far as protection of matrimonial property is concerned. This stemmed from the twin pronged need to recognise the rights of equality and non-discrimination and the fundamental need to establish cogent land laws in Uganda under a new dispensation.<sup>396</sup>

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<sup>396</sup>*Supra* note 56.

The Ugandan Constitution is heralded as one of the most gender neutral laws with regard to property rights in Sub-Saharan Africa.<sup>397</sup> It accords both men and women the same status and rights. The constitutional entrenchment of strong property rights, non-discrimination clauses and economic rights have provided fundamental framework which have been the main driving force for implementation of better land laws in Uganda.<sup>398</sup> Pursuant to this Constitution, Uganda has enacted domestic legislations which specifically protect the rights of spouses in regard to charging of matrimonial property.<sup>399</sup> If Kenya is to create coherent law both in content and language, it can largely borrow from Uganda in as far as creating necessary but sound mechanisms and requirements which can protect the rights of spouses. The foregoing part highlights the study of key provisions in Uganda which protects the rights of the female spouses.

#### **4.9.2 Study of Uganda**

The Constitution of Uganda provides that parties to a marriage are equal.<sup>400</sup> From the onset, it is important to state that Uganda has two primary legislations which address the issue of spousal consent in securitized lending of the matrimonial property. These are the Land Act<sup>401</sup> and the Mortgage Act.<sup>402</sup> These two Acts have elaborate provisions which

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<sup>397</sup>The Constitution of Uganda 1995. See also Article 26(1) and 26 (2) of the Ugandan Constitution which underscores the right of every person to own property.

<sup>398</sup>*Ibid*, 396.

<sup>399</sup>*Ibid*, 396.

<sup>400</sup>*Ibid*, Article 21 of the Constitution of Uganda 1995.

<sup>401</sup> The Land (Amendment) Act No.1 of 2004, Laws of Uganda.

<sup>402</sup> Mortgage Act, Act No.8 of 2009 Laws of Uganda. It provides in its preamble that it is an Act of Parliament meant to consolidate the law relating to mortgages; to repeal and replace the Mortgage Act; to provide for the creation of Mortgages; for the duties of the mortgagors and mortgagees regarding mortgages; for mortgages of matrimonial homes; to make mortgages take effect only as security; to provide for priority, tacking, consolidation and variation of mortgages; to provide for suits by mortgagors; the discharge of mortgages; covenants, conditions implied in every mortgage, the remedies of mortgagors and mortgagees in respect of mortgagees; for the power of court in respect of mortgages; and for related matters. Available at [http://www.ulii.org/files/ug/legislation/act/2009/8/mortgage\\_act\\_no\\_8\\_of\\_2009\\_pdf\\_13196.pdf](http://www.ulii.org/files/ug/legislation/act/2009/8/mortgage_act_no_8_of_2009_pdf_13196.pdf) (Last accessed on 20<sup>th</sup> July 2014).



entrench the requirement for spousal consent and the duty of the mortgagee in regard to the use of matrimonial property as a security for lending. These are as discussed below;

#### **4.9.3 Requirement for Consent under the Ugandan Law**

The Ugandan Land Act has a raft of provisions which underscore the requirement for spousal consent in any disposition regarding matrimonial property. First and foremost, the Act clearly states that in Uganda, a customary land owned by a family may only be mortgaged<sup>403</sup> with the consent of the spouse and further by the children of the mortgagor.<sup>404</sup> The Act particularly provides that if land is used by a family to enable them derive economic sustenance or ordinarily used as a family residence, then any sale, exchange, transfer, mortgage or lease can only be concluded if prior written consent had been given by a spouse.<sup>405</sup>

Section 39(1)(c)(i), already highlighted above, impliedly provides for the security of the spouse. In tandem with this provision, the Act fundamentally entrenches the security of occupancy by spouses on the family land by critically outlining that either spouse cannot

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<sup>403</sup> According to Section 2 of the Mortgage Act, a “mortgage” includes any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or contingent debt or other money or money’s worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage.

<sup>404</sup> Section 39 of the (amended) Land Act provide that:

- 1) No person shall –
  - (a) sell, exchange, transfer, pledge, mortgage or lease any land;
  - (b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or
  - (c) give away any land inter vivos, or enter into any other transactions in respect of land-
    - (i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;
    - (ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age.
    - (iii) In the case of land on which a person ordinarily resides with his or her children below the age of the majority age, except with prior written consent of the committee.
    - (iv) In the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee.

<sup>405</sup> *Ibid.*

deal with land in any way unless with the prior written consent of a partner.<sup>406</sup> This categorical provision protects the rights of spouses.<sup>407</sup>

Pursuant to this provision it has been so held by the court in the case of *Tumwebaze v Mpeirwe & Another*<sup>408</sup> that the import Sections 38A (3) and 39(1)(c) is critical in establishing the right of security of occupancy and the requirement of spousal consent. In this case, the respondent's main contention was premised on the position that by the time of the attachment, the suit property had been demarcated of the homestead implying that it was not part of the matrimonial home.<sup>409</sup> The court held that that argument was flawed and the action of demarcating the land off the family land was void *ab initio*.<sup>410</sup>

The Act also anticipated situations whereby consent could be denied by a spouse. In order to avoid complications and implications that could arise as a result of this, the Act explicitly states that consent should not be denied unreasonably.<sup>411</sup> Where consent is maliciously denied the Act provides that the District Land Tribunal has broad discretion to grant consent for the disposal of the land if it determines that a spouse has “unreasonably” denied her consent. The Tribunal has discretion to determine what is

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<sup>406</sup>Section 38A (3) of the Land (Amendment) Act.

<sup>407</sup> According to Section 39 of the Land (Amendment) Act transactions in favour of innocent purchasers are void if spousal consent is not obtained. This has also been affirmed in the case of *Wamono v Equity Bank of Uganda Ltd & Another* [2013] Ugcommc 97.

<sup>408</sup>*Tumwebaze v Mpeirwe & Another* [2013] UGHC 12.

<sup>409</sup> According to Section 2 of the Mortgage Act a “matrimonial home” means a building or a part of a building which a husband and wife, or as the case may be, wives, and their children, if any, ordinarily resides together, and includes – (a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and

(b) where a building is on or occupied in conjunction with agricultural land or pastoral, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouses for his, her, or their exclusive use.

<sup>410</sup>*Ibid* 400.

<sup>411</sup>Section 39(5) of the Land (Amendment) Act.

“unreasonable.”<sup>412</sup> If it so happens that a party is aggrieved by the decision of the Tribunal, then he has a right to appeal in the court of law.<sup>413</sup>

#### **4.9.4 Duty of the Mortgagee in Exercising Due Diligence under the Ugandan Law**

Equally to protect spouses there are specific duties which have been imposed on mortgagees.<sup>414</sup> At the outset, before any transaction is commenced the Acts requires the mortgagee to inquire into the marital status of the mortgagor<sup>415</sup> so as to establish whether or not he/she has a spouse or spouses and secondly, whether or not the property to be mortgaged is a matrimonial property.<sup>416</sup> The Act requires that the mortgagor must state to the mortgagee by way of statutory declaration or marriage certificate whether he is married or not.<sup>417</sup> If the mortgagor is married then the application form must be accompanied by a consent letter.<sup>418</sup>

In order to ascertain the veracity of the information given, the mortgagor and the spouse are additionally required to attach a certified copy of their marriage certificate or other marriage evidence of marriage to the declaration.<sup>419</sup> The Act further provides that the intending mortgagor shall make full disclosure to the intending mortgagee as to his or her marital status.<sup>420</sup>

The duty of exercising due diligence by verifying the marital status of the spouse is only discharged when the mortgagor presents a marriage certificate to the mortgagee issued in

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<sup>412</sup>*Ibid.*

<sup>413</sup>*Ibid.*

<sup>414</sup> According to Section 2 of the Mortgage Act, “mortgagee” means any person in whose favour a mortgage is created or subsists and includes any person deriving title under the original mortgagee.

<sup>415</sup> According to Section 2 of the Mortgage Act, “mortgagor” means a person who has mortgaged land or an interest in land and includes any person who from time to time deriving title under the original mortgagor or entitled to redeem the mortgage according to his or her estate, interest or right in the mortgaged property.

<sup>416</sup> The duty is imposed on the mortgagee pursuant to Section 5 of the Mortgage Act.

<sup>417</sup> Section 5(3) of the Act.

<sup>418</sup> Section 5(1) (a) read together with Section 6 of the Act

<sup>419</sup> Section 5 of the Act.

<sup>420</sup> Section 4 of the Act.

accordance with the laws of Uganda or in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage.<sup>421</sup>

Upon confirming that the mortgagor is in a marriage relationship, the mortgagee must further satisfy himself if the property is a matrimonial home<sup>422</sup> that consent has been duly given before embarking on any transaction.<sup>423</sup> Pursuant to this provision, the mortgagee must satisfy himself that the consent given by a spouse is an informed and genuine consent.<sup>424</sup> The mortgagee is also given discretion by the law to take any other necessary, prudent, pragmatic and reasonable steps he/she considers necessary and desirable to satisfy himself that the assent of the spouse(s) is an informed and genuine consent.<sup>425</sup>

According to the Act, informed advice can be obtained from people who have been authorized to give independent advice. They are referred to as “independent persons.” They include an officer of the government, a Justice of the peace, an advocate, a Notary Public, bank manager amongst others.<sup>426</sup>

#### **4.9.5 Provisions meant to prevent Fraud**

The Act has clear provisions which are meant to prevent fraud. This could arise in instances where a mortgagor presents a person purporting to be his or her spouse. The Act creates offences so as to prevent the abuse of spousal consent provision. Clearly, it

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<sup>421</sup>Section 5(3) of the Mortgage Act.

<sup>422</sup>*Ibid*, 272.

<sup>423</sup> Section 6(1) of the Act provides that a mortgagee shall satisfy himself or herself that the consent of a spouse is an informed and genuine consent and that duty is deemed to have been complied with if:

- (a) the mortgagee has explained to the spouse(s) of an applicant for a mortgage in the presence of an independent person, the terms and conditions of the mortgage which is being applied for in writing, and advised the applicant that he or she should ensure that his/her spouse receive independent advice on the terms and conditions of the mortgage which is being applied for, and;
- (b) the spouse(s), provide a signed and witnessed document to the effect that they have received independent advice on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or that they have, notwithstanding the advice from the mortgagee, waived their right to take independent advice.

<sup>424</sup>*Ibid*.

<sup>425</sup>*Ibid*, Section 6(3) of the Act.

<sup>426</sup>Section 6(2) of the Act.

states that any person who impersonates a spouse of a mortgagor or presents to a mortgagee as his or her spouse, a person not being his or her spouse or forges any document to any person for purposes of fulfilling any duty under the Act commits an offence.<sup>427</sup>

The provision on disclosure is also tailored to prevent fraud. It enjoins both the mortgagee and the mortgagor, and requires of them to act honestly, in good faith and in particular to disclose all relevant information relating to the mortgage.<sup>428</sup> Principally, the Act states in respect to disclosure of information that if a mortgagee or mortgagor refuses or neglects or fails to disclose information relevant to a mortgage in his/her possession then he/she/it commits an offence.<sup>429</sup> This also extends to people who have been authorized to provide independent advice.<sup>430</sup>

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<sup>427</sup> Section 39 of the Mortgage Act a person who-

- (a) impersonates a spouse of a mortgagor;
- (b) presents to a mortgagee as his or her spouse, a person not being his or her spouse ;
- (c) forges any document or utters a forged document to any person, for the purposes of fulfilling any duty or requirement under this Act, commits an offence and is liable on conviction to a fine....

<sup>428</sup> Section 5(3) of the Mortgage Act.

<sup>428</sup> *Ibid*, 272.

<sup>428</sup> Section 6(1) of the Act provides that a mortgagee shall satisfy himself or herself that the consent of a spouse is an informed and genuine consent and that duty is deemed to have been complied with if:

- (a) the mortgagee has explained to the spouse(s) of an applicant for a mortgage in the presence of an independent person, the terms and conditions of the mortgage which is being applied for in writing, and advised the applicant that he or she should ensure that his/her spouse receive independent advise on the terms and conditions of the mortgage which is being applied for, and;
- (b) the spouse(s), provide a signed and witnessed document to the effect that they have received independent advise on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or that they have, notwithstanding the advice from the mortgagee, waived their right to take independent advice.

<sup>428</sup> *Ibid*.

<sup>428</sup> *Ibid*, Section 6(3) of the Act.

<sup>428</sup> Section 6(2) of the Act.

<sup>428</sup> Section 39 of the Mortgage Act <sup>428</sup>Section 4 of the Mortgage Act.

<sup>429</sup> Section 4(2) of the Mortgage Act.

<sup>430</sup> Section 6(4) of the Act.

#### **4.9.6 Lesson Learnt from the Ugandan System**

Evidently, Uganda has comprehensive legislations fashioned to protect the aspect of spousal consent in securitized lending of the matrimonial property. From the foregoing, much can be drawn from Uganda's approach.

First, is that the requirement for consent goes beyond that of the spouses to include other family members. Importantly is the provision that consent should not be withheld unreasonably. In instances whereby consent is unreasonably withheld, the District Land Tribunal is empowered to intervene. Decisions of the Tribunal are also appealable.

Secondly, what can also be borrowed from Uganda is the form through which consent is granted and verified. In Uganda, consent is expressed through a declaration. Further, before consent has been made, a spouse is required to seek independent advice from authorized independent people.

Thirdly, both the mortgagor and the mortgagee have duties and obligations imposed on them under the law. Both are however expected in executing their duties and obligations to do so honestly and in good faith.

Fourthly, in order to prevent incidences of fraud, the Act impose the mortgagor, the mortgagee and the independent persons to dutifully carry out their functions diligently and professionally. If they do not properly comply with the requirements expected of them, they may be fined if found guilty on conviction. This also extends to persons who may be used by an applicant to defeat some of the requirements provided for in the Act.

Evidently the practice in Uganda is good for us and we should borrow much from their practice to improve what we already have in our new land laws.

#### **4.10 Conclusion**

This chapter has discussed the principle of spousal consent as envisioned in the Land Registration Act, Land Act and the Matrimonial Property Act. This is in light of the fact that it is at the heart throb of transactions which are deemed to be matrimonial properties, as such is an essential principle which requires a lot of attention. This chapter has also discussed the associated principle of duress and undue influence and their impact on spousal consent. It has gone further to interrogate the issue of land as a matrimonial property security and the rising procedure which should be followed. Particularly, it has explored the duties of the mortgagor and the mortgagee and the fundamental rights of the spouse.

This Chapter has also delved into conducting a comparative study with Uganda and it has highlighted the fundamental qualities of the Ugandan legislations which shepherd lending on the security of the matrimonial properties. It has highlighted the differences existing between the Kenyan and Ugandan legislation. Clearly Uganda has a better legislation compared to us in regard to issues of matrimonial property. If the policies are emulated the Kenyan system can be greatly improved. The next chapter is the conclusion and the recommendation of this study.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

*Marriage is a union of economically separate individuals, with each acquiring properties for themselves and for the marital unit.*<sup>431</sup>

Deborah H. Bell

#### **5.0 Introduction**

This chapter focuses on the summary and conclusions in respect of the foregoing chapters. It summarizes the discussions advanced in various chapters of this study. It also summarizes the gaps that exist in the legal framework on the various laws which seek to entrench the requirement for spousal consent in securitized lending of the matrimonial property. Lastly, it makes appropriate recommendations which if adopted would go a long way in enhancing the legislations in place meant to entrench the aspect of spousal consent. This would ensure that the requirement of spousal consent is achieved both in principle and deed.

#### **5.1 Summary and Conclusion**

Chapter one is the introductory chapter. It outlined the objectives and the importance of this research paper. It laid out the scope of the paper and the idea was to shed light on the study, its significance and to set out what it aimed to accomplish.

Chapter two discusses the historical and judicial development of land law in Kenya, with specific regard to matrimonial property. It also looks at the legal framework in Kenya. It discusses the provisions entrenched under the Kenyan and international law. The aim of this chapter is to put up a foundation for the thesis and to further lay a basis of the provision of spousal consent in disposition of matrimonial property under the Kenyan law.

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<sup>431</sup>*Supra* note 1.



Chapter three is a conceptual chapter whose purpose is to delimit within context various terms used under the Kenyan legal framework which have a bearing on the concept of spousal consent in the administration of the property. The chapter interrogated the various terms of marriage, spouse and matrimonial property and their definitions and applications as anticipated under the law. It also explored discussions pertinent to the institution of marriage. It also highlighted the spousal rights over the matrimonial property. This chapter also to a greater extent analysed the import of the definition of the term matrimonial home. In conclusion it underscored that all homes owned by a spouse be it rural, urban or holiday home, the underlying fact qualifying them to be matrimonial homes is the aspect ownership and occupation by either a spouse or both spouses to a marriage.

Chapter four starts by outlining the definition of the term spousal consent. It also looks at the crucial but pertinent issues of the duty to disclose, importance of the duty to disclose and the consequences of non-disclosure. It also goes ahead to examine the principles of duress, undue influence, unconscionability and how they can undermine the consent of a spouse. This chapter is also comparative in nature. It looks at the comparative analysis of the legislations in Uganda and highlights how their Acts' has achieved to provide for better laws through entrenching provisions meant to prevent fraud, establishing duty of the mortgagor to ensure that consent given is genuine and valid and placing requirements as to what constitute a proper and independent consent.

From the foregoing it is evident that this research has successfully achieved its objectives. It has emerged from the research that the legal regime guarding the rights of female

spouses is not coherent as it has gaping holes which badly expose women to the whims of men.

Having laid this basis, it is fair to conclude that the existing does not adequately protect women against instances of undue influence when charging matrimonial property and that a raft of changes need to be made on these laws to protect women against instances of undue influence. This research has particularly underscored the critical importance of having a proper spousal consent before disposition of matrimonial properties. This will largely inform the recommendations as discussed below.

## **5.2 Recommendations**

This research paper proposes the following recommendations:

- a) Section 79 (3) of the Land Act, Section 93(3) of the Land Registration Act and Section 12(5) of the Matrimonial Property Act should be amended to ensure that the object of seeking consent is achieved. As already highlighted in the discussion, it has been stated that the provision for consent was meant to ensure that spouses are not allowed to unilaterally deal with the matrimonial property in whatever manner they wish. In order to achieve this, the various Acts must explicitly provide for the requirement of a genuine and informed consent. This higher threshold will ensure that the objects of the various Acts are achieved. In light of this provision, the various Acts must fundamentally make it a requirement that before consent is given, a spouse must be independently advised on the effects of the securitized lending. This advice should be given by “independent persons.” “Independent persons” should include any officer of the Government, a Justice of the Peace, an advocate, a Notary public, bank manager, a minister of

any religion authorized to celebrate marriages and any other person authorized by the Cabinet Secretary by statutory instrument. The requirement to be independently advised should only be waived if the spouse has shown sufficient understanding of the effect of the securitized lending to the mortgagee.

- b) In order to prevent instances where a spouse with an overbearing influence forces his/her partner, as the case may be, or in the case of a man, partners, to consent to a disposition contrary to their wishes and tie the matrimonial property to a debt which he/she is aware he/she may not repay, the Land Registration Act and the Land Act should provide that the mortgagor in his undertakings must act honestly and in good faith and in particular, disclose all relevant information relating to the mortgage. The mortgagee should also act honestly and in good faith. He/she should also disclose all the relevant information to the partner or partners of the spouse before sanctioning the property. This would go a long way in curbing endorsement of dispositions which are likely to tie matrimonial property under unreasonable terms.
- c) Before any sanction of the securitized lending on the matrimonial property the Acts should not only require spousal consent but to the same effect, the Land Act and the Land Registration Act should provide that the mortgagor and his/her spouse, as the case may be, or in the case of a man, should provide a copy of their marriage certificate for verification to prevent commission of fraud. In the case of a Customary Marriage a letter from the chief and an affidavit attesting to the validity of marriage of the spouses will be sufficient. This will go a long way in snuffling incidences of fraud.

- d) Further to prevent commission of fraud, the Land Registration Act and the Land Act should provide that the independent persons, the mortgagor, the mortgagee or any other party who advertently commits a fraud is guilty of an offence and on conviction is liable to a fine. This would deter these parties from engaging in committing a fraud.
- e) The Land Registration Act and the Land Act should be amended to provide that in instances where consent is unreasonably denied by a spouse a party can seek judicial remedy. The aggrieved party should have the right to resort to judicial remedy by instituting a suit before the Environment and Land Court. The court upon determining the merits of the case would then decide whether to issue the consent. The determination of the case will however be subject to appeal in a higher court.

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