



# **Responsible Land Governance: Towards an Evidence Based Approach**

**ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY**  
WASHINGTON DC, MARCH 20-24, 2017



## **LAND AS MATRIMONIAL PROPERTY IN KENYA: DEMYSTIFYING THE CONCEPT OF CONTRIBUTION TO ACQUISITION OF LAND AS MATRIMONIAL PROPERTY**

**MITCHELLE OYUGA, NANCY IKINU**

Federation of Women Lawyers, Kenya

[mitchelle@fidakenya.org](mailto:mitchelle@fidakenya.org)

**Paper prepared for presentation at the  
“2017 WORLD BANK CONFERENCE ON LAND AND POVERTY”  
The World Bank - Washington DC, March 20-24, 2017**



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## **ABSTRACT**

In Kenya, equality in marriage is underscored in law by the Constitution which stipulates that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. This paper undertakes an appraisal of the laws that govern women land and property rights in Kenya. It assesses the Matrimonial Property Act, Act No.49 of 2013 which provides for rights and responsibilities of spouses in relation to matrimonial property. Specific focus is paid to section 7 which provides that ownership of matrimonial property vests in the spouses according to contribution of each spouse towards its acquisition. This provision shifts the burden of proof to the spouse having interest in matrimonial property to prove “contribution” to the acquisition or development of the said matrimonial property. This paper also assesses changes to the land laws through the Land Laws (Amendment) Act.2015 and highlights the provisions that will impede the enjoyment of women land and property rights in Kenya. It espouses that these highlighted sections of the Matrimonial Property Act, 2013 are unconstitutional and should be amended to accommodate equality in marriage as stipulated in Article 45 of the Constitution. It further provides that the concept of spousal consent to the disposal of land should be anchored in law to safeguard women land and property rights in Kenya.



## **KEY WORDS<sup>1</sup>**

### **Contribution**

Contribution to matrimonial property may be monetary or non-monetary. Non-monetary contribution includes domestic work, management of the matrimonial home, child care, companionship, management of family business and farm work.<sup>2</sup>

### **Equality**

Equal rights to acquire, administer, hold, control, use and dispose of property whether movable or immovable<sup>3</sup>

### **Marriage**

To become a husband or a wife, the couple must have observed the requirements in the Marriage Act, 2014 that lists the legal requirements for marriage under the five marriage regimes. The marriage regimes include: Christian, Civil, Customary, Hindu and Islamic marriages.

### **Matrimonial Property**

Property acquired during the subsistence of a marriage and is subject to division at the dissolution of the marriage.

---

<sup>1</sup> Definitions according to the Matrimonial Property Act, 2013



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## Contents

Introduction.....	5
Problem Statement.....	6
History of Matrimonial Property in Kenya.....	7
Assesment of the Matrimonial Property Act,2013 .....	9
Section 7 -The Unsatisfactory Feature of the Matrimonial Property Act,2013 .....	11
Petition filed by the Federation of Women Lawyers Kenya(FIDA KENYA) .....	11
The land regime in Kenya.....	14
Overview of the Land Law Amendments in 2016.....	17
Conclusion .....	19



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## INTRODUCTION

Women's access to land and property is central to women's socio-economic empowerment and plays a critical role in poverty reduction, food security and access to credit.<sup>4</sup> This is attributable to the fact that land is the most acceptable form of security in Kenya. History is replete with instances where women have been denied access and control of land and property during the subsistence of the marriage and at the dissolution of the marriage and as a result many women and children have been plunged into poverty and suffering. The 2010 Constitution of Kenya heralded a new age in women land and property rights in Kenya. The 2010 Constitution speaks to the issues and policy recommendations identified, analyzed and agreed upon by different stakeholders in the National Land Policy 2009.<sup>5</sup> The National land policy recognizes the need for security of tenure for all Kenyans irrespective of sex, gender or financial status. Similarly, the 2010 Constitution guarantees the equal protection of property rights for men and women. Article 40 provides that *'every person has the right, either individually or in association with others, to acquire and own property in Kenya'*. In cognizance of the challenges besetting communities in Kenya such as negative cultural practices, the 2010 Constitution of Kenya provides for elimination of gender discrimination in law, customs and practices related to land and property. In the instance of marriage, Article 45 provides that *"parties to a marriage are entitled to equal rights as at the time of the marriage, during the marriage and at the dissolution of the marriage."*

This paper discusses the socio-legal factors surrounding women's access and control of land and property in Kenya in five parts as follows:

Part (a) describes the problem statement.

Part (b) examines the History of Matrimonial Property in Kenya

Part (c) assesses the Matrimonial Property Act, 2013 with specific focus on section 7

Part (d) Reviews the petition filed by the Federation of Women Lawyers, Kenya in 2016

Part (e) examines the issues and concerns that led to the enactment of the Land Laws (Amendment) Act, 2016 how this impacts on women land and property rights in Kenya.

---

<sup>4</sup> FIDA Kenya and Georgetown University (2009) *Women's Land and Property Rights in Kenya*

<sup>5</sup> Available at <http://www1.uneca.org/Portals/lpi/CrossArticle/1/Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf> last accessed 14th January 2017



The conclusion summarizes and draws implications for women land and property rights in Kenya.

## PROBLEM STATEMENT

Land is not only the most important factor in production but also a highly emotive issue in Kenya.<sup>6</sup> In most Kenyan communities, land disputes revolve around rights to access and control of land and property. For women; negative cultural practices have contributed to a majority having secondary rights to land and property.<sup>7</sup> Meaning they cannot participate in decisions pertaining to the management and disposition of ‘family’ land and property. Advocacy for land reforms have seen developments in law such as the creation of statutory rights for spouses. The statutory rights include ownership of property by an unregistered spouse, disposition of matrimonial property with spousal consent and the recognition of common and joint tenancy. Some of these progressive provisions listed as overriding interests have been rolled back by the Land Laws (Amendment) Act, 2016. The omission of spousal consent contradicts section 12(5) Matrimonial Property Act which still stipulates that written and informed consent of both spouses is required in any alienation of matrimonial property (whether by way of sale, gift, lease, charge or otherwise) during the subsistence of a monogamous marriage. Similar contradictions are seen in the division of Matrimonial property under the Matrimonial Property Act 2013. While the Constitution of Kenya recognizes that ‘...spouses are equal at the time of marriage, during marriage and at the dissolution of marriage’ section 7 of the Matrimonial Property Act 2013 contradicts this provision by providing that any aggrieved party claiming that a property is matrimonial property for the purposes of his/her benefit has the onus to prove their interest by demonstrating their contribution. It stipulates that ‘...matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or if their marriage is otherwise dissolved. This provision poses a challenge especially to women given that a majority of married women in Kenya do not hold property jointly with their husbands. A majority provide non-monetary contributions in form of child care, companionship, and farm work among others. The difficulties associated with proving non-monetary contributions have seen varied rulings and judgments delivered by judicial officers. The other challenge has been that spouses are required to divorce before considering division of matrimonial property. This limitation works injustice to many women instances who want their share of matrimonial property without having to go through the rigors of a divorce process.

---

<sup>6</sup> Available at <https://ilegkenya1.wordpress.com/2015/03/02/land-reforms-in-kenya-achievements-and-the-missing-link> last accessed on 3<sup>rd</sup> January 2017.

<sup>7</sup> In 2009, FIDA Kenya discerned that women form 52% of the total population and that only 6% of land in Kenya is registered jointly with spouses and only 1% is registered by women alone. FIDA Kenya and Georgetown University (2009) *Women’s Land and Property Rights in Kenya*



## **HISTORY OF MATRIMONIAL PROPERTY IN KENYA**

Prior to the promulgation of the 2010 Constitution and the subsequent enactment of the Matrimonial Property Act 2013, the division of matrimonial property was governed by the Married Women's Property Act, 1882.<sup>8</sup>This statute of general application applied to the distribution of property upon divorce in all types of marriages in Kenya. It was considered an antiquated Act, ill-equipped in every way to deal with the realities of the lives of Kenyan women or to protect their basic human and economic rights.<sup>9</sup>This was in reference harsh to the sole technical clause available for courts to regulate property distribution between spouses often depriving wives of any shares, much less equal share to matrimonial property. Section 17 of the Married Women's Property Act provided that in any question between the husband and the wife as to title or possession of property either party may apply for an order to the court and the judge may make such an order with respect to the property in dispute as he thinks fit. The view that section 17 of the Married Women's Property Act put matrimonial property at the hazard of unfettered discretion of the judge led to the change in law in 1970. Rulings delivered in the case *National Provincial Bank Vs. Ainsworth* and in *Pettit Vs. Pettit* also contributed to the amendments to the Married Women's Property Act<sup>10</sup>. Changes were effected under the Matrimonial Property and Proceedings Act of 1970. The amendment under 37 provided that where a husband or a wife contributes in money or in money's worth to the improvement of real and personal property in which both have beneficial interest the husband or wife so contributing shall if the contribution is of a substantial nature be treated as having then acquired by virtue of his/her contribution a share or an enlarged share as the case may be in that beneficial interest. This meant non-monetary contributions were subject to consideration by the courts.

In Kenya, the application of section 17 first came to the fore through the case of *Karanja Vs. Karanja*<sup>11</sup> Here the wife brought an action under section 17 of the Married Women's Property Act. She averred that she had made financial contributions towards the purchasing of matrimonial property. Her husband on the other hand maintained that even if that were the case Kikuyu Customary law did not permit women to own property. The couple had been married under the African Christian and Divorce Act and throughout the course of marriage the wife had made contributions to the running of the household. She also assisted her husband in paying school fees for the children and at one time when the husband was away for 5 years

---

<sup>8</sup> A United Kingdom statute of General application applied in Kenya by virtue of section 3(1)c of the Judicature Act (Cap.8)

<sup>9</sup> Dividing Matrimonial Property on Divorce: Colonialism, Chauvinism and Modernism in Kenya, Andrew Commins, at 167

<sup>10</sup> *National Provincial Bank Vs. Ainsworth (1965)3 WLRI House of Lords*

<sup>11</sup> *Karanja V Karanja*[KLR306]



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



studying abroad she was the one who ran the home. In support of her claim for financial contribution she tendered evidence that every month her salary went to her husband's account who would withdraw it for his personal use. The property in dispute was a farm in Karen where the matrimonial home was situated and the wife claimed that she was a joint owner of the said property. She claimed that her husband evicted her from the matrimonial home when he met another woman forcing her to live in the servant squatters. Although the couple had other property the wife claimed that she was entitled to remain in Karen since she is the one who developed it.<sup>12</sup>In its determination the court determined that the contribution amounted to one third of the entire value of the matrimonial property. The husband was advised to sell off the property and give 300,000 thousand Kenya shillings being a third of 900,000 to the wife.

Later the Karanja decision was reaffirmed in *Kivuitu v Kivuitu*<sup>13</sup> by Omolo, Ag JA (as he was then), who laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares. In his obiter dicta, Omolo went further to presume that every wife has some interest in property acquired and registered in her husband's sole name due to her indirect contribution occasioned by fulfilling the duties of a wife and mother.<sup>14</sup>This particular case law did not address the question whether indirect contributions alone can suffice for orders under Section 17 of the Married Women's Property Act. Also, it did not lay down any general principle of equality applicable to all property disputes between husband and wife as later addressed in *Fatia Essa v. Mohamed Alibhai and Tabitha Wangeci Nderitu v. Nderitu*<sup>15</sup>. In *Essa v Essa* the wife went to court asking for equal share in the matrimonial property to which she had contributed. She proved her financial contribution and the court awarded her 50% of that property. This was the first time the Court Applied the Married Women Property Act to Kenyan Muslims. In the case of *Tabitha v Nderitu* the court analyzed its previous decisions and awarded 50% to a wife married under customary law and whose contribution was indirect.

After the 2010 Constitution was promulgated, case law on matrimonial property began to evolve. Division of matrimonial property was subject to 50:50 settlements. In *Agnes Nanjala William v Jacob Nicholas* the court held that *Echaria*<sup>16</sup> was not good law, court invoked Article 45(3) of the Constitution. In his judgment the learned Judge opined that '*The new constitution is expected to re-shape the legal landscape. A positive feature of this new constitution is that it has the principles of equality and social justice woven through it. It places an obligation on all persons to live up to the national values set out in*

---

<sup>12</sup> Jumah Daniel, *The Legal Framework Governing Division of Matrimonial Property in Kenya*,

<sup>13</sup> (1991)eKLR 241(C.A)Kenya

<sup>14</sup> Available at <http://lawafrica.com/bench.php?hbid=6> last accessed 15<sup>th</sup> February 2017

<sup>15</sup> As cited by Patricia Kameri-Mbote, Progress report on removing discrimination against women in respect of property and inheritance rights, 'Tools on Improving Women's Secure Tenure' Series 1, Number 2 (August 2006)30



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



*Article 10(2) which include sharing, equity, social justice and protection of the marginalized. Having said that, there are specific articles that deal with women's property rights. Article 45(3) of the Constitution provides that the parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However, pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home.”*

In 2013 Lady Justice Mary M. Gitumbi ruled in favor of a women's equal right to marital property. In *C.M.N. v. A.W.M.*,<sup>17</sup> the husband had made 100% of the monetary contributions to the family home and sought 100% ownership of that home, but the Judge ruled that “the legal provisions in force now under the new Constitution require this court to apply the principles of equality instead. This Court is duty bound to share the suit property equally between the Plaintiff and the defendant”

### **ASSESSMENT OF THE MATRIMONIAL PROPERTY ACT, 2013**

The coming into effect of the Constitution of Kenya 2010 triggered the enactment of the Matrimonial Property Act No.49 of 2013 to provide for the rights and responsibilities of spouses in relation to matrimonial property. The Matrimonial Property Act was assented to on 24th December 2013 and commenced on 16th January 2014 thereby repealing the Married Women's Property Act of 1882.<sup>18</sup>This is in conformity with Article 68 which obligated Parliament to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. The Act applies to all marriage regimes and excludes persons who profess the Islamic faith who may choose to be governed by Islamic law in all matters relating to matrimonial property.

The Matrimonial Property Act, 2013 borrows heavily from the letter and spirit of the 2010 Constitution.<sup>19</sup> It ameliorates the harshness that was associated with the Married Women's Property Act of 1882 by recognizing that married women have the same rights as married men. Section 4 provides that *a married woman has the same right as a married man – (a) to acquire, administer, hold, control, use and dispose of property whether moveable or immovable; (b) to enter into a contract; and (c) to sue, and to be sued in her own name.”*

---

<sup>17</sup> *C.M.N. v. A.W.M.*, High Court at Nairobi, Environmental & Land Case No. 208 of 2012

<sup>18</sup> A United Kingdom statute of general application applied in Kenya by virtue of section 3(1) c of the Judicature Act (Cap. 8)

<sup>19</sup> The Constitution of Kenya, 2010, Article 45(3)



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



In addition, the Act marks a positive departure from the previous regime by recognizing both monetary and non-monetary contribution. Supportive roles such as child care and domestic work are now legally recognized at the dissolution of marriage and during the division of matrimonial property. These were roles that ordinarily were not considered as contribution towards acquisition of matrimonial property. Section 6 (1) of the Act defines "contribution" as monetary and non-monetary contribution and includes— domestic work and management of the matrimonial home; child care; companionship; management of family business or property and farm work. In addition the law provides that a spouse, who makes a contribution towards the improvement of a non-matrimonial property, acquires a beneficial interest in the property equal to the contribution made.

Notable, for the first time the Act provides a clear meaning to matrimonial property. For a long time despite frequent usage of the term, matrimonial property had never been properly defined by statute. What we had were judicial decisions that filled the void until the dawn of the new Constitution. The Act distinguishes Matrimonial property from any other property under Section 2 by providing thus "matrimonial property" means *matrimonial home or homes; household goods and effects in the matrimonial home or homes; any other immovable and moveable property owned by both or either spouse and acquired during the subsistence of the marriage; or any other property acquired during the subsistence of the marriage*. It excludes trust property, including property held in trust under customary law.

Section 12 introduces spousal consent in dispositions relating to matrimonial property. The section provides that "*an estate or 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 either by way of sale, gift, lease, and mortgage or otherwise.*" This provision simply means that a sale agreement of matrimonial property by one spouse unilaterally is a voidable sale. The Act also protects spouses under section 14 by clarifying that where matrimonial property is registered in the name of one spouse only, the registered spouse is presumed to hold the property in trust for the unregistered spouse.

In the case of polygamous unions, the law is clear on the rights and responsibilities at the dissolution of the marriage. The matrimonial property acquired between the man and the first wife before he married the subsequent ones shall be retained equally between the husband and the first wife. Thereafter the remaining matrimonial property shall be divided subject to each wife's and husband's contribution to the acquisition of such property.



As for monogamous marriages two things are of paramount importance at the dissolution of the marriage. These are:

- a. The existence of a Prenuptial agreement;
- b. Proof of contribution to the acquisition of Matrimonial Property.

Section 7 provides that subject to section 6(3) on prenuptial agreement, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

### **Section 7 -The Unsatisfactory Feature of the Matrimonial Property Act, 2013**

The Constitution of Kenya recognizes equality between parties in a marriage by stating categorically under Article 45 (3) *that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.* The Constitution goes on to provide that every person is equal before the law and has the right to equal protection and equal benefit of the Law. Section 7 of the Matrimonial Property Act renege these Constitutional guarantees of Equality by introducing the burden of proof in determining contribution particularly non-monetary contributions. This poses a challenge especially to women who contribute to the acquisition of matrimonial properties but have no tangible proof for the same. This is what used to happen prior to the adoption of Kenya's Constitution in 2010. Case law held that at separation or divorce, property was to be distributed in proportion to a spouse's monetary contribution to that property. This line of reasoning severely discriminated against women, who generally did not provide monetary contributions to the property, but provided farm labor and child care. In the new regime, the same applies. Spouses who contribute to the acquisition of matrimonial property but have no tangible evidence are left with nothing. Further, the court provides that parties can only seek the division of matrimonial property after divorce or separation. This is cumbersome because there are many instances where women seeking division of matrimonial property but want to save their marriages.

### **PETITION FILED BY FEDERATION OF WOMEN LAWYERS KENYA (FIDA KENYA)**

The Petitioner is a non-governmental, non-profit and non-partisan duly registered under and in accordance with the pertinent laws of the Republic of Kenya. The Petitioner has for the past 30 years developed expertise relating to discrimination experienced by women and girls in Kenya through provision of legal services to indigent women, engagement in legal, policy and legislative reform, treaty



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



monitoring, research, education and advocacy. The petition instituted the petition in their own interest under Article 22 of the Constitution of Kenya 2010.

The petitioner avers that through its network of lawyers and female clients it has received numerous concerns on the Constitutionality of certain provisions of the Matrimonial Property Act 2013 including section 7. The Petitioner submits that section 6 (1) C precludes property which is registered in the sole name of one spouse to the detriment of the other. The Petitioner further affirms that majority of married women in Kenya do not hold any property jointly with their husbands but they are indeed joint owners as they helped to acquire the same as matrimonial property. The Petitioner avers that this provision will be used to deprive many married women of their fundamental rights to land and property contrary to Articles 40, 60 and 68 of the Constitution because their names are not on the ownership documents of the property, the said property is not matrimonial property. Regarding section 7, the petitioner avers that the provision of “according to the contribution of either spouse towards its acquisition” is contrary to Article 45(3) of the Constitution: that parties shall have equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. FIDA Kenya emphasizes that this provision further, infringes on the rights of married women to own property after the dissolution of a marriage as they must prove their contribution towards its acquisition and while the definition of contribution has been expanded to include non-monetary contributions. If this remains the case, the bulk of the property will belong to the spouse who has made monetary contributions and has proof of the same. This they say is a stark contrast to Section 10(2) of the Matrimonial Property Act which states that “any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree.” Section 10(3) of the Matrimonial Property Act states that parties to a marriage shall share equally any liability incurred during the subsistence of the marriage and reasonable and justifiable expenses incurred. They conclude that if liabilities are to be shared equally then assets must also be shared equally at the end of a marriage.

Apart from violating the Constitution the petitioner states that the provisions violate a number of treaties and conventions that form part of Kenyan law under Article 2 (5). These are ; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on Human and Peoples Rights (Banjul Charter), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



1. Article 7 (d) of the Maputo Protocol provides: State Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of Marriage. In this regard, they shall ensure that: d) in case of separation, divorce or annulment of Marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the Marriage.

2. Articles 3 and 18(3) of the Banjul Charter provide:

(1) Every individual shall be equal before the law

(2) Every individual shall be entitled to equal protection of the law

(3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

3. Article 26 of the ICCPR states: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Articles 15 and 16 of CEDAW provides:

(1) State Parties shall accord to women equality with men before the law.

(2) State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (c) The same rights and responsibilities during marriage and at its dissolution; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

In conclusion the petitioner made the following prayers:

1). A declaration that section 6(1)(c) of the Matrimonial Property Act is in conflict, inconsistent and contravenes articles 27, 40, 45(3), 60(1), 68(c) (iii) of the Constitution and is therefore null and void;

2) A declaration that section 7 of the MPA to the extent that it bases division of matrimonial property upon contribution, is invalid as it is in conflict, inconsistent and contravenes Articles 27, 40, 45(3), 60(1) of the Constitution and is therefore null and void;



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



3) An order of MANDAMUS compelling the Respondent to publish a Statute Miscellaneous Amendment Act revoking the aforesaid Sections within thirty days of delivery of judgment;

### THE LAND REGIME IN KENYA

Until 2010, land in Kenya was governed by diverse and a complex regime of land law. The laws dealing with different types of land were spread in different statutes. These were; The Indian Transfer of Property Act, 1882, The Government Lands Act, The Registration of Titles Act, The Land Titles Act, The Registered Land Act, The Way Leaves Act; and The Land Acquisition Act. The existence of many statutes, some termed incompatible, resulted in a complex land management and administration. The plethora of bureaucracy and the legal complexities necessitated a relook into land administration and management in Kenya. In 2004 formulation of a comprehensive National land policy began. Broad consultations with different stakeholders in Kenya resulted into the adoption of the National Land Policy in 2009 which was enacted as Sessional Paper No.3 of 2009. The National Land Policy has been lauded as one of the hallmarks in land reforms in Kenya. Its radical proposals on land management provide an overall framework for sustainable and equitable use of land. It provides guiding principles for sectorial and institutional reforms in Kenya. Key features of the National Land Policy were subsequently anchored in the 2010 Constitution. Article 60 of the 2010 Constitution 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 principle...*” The seven cardinal principles include:

- 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. sound conservation and protection of ecologically sensitive areas;
- f. Elimination of gender discrimination in law, customs and practices related to land and property in land; and
- g. Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

Pursuant to the promulgation of the 2010 Constitution it was necessary to expeditiously develop enabling land laws resonant with the new Constitution and National Land Policy 2009. Between 2010 and 2012 four statutes were enacted as follows:



## **The Land Act 2012**

The Land Act 2012 was developed to give effect to Article 68 of the Constitution which provides among others that Parliament shall revise, consolidate and rationalize all existing land laws. It was assented to on 27th April 2010 with a commencement date of 2nd May 2012. The Land Act has revised, consolidated and rationalized previous land laws so as to provide for the sustainable administration and management of land and land-based resources. Previously its provisions were scattered in different pieces of legislation such as the Government Land Act, the Registered Land Act and the Indian Transfer Act. It repeals the Way-Leaves Act Cap 292 and the Land Acquisition Act 295 and consolidates all the substantive land laws under one Act. It lays down laws on community land, administrative and management of private land, general provisions on leases and charges, compulsory acquisitions, settlement programmes, easements and analogous rights.<sup>20</sup> For instance it provides that charges cannot suffice without being assented to by both spouses.

## **The Land Registration Act, 2012**

The Land Registration Act makes provision with respect to registration of interest in land. It was enacted in 2012 to revise, consolidate and rationalize the registration of titles to land and to give effect to the principles and objects of devolved government in land registration. It repeals the Registration of Titles Act (Cap. 281), the Government Land Act (Cap.280), the Land Titles Act and the Registered Land Act (Cap.300). The enactment of this legislation has resulted into a uniform land registration system and uniform land registries countrywide. The Act provides for seven overriding interests among them spousal rights over matrimonial property.<sup>21</sup> In addition section 93(2) provides that if land is held in the name of one spouse only but the other spouse or spouses contribute by their labor or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired 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 and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

## **The Environment and Land Court Act, 2011 (Act No. 19 of 2011)**

---

<sup>20</sup> Available at <https://www.standardmedia.co.ke/article/2000059348/land-law-reform-g geared-to-greater-efficiency> last accessed 15th February 2017

<sup>21</sup> See section 28 of the Land Registration Act



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



This Act establishes the Environment and Land Court pursuant to Article 162 (2)(b) of the Constitution. The principal objective of the Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes related to the environment and the use and occupation of, and title to land in Kenya. This Act repealed The Land Disputes Tribunals Act , No. 18 of 1990 (Cap.303A) .The Environment and Land Court has similar jurisdiction with the High Court .It is empowered to hear cases relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interest in land. The court further exercises supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.

### **The National Land Commission Act, 2012 (Act No. 5 of 2012)**

Act of Parliament that provides for the powers and functions of the National Land Commission as envisaged under Article 67 of the Constitution of Kenya 2010. It also provides for the qualifications and procedures for the appointment of the chair and members of the Land Commission. This Act received Presidential assent on 27th April 2012 with a commencement date of 2nd May 2012.

The Enactment of these four statutes was a brave attempt to address the longstanding grievances on land rights particularly for women. The myriad statutes that were repealed served to discriminate women and to disenfranchise them from owning land in their own rights and to effectively take part in land administration and management. The repealed statutes discriminated women by invoking customary law which generally conferred exclusive control of land on men to govern land rights, vested in men absolute sole ownership to registered land and provided procedures that insulated customary laws from appeal and judicial scrutiny.<sup>22</sup> Although there were milestones, critics claimed that the drafting of the land laws was characterized by undue haste, opacity and lack of genuine consultations and debate. They claimed that this was geared towards renegeing on the promises of the Constitution and subverting the intentions of the National Land Policy.<sup>23</sup> Their claims and the varied experiences in the enforcement of the provisions culminated into a Bill of Parliament in 2015. The proponents of the Land Laws (Amendment) Bill 2015, averred that the proposals addressed inconsistencies with the National Land Policy and the 2010 Constitution. In 2016, the Land Laws (Amendment) Bill 2015 received presidential assent and came into force amid protests over the deletion of progressive provisions such as the requirement for spousal consent in transactions relating to matrimonial property.

---

<sup>22</sup> Available at <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Women-property-rights.pdf> last accessed 10th February 2017

<sup>23</sup> Available at <http://allafrica.com/stories/201508220036.html> last accessed on 30th January 2017.



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## Overview of the Land Law Amendments in 2016

It is now over five years since the enactment of the Land Act, 2012, the Land Registration Act 2012, the National Land Commission Act 2012 and the Environment and Land Court Act 2011. Within this period, legislation pertaining to the three categories of land has undergone different litmus tests for effectiveness. The general experience in the application of these laws has been incessant institutional conflicts, inconsistencies in the land sector operation and loss of trust in the documents generated by the various authorities in the land sector. This has been occasioned by the failure of the statutes to comply with the Constitutional provisions on land<sup>24</sup>. The recent clamor for reform in the land sector occasioned the enactment of the Land Laws (Amendment) Act, 2016 (No.28 of 2016).

The Land Laws (Amendment) Act, 2016 introduces significant changes to overriding interests previously embedded in the Land Registration Act and the Land Act. An overriding interest is an interest to which registered titles is subject, even though they do not appear in the register. Section 11 of the Land Laws Amendment Act amends section 28 of the Land Registration Act by deleting subsections (a) and (f). This means that the following are no longer automatically deemed to be overriding interests over registered land without their being noted on the register:-

- a. Spousal rights over matrimonial property;
- b. Leases or agreements for leases for a term not exceeding two years; and
- c. Periodic tenancies and indeterminate tenancies
- d. Joint tenancies

Regarding spousal consent section 31 of the Land Laws Amendment Act deletes section 93 of the Land Registration Act, 2012 and replaces it with a single paragraph providing that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act, 2013 (the “MPA”). Section 93 reads

*(1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or all the spouses-*

*(a) There shall be a presumption that the spouse shall hold the land as joint tenant unless-*

---

<sup>24</sup>The Practitioners Perspective on the Land Bills ,Ibrahim Mwathane .Available at <http://www.kenyalandalliance.or.ke/wp-content/uploads/2014/08/Land-Laws-Amendment-Bill-2015.pdf>



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



- (i) *a provision in the certificate of ownership or the certificate of customary 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 or*
  - (ii) *the presumption is rebutted in the manner stated in the sub section; and*
- (b) *the Registrar shall register the spouses as joint tenants*
  
- (2) *If the Land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired 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 and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered*
  
- (3) *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 has or spouses have as the case may be have consented to that 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 consent to that assignment.*
  
- (4) *If the spouse undertaking the disposition deliberately misleads the lender or the assignee or transferee by the answers to the inquires made in accordance with the 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'*

Section 31 now reads '*Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Properties Act.*'

Matrimonial Property is now defined under the Land Registration Act to mean any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage. This is distinguished



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



from matrimonial home which is defined under the Act to mean “any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home”. Previously section 93 (3) of the Land Registration Act imposed a duty on a lender or transferee to inquire of the borrower or transferor, respectively, on whether the borrower’s or transferor’s spouse(s) has consented to the charge or transfer where the borrower or transferor held the land or dwelling house in his or her name individually. Although the duty imposed on the lender and transferee is removed with this amendment in the Land Registration Act, the consent of both spouses is still required under section 12 (1) of the MPA in the case of any alienation of matrimonial property (whether by way of sale, gift, lease, charge or otherwise) during the subsistence of a monogamous marriage. Under section 12 (5) of the MPA, written and informed consent of both spouses is also required in case of a disposition in the form of a lease or charge over a matrimonial home.

While Pundits aver that the unregistered burdens on titles grossly undermine the quality of land transactions in titles, institutions such as FIDA Kenya, a woman’s rights organization that have been working jealously to safeguard women land and property rights in Kenya, attributes the gains in women land and property rights to the inclusion of spousal consent in land dispositions and the acknowledgment of overriding interests statutory rights for spouses.<sup>25</sup> “*Are you married?*”- This mandatory question confirmed the legal requirement for consent before finalization of land transactions. If it emerged that spousal consent was not sought in land dispositions then in law the transaction were deemed void. In instances where spousal consent was fraudulently obtained, courts have rescinded such transactions. The land laws amendment now makes the provision for spousal consent voidable. The law now provides that if one spouse acted unilaterally the aggrieved party should consider placing a caution on the land to halt any further engagements until the contestation is heard by a competent Court. While this considers the rights of other spouses the placement of a caution is encumbered by a huge lacuna. If caution is not placed before the finalization of the disposition, the aggrieved party loses rights to the property in question and must begin a rigorous process of convincing the courts to vitiate the contract.

### CONCLUSION

Kenya has come a long way in addressing women land and property rights. While we laud the 2010 Constitution as one of the most progressive Constitutions in the world, we must be keen to ensure that its enabling legislations are in conformity with the letter and the spirit of the 2010 Constitution. Although the

---

<sup>25</sup> Available at <http://www.jurisnooks.com/2015/09/11/property-disposal-spousal-consenttill-death-us-part> last accessed 13th February 2017



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



Matrimonial Property Act, 2013 ameliorated the harshness of the Married Women's Property Act of 1882 the highlighted provisions in this paper have been found wanting for being inconsistent with the supreme law of the land which is the Constitution. FIDA Kenya petition sets the stage for the re-examination of matrimonial property in Kenya. Meanwhile, we await the Courts, determination on the provisions of the Matrimonial Property Act 2013. It should also be noted that in as much as Kenya recognizes for International treaties and Conventions under Article 2(5) this has not translated for many women to get a share of property. This paper concludes that the omission of spousal consent was an error in law and that it should be anchored in law to safeguard women land and property rights in Kenya.



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## REFERENCES

### Selected Books/Articles/Journals/Reports

1. Andrew Commins, Dividing Matrimonial Property on Divorce: Colonialism, Chauvinism and Modernism in Kenya , at 167
2. FIDA Kenya and Georgetown University (2009) Women’s Land and Property Rights in Kenya
3. Ibrahim Mwathane, ‘The Practitioners Perspective on the Land Bills
4. Janet Kabeberi and Patricia Kameri Mbote et al, ‘Family laws reforms in Kenya: An Overview’, presentation at Heinrich Boll Foundation’s Gender Forum in Nairobi, 30<sup>th</sup> April 2009
5. Jumah Daniel, The Legal Framework Governing Division of Matrimonial Property in Kenya,
6. Kenya Land Alliance, the case for Women’s Land Rights, at 9
7. Patricia Kameri- Mbote, Progress report on removing discrimination against women in respect of property and inheritance rights, ‘Tools on Improving Women’s Secure Tenure’ Series 1, Number 2 (August 2006) 30

### Websites

1. <http://www.kenyalandalliance.or.ke/wp-content/uploads/2014/08/Land-Laws-Amendment-Bill-2015.pdf>
2. <http://www.kenyalandalliance.or.ke/wp-content/uploads/2014/08/Land-Laws-Amendment-Bill-2015.pdf>
3. <http://allafrica.com/stories/201508220036.html>
4. <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Women-property-rights.pdf>
5. <http://www1.uneca.org/Portals/lpi/CrossArticle/1/Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf>
6. <http://lawafrica.com/bench.php?hbid=6>

### Case Law

1. C.M.N. v. A.W.M., High Court at Nairobi, Environmental & Land Case No. 208 of 2012
2. Karanja v. Kajanja (1976) KLR 306
3. Kivuitu v Kivuitu (1991) Eklr 241 (C.A) (Kenya)
4. National Provincial Bank Vs. Ainsworth (1965) 3 WLR 1 House of Lords



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



5. Peter Mburu Echaria v Pricilla Njeri Echaria [2007]eKLR Nairobi Civil Appeal No.75 of 2001
6. Pettit v. Pettit (970) AC 777

## **Statutes and Conventions**

1. Land Registration Act,2012
2. Married Women's Property Act,1882
3. Matrimonial property Act, 2013
4. National land Commission Act,2012
5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa(Maputo Protocol
6. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
7. The African Charter on Human and Peoples Rights(Banjul Charter)
8. The Environment and Land court commission Act,2011
9. The International Covenant on Civil and Political Rights(ICCPR)
10. The Land Act,2012
11. The land laws (Amendment) Act,2016
12. The Marriage Act,2014

## **Constitution**

1. The Constitution of Kenya,2010