

THE LAW ON MATRIMONIAL PROPERTY IN KENYA

1. The applicable law in respect of matrimonial property is **article 45(3) of the Constitution** as read together with the **Matrimonial Property Act 2013**.

2. Definition of terms

2.1 Matrimonial property: means the matrimonial homes, household goods and effects in the matrimonial home or homes or any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage. (Section 6(1) of the Act). Notably, trust property, including property held in trust under customary law, does not form part of matrimonial property.

2.2 Matrimonial home: means any property that is owned or leased by one or both spouses and occupier or utilized by the spouses as their family home, and includes any other attached property.

2.3 Spouse: means a husband or a wife.

2.4 Marriage: means the voluntary union of a man and a woman whether in a monogamous or a polygamous union and registered in accordance with the **Marriage Act 2014**.

2.5 Contribution: means monetary and non-monetary contribution and includes domestic work and management of the matrimonial home, child care, companionship, management of family business property and farm work. Family business means any business which is run for the benefit of the family by both spouses or either spouse and generates income or other resources wholly or part of which are for the benefit of the family.

3. Matrimonial Property Rights

3.1 Unless otherwise agreed, 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.

3.2 Parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. Such an agreement may be set aside by the Court if it is determined that the same was influenced by fraud, coercion or is manifestly unjust.

3.3 Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. (**Article 45(3) of the Constitution & Section 4 of the Matrimonial Property Act**)

3.4 In the event one spouse makes a contribution towards the improvement of property, whether acquired before or during the marriage but the property acquired during the marriage does not become matrimonial property, then s/he acquires a beneficial interest in the property equal to the contribution made.

4. Polygamous Marriage

4.1 In the case of polygamous marriages, matrimonial property rights in respect of property acquired by the man and the first wife vest equally in the two, if the property was acquired before the man married another wife.

4.2 If the matrimonial property was acquired by the man after he marries another wife, then the property rights vests in the man and the wives, however many, taking into account any contributions made by the man and each of the wives.

4.3 However, if there is an agreement that a wife shall have her matrimonial property with her husband separate from that of the other wives, then any such wife shall own that property equally with her husband to the exclusion of the other wife or wives.

5. Spousal Liability

5.1 Any liability incurred by a spouse relating to a property acquired before the marriage shall remain their liability after marriage. If the property becomes matrimonial property, liability shall be shared equally by the spouses unless otherwise agreed.

5.2 Any liability incurred during the subsistence of the marriage or any reasonable and justifiable expense incurred for the benefit of the marriage shall be shared equally.

6. Applicability of Customary Law

6.1 During the division of matrimonial property between and among spouses, the customary law of the communities in question shall be taken into account, subject to the values and principles of the Constitution.

7. Special provisions relating to matrimonial property

7.1 Consent of both spouses is required before an estate or interest in any matrimonial property is alienated by any form, be it by way of sale, gift, lease, mortgage or otherwise.

7.2 A spouse has an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law relating to registration of title to land or of deeds

7.3 A spouse shall not be evicted from the matrimonial home by or at the instance of the other spouse during the subsistence of the marriage except by Court Order, and even then, the eviction shall not be done by any person except on the same of any estate or interest in the matrimonial home in execution of a decree, by a trustee in bankruptcy or by a mortgagee or charge in exercise of a power of sale or any other legal remedy.

7.4 Written and informed consent of both spouses is required before the matrimonial home is mortgaged or leased.

8. Presumptions as to Property Acquired During the Marriage

8.1 Where matrimonial property is acquired during the marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

8.2 Where matrimonial property is acquired during the marriage in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

8.3 Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.

9. Case Law

9.1 In the case of **JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)**, the Supreme Court (Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ.) dealt with the issues of:

- a. the applicable law in the division of matrimonial property to causes filed prior to the current matrimonial property regime namely the Constitution and the Matrimonial Property Act 2013; and

- b. whether article 45(3) of the Constitution provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.

9.2 Applicable Law

- 9.2.1 The Court concluded that the Matrimonial Property Act does not apply retrospectively and held that the applicable law to claims filed before its commencement is the **Married Women's Property Act 1882**. Consequently, the principles in **Echaria vs Echaria** are good law and remain the basis within which matrimonial property should be distributed for matters filed before the commencement of the **Matrimonial Property Act, 2013**.
- 9.2.2 The principle in the **Echaria case** was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. The court also noted that for one to be entitled to a share of the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounts to contribution may either be direct and monetary and indirect and non-monetary.

9.3 Proprietary rights under article 45(3) of the Constitution

- 9.3.1 With regard to the Constitution, the Court reiterated that the Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. This is because a Constitution looks forward and backward, vertically and horizontally, as it seeks to reengineer the social order, in quest of its legitimate object of rendering political goods. In this way, a constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. The Court thus found that a reading of **article 45(3)** of the **Constitution** can only lead to the conclusion that there is nothing that bars its provisions from being applied retrospectively.
- 9.3.2 The Court held that equality under **article 45(3)** means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed.
- 9.3.3 In so finding, the Court reasoned that nowhere in the Constitution is there any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and **article 45(3)** was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only. Instead, the Court held that **article 45(3)** acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more.
- 9.3.4 On the **50/50 issue**, the Court opined that while **article 45(3)** deals with equality of the fundamental rights of spouses during and after dissolution of marriage, equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does that provision led to the assumption that spouses are automatically entitled to a 50% share by fact of being married.

10. Conclusion

Ultimately, the prevailing guiding principle should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.