UNIVERSITY OF NAIROBI

FACULTY OF LAW

THE MWPA: IS THERE A CASE FOR ENACTMENT OF A MATRIMONIAL PROPERTY ACT IN KENYA?

CHRISTOPHER NDOLO MUTUKU

G62/P/7601/05

Supervisor

Mr. William Musyoka

A research paper submitted in partial fulfillment of the requirements for the award of the degree of Master of Laws

October 2008

DECLARATION

I, Christopher Ndolo Mutuku, hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed: ..... Date: 31st October 2008

CHRISTOPHER NDOLO MUTUKU

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

Signed: 17th October 2008 ..... Date: .....

MR. WILLIAM MUSYOKA

DEDICATION

This Research Paper is dedicated to my lovely wife, Caroline Njoki Ndolo, whose support and dedication has been invaluable and unfailing, and without whom I would not have come thus far, and to my loving daughters, Charlene Ndinda, Charmaine Nyambura and Crystal Ndungwa.

Nairobi, Kenya. July 2008.

ACKNOWLEDGEMENT

The completion of this Research Paper would not have been possible without the insightful and critical contributions of many people. I am indebted to M/s Pauline Nyamweya, my initial supervisor who led me through formulating and establishing the course and structure of this Paper; to Mr. William Musyoka, my supervisor; to M/s Rose Ayugi and Dr. Winnie Kamau, whose advise I variously sought over the telephone; and last but not least, to my wife, Caroline Njoki, who diligently helped me with research materials from the internet.

To them all, I express my unreserved and heartfelt gratitude.

ABSTRACT

This Paper is an examination of the place and relevance of section 17 of the Married Women's Property Act, 1882 after the granting of divorce. It traces the developments of the law in England, from whence the Act of 1882 originated, up to 1973 and also examines the principles requisite for a just and equitable family law to be in place. The paper likewise discusses the way in which section 17 of the Act 1882 has been applied in Kenya. The Paper concludes that the Act of 1882 is an antiquated foreign legislation that has been overtaken by the changing environment in Kenya and argues for the enactment of a Matrimonial Property Act, relevant to the situation in Kenya, and the unification and harmonization of the bifurcated systems of marriage law to ensure certainty and predictability. The Paper also argues for the repeal of section 82(4) of the Constitution of Kenya for entrenching discrimination in personal law.

TABLE OF CASES

TABLE OF STATUTES

ENGLISH STATUTES

1. 1. The Administration of Justice Act, 1970.
2. The Family Supplements Act, 1970.
3. The Land Charges Act, 1925.
4. The land registrations Act, 1925.
5. The Law Reform Act 1969.
6. The Law Reform (Married Women and Tortfeasors) Act, 1935.
7. The Law Reform (Husband and Wife) Act, 1962.
8. The Married Women's Property Act, 1870.
9. The Married Women's Property Act, 1870.
10. The Matrimonial Proceedings and Property Act, 1970:
11. The Matrimonial Causes Act, 1973.
12. The Matrimonial Proceedings and Property Act, 1973..
13. The Married Women's Property Act, 1893.
14. The Married Woman's Property Act, 1907.
15. The Married Woman PropertyAct, 1964.
16. The Married Woman's (Restriction upon Anticipation) Act, 1949.
17. The Matrimonial Causes (Property and Maintenance Act), 1958.
18. The Matrimonial Causes Act 1973.
19. The Matrimonial Homes Act 1967.
20. The Matrimonial Homes Act 1983
21. The Matrimonial Homes and Property Act 1981

KENYAN STATUTES

1. The African Christian Marriage and Divorce Act, Cap. 151, Laws of Kenya.
2. The Civil Procedure Act, Cap. 21, Laws of Kenya.
3. The Constitution of Kenya.
4. The Marriage and Divorce Act, Cap.157, Laws of Kenya.
4. The Hindu Marriage and Divorce Act, Cap. 157, Laws of Kenya.
5. The Judicature Act, Cap. 8, Laws of Kenya.
6. The Marriage Act, Cap. 150, Laws of Kenya.
7. The Mohammedan Marriage, Divorce and Succession Act, Cap.155, Law of Kenya.

OTHER STATUTES

1. The Customary Marriages Act, Chapter 5.07, Zimbabwe.
2. The Law of Marriage Act, 1971, Tanzania.
3. The Marriage Act, Chapter 5.11, Zimbabwe.
4. The Matrimonial Causes Act, Botswana.

TABLE OF BILLS

1. The Domestic Relations Bill, 1995 (Uganda).
2. The Equal Opportunities Bill, 2007.
3. The Family Protection Bill, 2002.
4. The Marriage Bill, 1993.
5. The Matrimonial Property Bill, 2007.

TABLE OF ABBREVIATIONS

1.	ALL E.R.	All England Reports.
2.	Beav.	Beaver Law Digest.
3.	C. A.	Court of Appeal.
4.	C.A.K.	Court of Appeal Kenya.
5.	Cmnd.	Morton Commission on Marriage and Divorce.
6.	ed.	Edition.
7.	H.C.C.C.	High Court Civil Case.
8.	H.C.D.C.	High Court Divorce Cause.
9.	KLR	Kenya Law Reports.
10	MWPA.	Married Women's Property Act, 1882.
11	W.L.R.	Weekly Law Reports.

TABLE OF CONTENTS

CHAPTER ONE

1. INTRODUCTION.

There is nothing new about the debate and controversy on the parameters to be applied in the distribution of "matrimonial" property between couples during the pendence of a marriage and after divorce, and the debate on the applicable law for both scenarios with a further distinction being drawn before decree *nisi* and after decree *absolute*. The second distinction is important because whilst a court of law may have pronounced a decree of divorce, until that decree is made *absolute*, the parties are still, in law, husband and wife with all the rights and obligations that avail themselves to the institution of marriage. Various judges[1] have come up with diametrically opposed ways of determining the manner in which distribution of matrimonial property is to be undertaken, so much so that it at times appears that they may be applying different laws.

What is relatively new in Kenya, following a ruling delivered by Ringera, J. in *Ying v. Ren*[2], is the relevance and place of section 17 in the settlement and distribution of property after the issuance of decree *absolute*.

---

[1] Omolo, Gachuhi, Masime, JJA. in *Kivuitu v. Kivuitu* [1991] 2KAR 241 and Kamau, J. in *Rose Mbithe Mulwa v. David Musyimi Ndetei* H.C.C.C. No. 6 of 2002 (O.S.) (unreported).

[2] Mombasa H.C.C.C. No. 124 of 1994 (O.S.) (unreported).

1.1 BACKGROUND TO THE PROBLEM.

The MWPA is a statute of general application, applicable in Kenya as it applied in England on 12th August 1897.[3] The MWPA is an important Act because, firstly, by it's opening words, it provided a married woman full proprietary rights to acquire, hold and dispose of any real or personal property as her separate property, in the same manner as if she were *femme sole* without the intervention of any trustee. This was an important milestone in the law relating to married women and property and this will be discussed at length in chapter 2 of this Paper, but suffice to state that prior to the enactment of the MWPA, a married woman's proprietary capacities were, at common law, very limited. Secondly, the Act provides an avenue for the determination, in a summary way, property disputes between husbands and wives. Section 17 thereof reads:

"In any question between husband and wife as to the title to or possession of property, either party...may apply by summons or otherwise in a summary way to any judge of the High Court of Justice...and the judge may make such orders with respect to the property in dispute as he thinks fit..."

Therefore if the statute be applicable to Kenya as it was on 12th August 1897, then, according to Ringera, J. in *Ying v. Ren*[4]:

---

[3] S.3 (2) of the Judicature Act, Cap. 8, Laws of Kenya, enjoins courts in Kenya to apply statutes of general application as were in force in England on 12th August 1897.
[4] *Supra* note 2 p.4.

> "the wording of section 17 of the Married Women's Property Act of 1882 of England is all too clear to admit to doubt. And this is the statute that is of general application (sic). Subsequent statutory modifications and extension of the court's power thereunder are not part of the received law of Kenya. The plain meaning of the section is that the relief thereunder can be sought in the form of an Originating Summons taken out by a spouse in a subsisting marriage".

Section 17 of the MWPA is merely a procedural section[5] that has been used to ascertain, as was stated by Lord Denning in *Hine v. Hine*[6], the "respective rights of husband and wife", and to vary any ante-nuptial or pre-nuptial settlements. At present in England, the section can be used to order the transfer from one to the other, or the payment of a lump sum.[7]

There are myriad problems associated with section 17 of the MWPA. In *Pettit v. Pettit,*[8] it was observed that:

> "There have been many cases showing acute differences of opinion in the Court of the Appeal. Various questions have arisen, generally after the break-up of a marriage. Sometimes both spouses have contributed in money to the purchase of a house: sometimes the contribution of one spouse has been otherwise than in money: Sometimes one spouse owned the house and the other spent money or did some work in improving it: and there have been a variety of other circumstances.... Views have been expressed that the law does give a claim to the contributing spouse in the first, or the first and second or in all the three cases which I have outlined. But there has been no unanimity as to the legal basis or the legal nature of such claims."

---

[5] *Pettit v Pettit* (1969) 2 ALL ER pp.388-389; Black, J. M. and Bridge, A. J., A Practical Approach to Family Law, 2nd ed., (Blackstone Press Limited, London, 1989,) p.394.
[6] 2 ALL E. R.
[7] *Ibid* p.290.
[8] *Supra* note 5 pp.388-389.

1.2. STATEMENT OF THE PROBLEM.

Various courts in Kenya have come up with conflicting decisions on the application of section 17. The Court of Appeal, accepting that proceedings before it have been commenced by a divorced spouse under section 17 of the Married Women's Property Act, 1882, after issuance of decree *absolute*, and even after remarriage by one of the spouses, has proceeded to distribute matrimonial property between the divorced couple. Examples of such scenarios are to be found in the cases *of Kivuitu v. Kivuitu*[9] *& Karanja v. Karanja*[10] *and Fathiya Essa v. Mohammed Alibhai.*[11] Indeed this has been the practice in Kenyan courts until 23rd January 1996 when Ringera, J. delivered the ruling in Ying v. Ren.[12]

Recent court decisions have, however, been categorical that courts in Kenya will not entertain proceedings commenced under section 17 by divorced spouses after issuance of decree *absolute*, primarily because they are no longer considered husband and wife, and in the opinion of these courts, section 17 is strictly available to litigants who are husband and wife at the time of the commencement of the proceedings. Besides *Ying v.Ren,* such decisions are to be found *in Saida Karimbux v. Mohammed Yakub Umardin Karimbux,*[13] *Esther Njeri Waruhiu v. Paul Kang'ethe Waruhiu,*[14] and *Rose Mbithe Mulwa V. David Musyimi Ndetei.*[15]

---

[9] [1991] 2 KAR 241.
[10] [1976] K.L.R. 307.
[11] Mombasa Civil Appeal No. 101 of 1995 (unreported).
[12] *Supra* note 2.
[13] Nairobi H.C.C.C. No. 974 OF 1992 (unreported).
[14] Nairobi H.C.C.C. No. 2436 of 1999 (unreported).
[15] Nairobi H.C.C.C. No. 6 of 2002 (O.S.) (unreported).

Moreover the general state of the law relating to settlement of property disputes between spouses and ex-spouses is discriminatory against women in that it fails to take into considerations a married woman's indirect contribution to the acquisition of matrimonial property. According to Lord Diplock in cases where a wife makes no direct contribution towards the purchase of the matrimonial home, even though she may have substantially contributed in other areas thereby lessening the husband's load in purchasing the home, her conduct will be viewed as simply consistent with a common intention to share the day-to-day expenses.[16]

There is therefore need to address the conflict in Kenyan judicial decisions and propose a resolution to such conflict. And in addressing this conflict, it is important to also look at the general problems, both procedural and substantive, that are associated with section 17 and ask whether in fact the MWPA, a foreign and antiquated legislation, has any relevance to current Kenyan circumstances.

1.3. OBJECTIVES.

The objectives of this study are three fold.

The first is to demonstrate that judicial decisions in Kenyan courts on the application of section 17 have been contradictory.

[16] *Pettit v. Pettit supra* note 5 p.793. This position has been restated by the Court of Appeal in *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR.

The second is to demonstrate the injustices that section 17 occasions married women by its discriminatory nature and the general difficulties resulting from the said section.

The third is to argue a case, and make recommendations, for reform in family law in the field of matrimonial property.

1.4 JUSTIFICATION.

This study is important for policy and law reform in that it identifies the flaws inherent in the field of family law, specifically in settlement of property disputes between spouses and ex- spouses, and makes recommendations for reforms that, if adopted, could bring positive change and help develop this field of law.

There is need for, at the very least, the enactment of an amendment to section 17 in line with what was done in England in 1967, 1970, and 1973 or as a more permanent solution, the repealing of the entire MWPA and the enactment of a new legislation to deal with distribution of property after divorce.

1.5. RESEARCH QUESTIONS.

1.5.1 How can the conflict in judicial decisions in Kenya on section 17 of the Married Women's Property Act, 1882, be resolved?

1.5.2 Is there a need for the enactment of new legislation to deal with settlement of property disputes between spouses and ex-spouses?

1.6 HYPOTHESIS.

The application of the section 17 of the MWPA as interpreted by our various courts is uncertain and contradictory. The current law in Kenya relating to settlement of property disputes between spouses and ex-spouses is unjust and discriminatory against women and there is need for its reform. Moreover, this law has not kept pace with other socio-political developments in Kenya and is therefore outdated.

1.7 THEORETICAL FRAMEWORK

What is good law and what are the requirements for an efficient and just legal system? Does conflicting law constitute law and does it augur well for the rule of law? The whole of jurisprudence has been said to be an attempt to answer the question *'what is law'* and there is no consensus on what the law is. All jurisprudes who have discussed this question have ultimately failed to give a definition of what the law is but instead compartmentalized it by defining it by what it is, what it does, its purpose, etc. What cannot be in doubt is that good law must serve the common and just aspirations of the citizenry and, in line with the sociological theories of law must reflect the values that society holds dear –justice and equality.

Lon Fuller,[17] a Naturalist, has this to say of the law: "Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties..."

It is also important that law be just and fair. For Fuller principles of law are not just about order, they are about order. Adams and Brownsword have this to say of Fuller and his philosophy on law and morality:

> "The crux of the inner morality is the principle of congruence, for this ensures the idea of the Rule of Law, understood as a regime of fair play (of sticking to the rules) between legal officials and citizens. To underline this claim, Fuller invokes a distinctions between the law as a managerial enterprise and law as reciprocal enterprise."

The twin principles of generality and of faithful adherence by the government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction:

> "Law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of the government being that of standing as a guardian of the integrity of this system."[18]

---

[17] Fuller, L., "The Morality of Law, 1969" in Freeman, M. D. A. (editor), *Lloyd's Introduction to Jurisprudence*, 7th ed., (Sweet & Maxwell, London, 2001) p157.
[18] Adam, J. N., & Brownsword, R., *Understanding the Law*, 2nd ed., (Sweet & Maxwell, London, 1999) p.17.

To add to Fuller's voice, Hans Kelsen[19] argues that law requires a certain minimum degree of regularity and certainty, for without this it would be impossible to assert that what was operating in a given territory amounted to a legal system. Clearly, however, no exact criterion can be applied for determining what degree of regularity or certainty is necessary to achieve this aim, and States may vary from arbitrary tyrannies, where all are subject to the momentary caprices of a tyrant, to the elaborate and orderly States associated with liberal democracies.

On the flip side, H. L. Hart,[20] an Englishman and a Positivist, is a proponent of the separationist theory which was formulated by John Austin, another Positivist, thus:

> The existence of law is one thing, its merits or demerits another. Whether it be or not be is one enquiry. Whether it be or not be conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it..."[21]

In other words, law and morality have no necessary connection and law is purely utilitarian.

To Fuller, law cannot, as Hart would have it, be defined merely by reference to itself, but by reference to the inner morality. Fuller then proceeds to list eight conditions that must be met for "it" to be law, to wit:

- It must be promulgated;
- It must be prospective, i.e., address the future;

---

[19] "The Pure Theory of Law" in Freeman M. D. A. (editor) *Lloyd's Introduction to Jurisprudence*, 7th ed., (Sweet &Maxwell, London, 2001), p. 276.
[20] Hart, H. L. A., *The Concept of Law*, 2nd ed. (Oxford at the Clarendon Press, 1961).
[21] Freeman *supra* note 16, pp.129-131.

- It must be general;
- It must be clear, certain and unambiguous;
- It must not contradict itself;
- It must not contain impossibilities, i.e., it must be enforceable and applicable
- It must be constant/consistent through time; and
- It must have congruence between what it says and what officials do.[22]

Thus the reason why this study will take a Naturalist leaning, because questions of justice and fairness are intertwined with morality.

Law must be clear and unambiguous, irrespective of whether it is 'good' or 'bad' law, be it from the point of view of a Positivist or a Naturalist. It must apply similarly and equally to all who are subject to it and there ought not to be double standards, or different decisions arrived at applying the same law on similar facts. The law on judicial precedents demands that precedents must be consistent and where there is any deviation from an earlier decision, it must arise out of material differences in facts and circumstances, and it behoves the court a duty to distinguish the differing decision from the precedent. This is the spirit behind the doctrine of *stare decisis et non quieta movere* (to adhere to precedents and not to unsettle things that are established).

[22] Fuller, L., *supra* note 16.

The law must be clear and consistent, and any conflict that arises in judicial decisions negates this basic principle of law, and it must be resolved if the law is to serve its primary function of ensuring justice and fairness for all, equally.

This is not the case at present in Kenya with regard to section 17 and family law on matrimonial property. There is therefore need for an examination of Section 17 to determine whether indeed it meets the basic requirement of good law and if not, what needs to be done about it.

1.8 LIMITATIONS.

It is not possible to access to all decisions made by the High Court of Kenya and the Kenya Court of Appeal on the issue, bearing in mind that law reporting is yet to encompass all decisions, it will therefore not be possible to examine and critique every relevant court decision.

1.9 RESEARCH METHODOLOGY.

This research is library based, requiring reference to both primary and secondary materials. Primary materials are cases, statutes, books, published thesis and dissertations. Secondary materials will consist of scholarly journals, newspapers, reports of proceedings in Parliament (the Hansard), reports by government appointed commissions and law firms, and unpublished thesis and dissertations.

1.10 LITERATURE REVIEW.

This is a fairly new controversy in the Kenyan context and despite all my best efforts, I have not come across any work addressing the need for resolution of judicial conflicts on section 17, with specific reference to the conflicting decisions on whether or not the High Court and the Court of Appeal have jurisdiction to entertain proceedings brought under the said section by divorced spouses. This may be explained by the fact that it was not until 1996 that the courts addressed the question and the subsequent rulings gave rise not just to the contradiction, but also to the need to have Parliament legislate on section 17.

In England however, the issue has received considerable attention, beginning with a very in-depth discussion on the place of section 17 by the House of Lords in *Pettit v. Pettit* where the difficulties relating to its application were analysed consequent to which the said MWPA was amended through enactment of the Matrimonial Proceedings and Property Act 1970. The Act provided for the application of the provisions of section 17 to parties whose marriage had been dissolved or annulled within three years of the application under the said section. The amendment by was necessitated by the findings of the Law Lords when they concurred that it was necessary for the Legislature to intervene.

Rayden's Practice and Law on Divorce[23] has also dealt with the issue and come to the conclusion that an application under section 17 may only be made whilst parties are either husband and wife, or before the issuance of decree *absolute*. Tolstoy on Divorce[24] likewise discusses the subject and comes to the same conclusion.

Passingham[25] has dealt with the issue in the English context, demonstrating that it was meant to be a "convenient method of determining summarily 'any question between husband and wife as to the title to or possession of property'... but its numerous shortcomings led to the enactment of the Matrimonial Homes Act 1967 and the Matrimonial Proceedings Act, 1970. The law applicable in England is, however, different from that of Kenya, as the scope of section 17 has been expanded by the enactment of the Acts of 1967, 1970 and 1973.

Clark, Jr. [26] explains that in the United States of America property may be divided even if the divorce is denied and despite there being numerous statutes on the equitable distribution of "matrimonial" property in the different states, "there seems no substantial basis for holding that such statutes have any constitutional infirmities, so long, of course, as they apply even-handedly to both husbands and

[23] 10th ed., (Butterworths, London, 1967).
[24] *Tolstoy on Divorce*, 7th ed., (Sweet & Maxwell, London, 1971), p.177.
[25] Passingham, B., *Law and Practice in Matrimonial Causes*, 2nd ed. (Butterworths, London, 1974), p. 194.
[26] Clark Jr., Homer, H., *The Law of Domestic Relations in the United States*, 2nd ed., (West Publishing Co., St. Paul, Minn. 1988) p. 591.

wives"[27] Perhaps there is a case for Kenya to enact various statutes for the different marriage systems obtaining in Kenya.

The report by the law firm of Mohammed & Muigai Advocates[28] has examined the state of family law in Kenya generally and made recommendations on the Gender Responsive laws project[29] in the area of marriage, matrimonial property, domestic violence and gender equality. The report examines the history and developments in the review of marriage laws, analyses the Matrimonial Property Bill 2007 and the Gender Equality Bill 2007 (also referred to as the Equal Opportunities Bill) and gives recommendations in support of the bills. But the report is in exhaustive in that it does not identify the problem areas of the proposed Matrimonial Property Bill of Gender Equality Bill, proposing instead for their adoption. Yet the Matrimonial Property Bill, unless it is modified, is bound to raise more confusion, particularly with its generalized definition on what constitutes matrimonial property[30] and its failure to embrace parties in relationships other than marriage.

Likewise, Wachira Githinji has analysed the question of proprietary rights from a gender perspective and observed that despite the MWPA being the law applicable in questions of property disputes between spouses, "[I]t is instructive to note that

---

[27] *Ibid* p. 591.

[28] Reports by Mohammed & Muigai Advocates to the Kenya Law Reform Commission, *Review and Analysis of the Marriage Bill 1993, the Matrimonial Property Bill, the Gender Equality Bill and the Family Protection (Domestic Violence) Bill 2007.*

[29] These four bills are part of the Gender Responsive Laws Project.

[30] S.7 (1) (a) to (c), defines matrimonial property as the matrimonial home or homes, house hold goods and effects in the matrimonial home or homes, immovable property, owned by either spouses which provide the basic income for sustenance of the family.

that our Legislature has to date not passed a Kenyan Act to deal with this issue."[31] He nonetheless only restates the law and does not propose any reforms.

Human Rights Watch has, in one of its reports, reported that "[E]ven women who pay for property and have title solely in their name are not immune from property rights violations."[32] The report examines issues of property, including disputes that arise during the subsistence of, and after, marriage. But it falls short by failing to make any recommendation on how to improve the sorry state they so eloquently capture, whether by enforcing existing law or enacting new appropriate law.

A number of LL.B students' dissertations have discussed section 17 and property rights generally, the most relevant to this research being Mukiri,[33] Ranji,[34] Macharia[35] and Gitia[36], but though they all generally touch on property rights following the break –up of relationships, they have not addressed procedural conflicts in judicial decisions in crystallizing/ realizing those rights, nor indeed exhaustively analysed the substantive difficulties experienced in the application of

---

[31] " A Gender Perspective of Court Cases Related to Property and Inheritance Rights in Kenya", in Kanyi, W. and Ngunjiri M, (editors) *Gender Perspective on Property and Inheritance Rights – Kenya* (The Collaborative Centre of Gender & Development, 2002), pp .19 -20

[32] *Double Standard: Women's Property Rights Violations in Kenya* (Human Rights Watch, Vol. 15, No. 5 (A), March 2003), p.27.

[33] Mukiri, P, *Matrimonial Property Rights with Reference to the Family Law System in Kenya,* (LL. B Dissertation, University Nairobi, 1990.)

[34] Ranji, N. L., *Gender Equality & Law Reform in Marriage & Family Law in Kenya,* (LL. B Dissertation, University of Nairobi, 2000).

[35] Macharia M. J., *The Emerging Trend in the Devolution of Matrimonial Property in Kenya: The Case for a new Matrimonial Causes Act,* (LL. B Dissertation, University of Nairobi, 2002).

[36] Gitia, S.J. W., *Presumption of Marriage & Property Rights for Cohabitees* (LL.B Dissertation, University of Nairobi, 2003).

section 17. Gitia[37] has gone a bit further by dealing with the doctrine of presumption of marriage in the Kenyan context but has not gone far enough to address issues relating to engaged couples, which are an ancillary study in this Research Paper. Questions of property rights relevant to this research have also been addressed by other LL.B students, amongst them, Ikiara,[38] Musyimi,[39] Mwaniki,[40] and Karuga.[41] Karuga's paper requires particular mention because it deals generally with the practice and procedure of Parliament but has not exhaustively discussed the hurdles that have beset reform in family law since 1964.

Cretney's [42] contribution in the field of settlement of property disputes is useful but only addresses the English situation, which is obviously different from that obtaining in Kenya. Whilst it is important to look to England for guidance on law reform in this area, such guidance must be informed by Kenya's peculiar circumstances.

---

[37] *Ibid.*

[38] Ikiara, J. M., *The Various Marriage Systems in Kenya: Is there a Case for a Uniform Legislation Framework?* (LL. B Dissertation, University of Nairobi, 2003).

[39] Musyimi, F. K., *Cohabitation and its Legal Consequences with Specific Reference to Kenya: A Case for Legal Intervention,* (LL.B Dissertation, University of Nairobi, 2003).

[40] Mwaniki, J. W., *Disadvantaged Groups & The Role of the Law in Leveling the Plane: A Case Study on Women & Children,* (LL.B Dissertation, University of Nairobi, 2003).

[41] Karuga, M. N., *A Critical Appraisal of the Kenya Parliament*, (LL.B Dissertation, University of Nairobi, 2004).

[42] Cretney, S. M., *Principles of Family Law*, 3rd ed., (Sweet & Maxwell, London 1979).

Lord Diplock[43] observed that "[W] hen parties enter into an agreement which they intend to give rise to legally enforceable rights and liabilities, they must...contemplate that there will be some system of law by which their mutual rights and obligations will be determined, i.e., the substantive or "proper" law of their agreement."

[43] *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA,* 1970, 3 ALL ER 71.

CHAPTER BREAKDOWN.

CHAPTER TWO

2 DEVELOPMENTS IN THE LAW OF HUSBAND AND WIFE IN ENGLAND BETWEEN 1882 AND 1973, WITH PARTICULAR REFERENCE TO S. 17.

2.1 INTRODUCTION.

This chapter traces the development of the law of husband and wife in the field of property in England between 1882 and 1973. It follows the progression of married women's proprietary capacities at common law, which initially very limited (on the basis, purely, of her gender), to the point of equality with her male counterpart. The chapter examines landmark decisions of the Court of Chancery and the House of Lords on the state of family law in England which informed the reforms in England, particularly the enactment of the Matrimonial Homes Act, 1967 and the Matrimonial Proceedings Acts of 1970 and 1973. The overall effect of these reforms was the enlargement of the court's powers when dealing with disputes between spouses (including engaged couples and boyfriends/girlfriends) involving property, and the simplification of the procedure for settlement of such disputes. Prior to these reforms the court's powers were limited purely to determination of property rights and varying ante-nuptial and pre-nuptial settlements. Now the courts can order the transfer of property from one spouse to the other, they can award a lump sum and generally readjust the financial positions of the parties.

2.2 HISTORICAL BACKROUND.

At common law a wife's proprietary capacities were very limited. Fredman[44] explains that liberal principles of individual freedom were not extended to married women until deep into the twentieth century. Instead, the Diceyan ideal of formal equality of all individuals before the law unabashedly excluded women from the category of 'individuals'. This was epitomized by the common law of coverture which entailed that "the very being or legal existence of the wife is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover she does everything."[45] Married women were perpetual legal minors, divested of the possibility of economic independence. Any property which a married woman had owned as a single woman became her husband's property on marriage: personal property vesting absolutely, real property during the lifetime of the husband. Similarly, he had absolute right to all property which came into her hands during her marriage, including all her earned income. Although the Court of Chancery protected a wife's equitable separate estate it was by a statutory enactment that the rights of a wife concerning property were established. The Matrimonial Causes Act of 1857, provided that in every case of a judicial separation a wife should be considered as a *femme sole* with respect to property that she might acquire before or during marriage.

---

[44] Fredman, S., *Women and the Law,* (Oxford University Press, Oxford 1997), pp. 40-43.
[45] *Ibid* p.40.

By the Married Women's Property Act 1870, certain property[46] of a married woman was deemed to be her separate property. Section 9 of the Act provided that "in any question between husband and wife as to the property declared by this Act to be the separate property of the wife" either party could by summons or motion apply in a summary way either to the Court of Chancery in England or Ireland or to the judge of the county court of the district in which either party resided. The judge was empowered to make such order or direct such enquiry or award such costs as he thought fit. There was a right of appeal just as if the order of the same judge had been made in a pending suit or on an equitable plaint. The proceedings could be in the judge's private room. To the extent set out in section 2, a married woman could bring an action in her own name in respect of her separate property.

Even before the first Married Women's Property Act of 1870, questions of title to property of spouses could arise in claims by execution creditors, trustees in bankruptcy and mortgagees,[47] or in proceedings in Chancery between the spouses themselves. Although neither spouse could bring an action against the other at common law on a contract made between them, such contracts, if relating to the wife's estate settled to her separate use, could be enforced by equitable remedies in the Court of Chancery, for example as was the case in *Woodward v Woodward.*[48] This jurisdiction, transferred to the High Court of Justice by the Supreme Court of Judicature Act 1873, was not abolished by the Married Women's Property Acts of 1870 or 1882 and it can hardly be

[46] Such as wages and earnings acquired after the passing of the Act in any employment occupation or trade in which she was engaged, or which she carried on separately from her husband and other property referred to in section 1 of the Act and deposits and savings banks referred to in section 2, and other property referred to in other sections.
[47] *Hewison v. Negus* (1853), 16 Beav. 594.
[48] (1863), 3 De G.j. & Sm. 672

supposed that Parliament intended that the titles of spouses to property should be different if one procedure for determining it were adopted instead of another.[49]

2.3 STATUS OF MARRIED WOMEN AFTER 1882.

By the Married Women's Property Act of 1882, married women were given full proprietary rights. In its opening words the Act provided that, in accordance with its provisions, a married woman should:

> "...be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee".

Also by section 1 (2) it was provided that a married woman was to be capable of entering into and rendering herself liable for and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *femme sole.* The date of the commencement of the Act was 1st January 1883. A woman who married after that date could hold all her separate property, in the same manner as if she were a *femme sole* in terms of Section 2. In terms of Section 5, in case of a woman who married before that date, she could hold as *femme sole* all the property she acquired after that date.

On the real import of the Act of 1882, Lush explains:

> "One of the most important changes effected by the Married Women's Property Act, 1882, was the alteration which it made in the status of a married woman by giving her the power of taking or defending legal proceedings. The ... married woman 'shall be capable of suing and being

[49] Per Lord Morris of Both-Y- Gest in *Pettit v. Pettit, supra* note 5, p.392.

> sued, either in contractor or in tort, or otherwise. . . . in all respects as if she were *femme sole,* and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property ...and any damages or costs recovered against her in any such action or proceeding shall be payable out of her own separate property,' and not otherwise."[50]

As earlier stated, prior to this Act and the preceding one of 1870, a married woman could not sue as *femme sole* except under exceptional circumstances the first of such circumstances being:

> " ...if the husband was civilly dead, or if she carried on a trade within the custom of the City of London.... In the last case her power to sue was confined to suit in the City Courts, but even there her husband must be joined, and did not extend to the courts of Westminster, where the ordinary common law rule that a *feme covert* could not sue alone in the superior courts was strictly enforced."[51]

The other exceptional circumstances were where she could sue as co- plaintiff with her husband "in which case the action was regarded as the husbands' "[52], or (in Chancery) "by her next friend, unless by leave of the Court, on giving such security for costs as the Court might require", or by "her next friend in Chancery without her husband, and an application to stay an action unless he was joined was refused. On the other hand, she

---

[50] S.N. Grant- Bailey, *Lush on the Law of Husband and Wife, 4th ed.*, (London: Stevens and Sons Limited, 1933) p. 573.

[51] *Ibid* p. 573.

[52] *Ibid* pp. 573-4; see also *Reeve v. Dalby,* 2 Sim. &Stu. 464*; Meddowcroft v. Campbell,* 13 b. 184, where she sued by her next friend, her husband being co- plaintiff. Where the husband sued the wife's trustee, claiming a conveyance to himself of certain property, and made his wife a defendant, it was held that the husband thereby admitted that the wife was entitled to her separate use: *Earl v. Ferris,* 19 Beav. 67, *Butterfield v. Mott* (1884), W.N. p.164.

could not in general be sued without joining her husband unless she obtained an order of the Court."[53]

As can be seen, the Act of 1882 greatly altered the status of a married woman, and section 17 thereof was cardinal in bringing to fruition the altered status. This is the section that is of primary concern to this Paper.

2.4 JUDICIAL INTERPRETATION OF S. 17.

According to all the five Law Lords in the case of *Pettit v. Pettit,* section 17 of the Married Women's Act 1882 (following on section 9 of the Act of 1870) was merely a procedural section, relating to:

> "any question between husband and wife as to the title to or possession of property," conferring on the "judge no greater discretion than he would have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion, section 17 now disappears from the scheme and the rights of the parties must be judged on the general principles applicable in any court of law when considering question of title to property, and though the parties are husband and wife, these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related...."[54]

Another important point that the Law Lords made was that marriage did not result in any common ownership or co- ownership of the property and the term "*family assets*" was superfluous and devoid of any legal meaning in as far as it did not refer to assets

---

[53] *Ibid* p. 574.
[54] Per the dictum of Lord Upjohn in *Pettit v. Pettit supra note* 5, p. 405.

separately owned by one spouse. Lord Reid stated that property belonging to a spouse remained the exclusive property of that spouse and could not be regarded as family property. To do so would amount to introducing a new conception into English law, and not merely developing existing principles.[55]

The other Law Lords concurred with him, with Lord Morris of Borth –Y- Gest explaining that there was never a suggestion in family law that the status of marriage was to result in any common ownership or co-ownership, or indeed that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another.

Section 17 was, from the outset, laden with difficulties, with many cases[56] showing acute differences in opinion in the Court of Appeal. According to Lord Reid, some of these difficulties arise due to the diverse nature of the facts before the court: sometimes both spouses have contributed in money to the purchase of a house: sometimes the contribution of one spouse, has been otherwise than in money: sometimes one spouse owned the house and the other spent money or did some work improving it.[57] What was never in doubt was that section 17 was merely procedural one and as explained by Lord Romer in *Cobb v. Cobb,* [58] the power of the court was limited to ascertaining the respective rights of husband and wife to disputed property.

---

[55] *Ibid* p. 972.
[56] Examples are analysed in *Pettit v. Pettit, supra note* 5.
[57] *Ibid* p.388.
[58] [1955] 2 ALL E. R. 696 p.700; [1955] WLR 736 p. 737

Yet even though it might appear that English law was settled on the question of the application of section 17, it was not until the matter came before the House of Lords in *Pettitt v. Pettitt* and *Gissing v. Gissing*[59] that the differences of opinion as to the way in which the powers of the court under section 17 of the Married Women's Property Act 1882 should be exercised became apparent. These arose from the words in the section whereby the judge is to make such order "as he thinks fit." Lord Denning, in *Hine v. Hine,*[60] was of the opinion that the court was entitled to make such orders as appeared to be just, including passing property rights from one spouse to the other. In *Appleton v. Appleton,*[61] he went further and stated that the court had the power to create agreements in favour of spouses, even though they themselves had never envisaged, based on fair play and just considerations.

But following the decisions in *Pettit v. Pettit* and *Gissing v. Gissing* it is became clear that the view expressed by Romer L. J. was right, and that Lord Denning was wrong: section 17 is a purely procedural section devised as a means of resolving a dispute or question as to title rather than as a means of giving some title not previously existing. In a question of the title to property the question for the court is "whose is this" and not "to whom shall this be given" According to Lord Reid, there is no power under section 17 for the court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the court thinks the parties would have agreed had they discussed the possible breakdown or ending of their relationship. Nor is there power to

[59] [1970] 2 ALL E.R. 780; [1970] A.C. 777.
[60] [1969] 3ALL E. R. 345.
[61] [1965] 1 WLR 25.

decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated.[62]

Another important point was made by the House of Lords, particularly in *Pettitt v. Pettitt*, where it was demonstrated that there is no merit in suggestions that property rights may be different before and after the breakdown of a marriage. This is irrelevant in determining where the ownership lay before the breakdown: the breakdown will merely have caused the need for a decision but will not of itself have altered whatever was the pre-existing position as to ownership.

Lord Denning appears to have realized the folly of his argument because he expressed hope in *Kowalazuk v. Kowalazuk*[63] that in future, after there had been a divorce, the property rights of the spouses may be adjusted by means of an application under what is now section 24 of the Act of 1973, since it is unnecessary to decide the exact property rights under section 17 of the Act of 1882 when all appropriate orders can be made under the Act of 1973.[64] Expressing hope, however, never solved the problems associated with distribution of property under Section 17.

Fribance v. Fribance[65] appears to have settled the place of Section 17 in England, thereby exposing its injustice to litigants who were once married, had legitimate property rights against each other, but w ere at the time of taking out summons divorced. In this case, on

---

[62] *Pettit v. Pettit, supra* note 5 p. 996.
[63] [1973] 1 W.L.R. 930 p note 5 p. 996.
[63] [1973] 1 W.L.R. 93. 934.
[64] *Supra* note 13 p. 195.
[65] [1955] ALL E. R. 787.

September 8th 1955, the wife issued a summons under section 17 of the Married Women's Property Act, 1882, for the determination of a dispute as to the title or possession of property. She had previously obtained a decree *nisi* of divorce, which was made absolute on the husband's application on October 4th 1955. On October 17, 1955, the wife's summons under Section 17 came before the registrar who referred the matter to the judge in view of the fact that the parties were no longer husband and wife.

Finally for avoidance of doubt, the place of section 17 in English Law was settled by enactment of an Act of Parliament, and in a nutshell, this was the outcome: since the wording of the section refers to questions "between husband and wife", it was held in *Pettit v. Pettit*[66] that before the Matrimonial Proceedings and Property Act, 1970 came into operation proceedings could not be commenced after the marriage had been ended by decree *absolute* of divorce or nullity, though proceedings started before decree *absolute* could be continued thereafter. Section 39 of that Act now provides that proceedings can be commenced by either party although the marriage has been dissolved or annulled, so long as the application is made within three years of the decree *absolute*. Thus if the inter-related questions of title to property and adjustment of property rights cannot be finally determined before the marriage is ended, the summary procedure for determination of the former question will remain available for a reasonable time after the final decree. Incidentally, section 17 has also been applied by the Law Reform (Miscellaneous Provisions) Act, 1970, section 2 to property disputes between the parties to broken engagements to marry, provided the application is made within three years of the termination of the agreement.

---

[66] *Supra* note 5.

And this amendment by enactment was despite the fact that the House of Lords insisted that the law was as clear as daylight. Lord Morris of Borth – y – Gest in *Gissing v. Gissing*[67] observed that when questions arose between spouses or between former spouses or in relation to the affairs of one or another of them concerning the beneficial ownership of property the task of a court would often be one of much difficulty. But this difficulty was not because the principles of law were in any way obscure or in doubt. Rather, it was because the nature of the evidence would often not be specific and precise.

Yet one wonders why, if the principles of law are so clear, the English Parliament found it necessary to enact no less than sixteen statues to clarify on matters relating to property disputes between husband and wife.

2.5 STATUTORY DEVELOPMENTS.

Since 1882, England has enacted no less than 16 statutes[68] to improve on the MWPA and family law generally. These statutes have had a profound effect on the law relating to property disputes not just between spouses, but also between engaged couples. The law currently in England even caters for the children of a broken marriage and likewise

---

[67] *Supra* note 58.

[68] The Married Women's Property Act, 1893; The Married Women's Property Act, 1907; The Law Reform (Married Women & Tortfeasors) Act, 1935; The Married Women's (Restriction Upon Anticipation) Act, 1949; The Married Causes (Property and Maintenance) Act, 1958; The Law Reform (Husband and Wife) Act, 1962; The Matrimonial Women's Property Act, 1964; The Matrimonial Homes Act, 1967; The Law Reform Act, 1969; The Matrimonial Proceedings and Property Act, 1970; The Law Reform (Miscellaneous Provisions) Act, 1970; The Administration of Justice Act, 1970; and The Matrimonial Causes Act, 1973. Even though this paper is restricted to the period up to 1973, it may still be added that there have also been further statutes, specifically the Matrimonial Homes and Property Act, 1981, and the Matrimonial Homes Act, 1983.

affects the rights of third parties. The Matrimonial Homes Act 1967 was intended not only to give to each spouse rights of occupation in the matrimonial home enforceable against the other spouse in whom the legal estate is vested, but also to provide means of protecting those rights against the claims of third parties"[69]

It provides that where one spouse is not entitled to occupy a dwelling house by virtue of any estate or interest or contract, or by virtue of any enactment giving him or her the right to remain in occupation, the spouse not so entitled will have certain rights of occupation, which include the right not to be evicted from the dwelling house, or any part thereof if already in occupation, and where he or she is not in occupation the right to enter and occupy the dwelling house with the leave of the court.[70] These are important developments in protecting a wife who has no proprietary, contractual or statutory right to remain in the matrimonial home. This is the wife Lord Denning referred to as "bare,"[71] although as the Morton Commission on Marriage and Divorce observed,[72]

> "Wives may be selfish and grasping as well as husbands; it is necessary to guard against the risk that substantial injustice may be done to husbands as a result of the measures designed to alleviate the hardship which some wives may suffer."

---

[69] *Supra* note 13 p. 203.

[70] *Ibid* p. 204. The dwelling house, however, must have been a matrimonial home at one time. These rights of occupation under the Act are to be a charge on that estate or interest which is registrable as a Land Charge Class F under the Land Charges Act 1925, or in the case of a registered land, as a notice or caution under the Land Registration Act 1925. The registration of such a charge is important in that it ensures that thereafter there will be no sale or mortgages of the dwelling house by the spouse in whom it is vested without the consent of the other spouse. The importance of this is that it enables the court, should it be so minded, to deal with the matrimonial home, "unsold and unmortgaged, in the exercise of its powers of adjustment of property rights on the breakdown of the marriage under section 24 of the Act of 1973, though it will be of no assistance in relation to a mortgage already in existence when the charge was registered, which will take priority over the charge."

[71] *Gurasz v. Gurasz,* [1970] p.111.

[72] Cmnd. 9678, para. 648.

Moreover the general state of the law relating to settlement of property disputes between spouses and ex-spouses is discriminatory against women in that it fails to take into considerations a married woman's indirect contribution to the acquisition of matrimonial property. According to Lord Diplock in cases where a wife makes no direct contribution towards the purchase of the matrimonial home, even though she may have substantially contributed in other areas thereby lessening the husband's load in purchasing the home, her conduct will be viewed as simply consistent with a common intention to share the day-to-day expenses.[16]

There is therefore need to address the conflict in Kenyan judicial decisions and propose a resolution to such conflict. And in addressing this conflict, it is important to also look at the general problems, both procedural and substantive, that are associated with section 17 and ask whether in fact the MWPA, a foreign and antiquated legislation, has any relevance to current Kenyan circumstances.

1.3. OBJECTIVES.

The objectives of this study are three fold.

The first is to demonstrate that judicial decisions in Kenyan courts on the application of section 17 have been contradictory.

[16] *Pettit v. Pettit supra* note 5 p.793. This position has been restated by the Court of Appeal in *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR.

The second is to demonstrate the injustices that section 17 occasions married women by its discriminatory nature and the general difficulties resulting from the said section.

The third is to argue a case, and make recommendations, for reform in family law in the field of matrimonial property.

1.4 JUSTIFICATION.

This study is important for policy and law reform in that it identifies the flaws inherent in the field of family law, specifically in settlement of property disputes between spouses and ex- spouses, and makes recommendations for reforms that, if adopted, could bring positive change and help develop this field of law.

There is need for, at the very least, the enactment of an amendment to section 17 in line with what was done in England in 1967, 1970, and 1973 or as a more permanent solution, the repealing of the entire MWPA and the enactment of a new legislation to deal with distribution of property after divorce.

1.5. RESEARCH QUESTIONS.

1.5.1 How can the conflict in judicial decisions in Kenya on section 17 of the Married Women's Property Act, 1882, be resolved?

1.5.2 Is there a need for the enactment of new legislation to deal with settlement of property disputes between spouses and ex-spouses?

1.6 HYPOTHESIS.

The application of the section 17 of the MWPA as interpreted by our various courts is uncertain and contradictory. The current law in Kenya relating to settlement of property disputes between spouses and ex-spouses is unjust and discriminatory against women and there is need for its reform. Moreover, this law has not kept pace with other socio-political developments in Kenya and is therefore outdated.

1.7 THEORETICAL FRAMEWORK

What is good law and what are the requirements for an efficient and just legal system? Does conflicting law constitute law and does it augur well for the rule of law? The whole of jurisprudence has been said to be an attempt to answer the question *'what is law'* and there is no consensus on what the law is. All jurisprudes who have discussed this question have ultimately failed to give a definition of what the law is but instead compartmentalized it by defining it by what it is, what it does, its purpose, etc. What cannot be in doubt is that good law must serve the common and just aspirations of the citizenry and, in line with the sociological theories of law must reflect the values that society holds dear –justice and equality.

Lon Fuller,[17] a Naturalist, has this to say of the law: "Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties..."

It is also important that law be just and fair. For Fuller principles of law are not just about order, they are about order. Adams and Brownsword have this to say of Fuller and his philosophy on law and morality:

> "The crux of the inner morality is the principle of congruence, for this ensures the idea of the Rule of Law, understood as a regime of fair play (of sticking to the rules) between legal officials and citizens. To underline this claim, Fuller invokes a distinctions between the law as a managerial enterprise and law as reciprocal enterprise."

The twin principles of generality and of faithful adherence by the government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction:

> "Law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of the government being that of standing as a guardian of the integrity of this system."[18]

---

[17] Fuller, L., "The Morality of Law, 1969" in Freeman, M. D. A. (editor), *Lloyd's Introduction to Jurisprudence*, 7th ed., (Sweet & Maxwell, London, 2001) p157.
[18] Adam, J. N., & Brownsword, R., *Understanding the Law*, 2nd ed., (Sweet & Maxwell, London, 1999) p.17.

To add to Fuller's voice, Hans Kelsen[19] argues that law requires a certain minimum degree of regularity and certainty, for without this it would be impossible to assert that what was operating in a given territory amounted to a legal system. Clearly, however, no exact criterion can be applied for determining what degree of regularity or certainty is necessary to achieve this aim, and States may vary from arbitrary tyrannies, where all are subject to the momentary caprices of a tyrant, to the elaborate and orderly States associated with liberal democracies.

On the flip side, H. L. Hart,[20] an Englishman and a Positivist, is a proponent of the separationist theory which was formulated by John Austin, another Positivist, thus:

> The existence of law is one thing, its merits or demerits another. Whether it be or not be is one enquiry. Whether it be or not be conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it..."[21]

In other words, law and morality have no necessary connection and law is purely utilitarian.

To Fuller, law cannot, as Hart would have it, be defined merely by reference to itself, but by reference to the inner morality. Fuller then proceeds to list eight conditions that must be met for "it" to be law, to wit:

- It must be promulgated;
- It must be prospective, i.e., address the future;

---

[19] "The Pure Theory of Law" in Freeman M. D. A. (editor) *Lloyd's Introduction to Jurisprudence*, 7th ed., (Sweet &Maxwell, London, 2001), p. 276.
[20] Hart, H. L. A., *The Concept of Law*, 2nd ed. (Oxford at the Clarendon Press, 1961).
[21] Freeman *supra* note 16, pp.129-131.

- It must be general;
- It must be clear, certain and unambiguous;
- It must not contradict itself;
- It must not contain impossibilities, i.e., it must be enforceable and applicable
- It must be constant/consistent through time; and
- It must have congruence between what it says and what officials do.[22]

Thus the reason why this study will take a Naturalist leaning, because questions of justice and fairness are intertwined with morality.

Law must be clear and unambiguous, irrespective of whether it is 'good' or 'bad' law, be it from the point of view of a Positivist or a Naturalist. It must apply similarly and equally to all who are subject to it and there ought not to be double standards, or different decisions arrived at applying the same law on similar facts. The law on judicial precedents demands that precedents must be consistent and where there is any deviation from an earlier decision, it must arise out of material differences in facts and circumstances, and it behoves the court a duty to distinguish the differing decision from the precedent. This is the spirit behind the doctrine of *stare decisis et non quieta movere* (to adhere to precedents and not to unsettle things that are established).

[22] Fuller, L., *supra* note 16.

The law must be clear and consistent, and any conflict that arises in judicial decisions negates this basic principle of law, and it must be resolved if the law is to serve its primary function of ensuring justice and fairness for all, equally.

This is not the case at present in Kenya with regard to section 17 and family law on matrimonial property. There is therefore need for an examination of Section 17 to determine whether indeed it meets the basic requirement of good law and if not, what needs to be done about it.

1.8 LIMITATIONS.

It is not possible to access to all decisions made by the High Court of Kenya and the Kenya Court of Appeal on the issue, bearing in mind that law reporting is yet to encompass all decisions, it will therefore not be possible to examine and critique every relevant court decision.

1.9 RESEARCH METHODOLOGY.

This research is library based, requiring reference to both primary and secondary materials. Primary materials are cases, statutes, books, published thesis and dissertations. Secondary materials will consist of scholarly journals, newspapers, reports of proceedings in Parliament (the Hansard), reports by government appointed commissions and law firms, and unpublished thesis and dissertations.

1.10 LITERATURE REVIEW.

This is a fairly new controversy in the Kenyan context and despite all my best efforts, I have not come across any work addressing the need for resolution of judicial conflicts on section 17, with specific reference to the conflicting decisions on whether or not the High Court and the Court of Appeal have jurisdiction to entertain proceedings brought under the said section by divorced spouses. This may be explained by the fact that it was not until 1996 that the courts addressed the question and the subsequent rulings gave rise not just to the contradiction, but also to the need to have Parliament legislate on section 17.

In England however, the issue has received considerable attention, beginning with a very in-depth discussion on the place of section 17 by the House of Lords in *Pettit v. Pettit* where the difficulties relating to its application were analysed consequent to which the said MWPA was amended through enactment of the Matrimonial Proceedings and Property Act 1970. The Act provided for the application of the provisions of section 17 to parties whose marriage had been dissolved or annulled within three years of the application under the said section. The amendment by was necessitated by the findings of the Law Lords when they concurred that it was necessary for the Legislature to intervene.

Rayden's Practice and Law on Divorce[23] has also dealt with the issue and come to the conclusion that an application under section 17 may only be made whilst parties are either husband and wife, or before the issuance of decree *absolute.* Tolstoy on Divorce[24] likewise discusses the subject and comes to the same conclusion.

Passingham[25] has dealt with the issue in the English context, demonstrating that it was meant to be a "convenient method of determining summarily 'any question between husband and wife as to the title to or possession of property'... but its numerous shortcomings led to the enactment of the Matrimonial Homes Act 1967 and the Matrimonial Proceedings Act, 1970. The law applicable in England is, however, different from that of Kenya, as the scope of section 17 has been expanded by the enactment of the Acts of 1967, 1970 and 1973.

Clark, Jr. [26] explains that in the United States of America property may be divided even if the divorce is denied and despite there being numerous statutes on the equitable distribution of "matrimonial" property in the different states, "there seems no substantial basis for holding that such statutes have any constitutional infirmities, so long, of course, as they apply even-handedly to both husbands and

---

[23] 10th ed., (Butterworths, London, 1967).
[24] *Tolstoy on Divorce*, 7th ed., (Sweet & Maxwell, London, 1971), p.177.
[25] Passingham, B., *Law and Practice in Matrimonial Causes*, 2nd ed. (Butterworths, London, 1974), p. 194.
[26] Clark Jr., Homer, H., *The Law of Domestic Relations in the United States*, 2nd ed., (West Publishing Co., St. Paul, Minn. 1988) p. 591.

wives"[27] Perhaps there is a case for Kenya to enact various statutes for the different marriage systems obtaining in Kenya.

The report by the law firm of Mohammed & Muigai Advocates[28] has examined the state of family law in Kenya generally and made recommendations on the Gender Responsive laws project[29] in the area of marriage, matrimonial property, domestic violence and gender equality. The report examines the history and developments in the review of marriage laws, analyses the Matrimonial Property Bill 2007 and the Gender Equality Bill 2007 (also referred to as the Equal Opportunities Bill) and gives recommendations in support of the bills. But the report is in exhaustive in that it does not identify the problem areas of the proposed Matrimonial Property Bill of Gender Equality Bill, proposing instead for their adoption. Yet the Matrimonial Property Bill, unless it is modified, is bound to raise more confusion, particularly with its generalized definition on what constitutes matrimonial property[30] and its failure to embrace parties in relationships other than marriage.

Likewise, Wachira Githinji has analysed the question of proprietary rights from a gender perspective and observed that despite the MWPA being the law applicable in questions of property disputes between spouses, "[I]t is instructive to note that

---

[27] *Ibid* p. 591.

[28] Reports by Mohammed & Muigai Advocates to the Kenya Law Reform Commission, *Review and Analysis of the Marriage Bill 1993, the Matrimonial Property Bill, the Gender Equality Bill and the Family Protection (Domestic Violence) Bill 2007.*

[29] These four bills are part of the Gender Responsive Laws Project.

[30] S.7 (1) (a) to (c), defines matrimonial property as the matrimonial home or homes, house hold goods and effects in the matrimonial home or homes, immovable property, owned by either spouses which provide the basic income for sustenance of the family.

that our Legislature has to date not passed a Kenyan Act to deal with this issue."[31] He nonetheless only restates the law and does not propose any reforms.

Human Rights Watch has, in one of its reports, reported that "[E]ven women who pay for property and have title solely in their name are not immune from property rights violations."[32] The report examines issues of property, including disputes that arise during the subsistence of, and after, marriage. But it falls short by failing to make any recommendation on how to improve the sorry state they so eloquently capture, whether by enforcing existing law or enacting new appropriate law.

A number of LL.B students' dissertations have discussed section 17 and property rights generally, the most relevant to this research being Mukiri,[33] Ranji,[34] Macharia[35] and Gitia[36], but though they all generally touch on property rights following the break –up of relationships, they have not addressed procedural conflicts in judicial decisions in crystallizing/ realizing those rights, nor indeed exhaustively analysed the substantive difficulties experienced in the application of

---

[31] " A Gender Perspective of Court Cases Related to Property and Inheritance Rights in Kenya", in Kanyi, W. and Ngunjiri M, (editors) *Gender Perspective on Property and Inheritance Rights – Kenya* (The Collaborative Centre of Gender & Development, 2002), pp .19 -20

[32] *Double Standard: Women's Property Rights Violations in Kenya* (Human Rights Watch, Vol. 15, No. 5 (A), March 2003), p.27.

[33] Mukiri, P, *Matrimonial Property Rights with Reference to the Family Law System in Kenya,* (LL. B Dissertation, University Nairobi, 1990.)

[34] Ranji, N. L., *Gender Equality & Law Reform in Marriage & Family Law in Kenya,* (LL. B Dissertation, University of Nairobi, 2000).

[35] Macharia M. J., *The Emerging Trend in the Devolution of Matrimonial Property in Kenya: The Case for a new Matrimonial Causes Act,* (LL. B Dissertation, University of Nairobi, 2002).

[36] Gitia, S.J. W., *Presumption of Marriage & Property Rights for Cohabitees* (LL.B Dissertation, University of Nairobi, 2003).

section 17. Gitia[37] has gone a bit further by dealing with the doctrine of presumption of marriage in the Kenyan context but has not gone far enough to address issues relating to engaged couples, which are an ancillary study in this Research Paper. Questions of property rights relevant to this research have also been addressed by other LL.B students, amongst them, Ikiara,[38] Musyimi,[39] Mwaniki,[40] and Karuga.[41] Karuga's paper requires particular mention because it deals generally with the practice and procedure of Parliament but has not exhaustively discussed the hurdles that have beset reform in family law since 1964.

Cretney's [42] contribution in the field of settlement of property disputes is useful but only addresses the English situation, which is obviously different from that obtaining in Kenya. Whilst it is important to look to England for guidance on law reform in this area, such guidance must be informed by Kenya's peculiar circumstances.

---

[37] *Ibid.*

[38] Ikiara, J. M., *The Various Marriage Systems in Kenya: Is there a Case for a Uniform Legislation Framework?* (LL. B Dissertation, University of Nairobi, 2003).

[39] Musyimi, F. K., *Cohabitation and its Legal Consequences with Specific Reference to Kenya: A Case for Legal Intervention,* (LL.B Dissertation, University of Nairobi, 2003).

[40] Mwaniki, J. W., *Disadvantaged Groups & The Role of the Law in Leveling the Plane: A Case Study on Women & Children,* (LL.B Dissertation, University of Nairobi, 2003).

[41] Karuga, M. N., *A Critical Appraisal of the Kenya Parliament,* (LL.B Dissertation, University of Nairobi, 2004).

[42] Cretney, S. M., *Principles of Family Law*, 3rd ed., (Sweet & Maxwell, London 1979).

Lord Diplock[43] observed that "[W] hen parties enter into an agreement which they intend to give rise to legally enforceable rights and liabilities, they must...contemplate that there will be some system of law by which their mutual rights and obligations will be determined, i.e., the substantive or "proper" law of their agreement."

[43] *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA,* 1970, 3 ALL ER 71.

CHAPTER BREAKDOWN.

CHAPTER TWO

2 DEVELOPMENTS IN THE LAW OF HUSBAND AND WIFE IN ENGLAND BETWEEN 1882 AND 1973, WITH PARTICULAR REFERENCE TO S. 17.

2.1 INTRODUCTION.

This chapter traces the development of the law of husband and wife in the field of property in England between 1882 and 1973. It follows the progression of married women's proprietary capacities at common law, which initially very limited (on the basis, purely, of her gender), to the point of equality with her male counterpart. The chapter examines landmark decisions of the Court of Chancery and the House of Lords on the state of family law in England which informed the reforms in England, particularly the enactment of the Matrimonial Homes Act, 1967 and the Matrimonial Proceedings Acts of 1970 and 1973. The overall effect of these reforms was the enlargement of the court's powers when dealing with disputes between spouses (including engaged couples and boyfriends/girlfriends) involving property, and the simplification of the procedure for settlement of such disputes. Prior to these reforms the court's powers were limited purely to determination of property rights and varying ante-nuptial and pre-nuptial settlements. Now the courts can order the transfer of property from one spouse to the other, they can award a lump sum and generally readjust the financial positions of the parties.

2.2 HISTORICAL BACKROUND.

At common law a wife's proprietary capacities were very limited. Fredman[44] explains that liberal principles of individual freedom were not extended to married women until deep into the twentieth century. Instead, the Diceyan ideal of formal equality of all individuals before the law unabashedly excluded women from the category of 'individuals'. This was epitomized by the common law of coverture which entailed that "the very being or legal existence of the wife is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover she does everything."[45] Married women were perpetual legal minors, divested of the possibility of economic independence. Any property which a married woman had owned as a single woman became her husband's property on marriage: personal property vesting absolutely, real property during the lifetime of the husband. Similarly, he had absolute right to all property which came into her hands during her marriage, including all her earned income. Although the Court of Chancery protected a wife's equitable separate estate it was by a statutory enactment that the rights of a wife concerning property were established. The Matrimonial Causes Act of 1857, provided that in every case of a judicial separation a wife should be considered as a *femme sole* with respect to property that she might acquire before or during marriage.

---

[44] Fredman, S., *Women and the Law,* (Oxford University Press, Oxford 1997), pp. 40-43.
[45] *Ibid* p.40.

By the Married Women's Property Act 1870, certain property[46] of a married woman was deemed to be her separate property. Section 9 of the Act provided that "in any question between husband and wife as to the property declared by this Act to be the separate property of the wife" either party could by summons or motion apply in a summary way either to the Court of Chancery in England or Ireland or to the judge of the county court of the district in which either party resided. The judge was empowered to make such order or direct such enquiry or award such costs as he thought fit. There was a right of appeal just as if the order of the same judge had been made in a pending suit or on an equitable plaint. The proceedings could be in the judge's private room. To the extent set out in section 2, a married woman could bring an action in her own name in respect of her separate property.

Even before the first Married Women's Property Act of 1870, questions of title to property of spouses could arise in claims by execution creditors, trustees in bankruptcy and mortgagees,[47] or in proceedings in Chancery between the spouses themselves. Although neither spouse could bring an action against the other at common law on a contract made between them, such contracts, if relating to the wife's estate settled to her separate use, could be enforced by equitable remedies in the Court of Chancery, for example as was the case in *Woodward v Woodward.*[48] This jurisdiction, transferred to the High Court of Justice by the Supreme Court of Judicature Act 1873, was not abolished by the Married Women's Property Acts of 1870 or 1882 and it can hardly be

[46] Such as wages and earnings acquired after the passing of the Act in any employment occupation or trade in which she was engaged, or which she carried on separately from her husband and other property referred to in section 1 of the Act and deposits and savings banks referred to in section 2, and other property referred to in other sections.
[47] *Hewison v. Negus* (1853), 16 Beav. 594.
[48] (1863), 3 De G.j. & Sm. 672

supposed that Parliament intended that the titles of spouses to property should be different if one procedure for determining it were adopted instead of another.[49]

2.3 STATUS OF MARRIED WOMEN AFTER 1882.

By the Married Women's Property Act of 1882, married women were given full proprietary rights. In its opening words the Act provided that, in accordance with its provisions, a married woman should:

> "...be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee".

Also by section 1 (2) it was provided that a married woman was to be capable of entering into and rendering herself liable for and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *femme sole.* The date of the commencement of the Act was 1st January 1883. A woman who married after that date could hold all her separate property, in the same manner as if she were a *femme sole* in terms of Section 2. In terms of Section 5, in case of a woman who married before that date, she could hold as *femme sole* all the property she acquired after that date.

On the real import of the Act of 1882, Lush explains:

> "One of the most important changes effected by the Married Women's Property Act, 1882, was the alteration which it made in the status of a married woman by giving her the power of taking or defending legal proceedings. The ... married woman 'shall be capable of suing and being

[49] Per Lord Morris of Both-Y- Gest in *Pettit v. Pettit, supra* note 5, p.392.

> sued, either in contractor or in tort, or otherwise. . . . in all respects as if she were *femme sole,* and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property ...and any damages or costs recovered against her in any such action or proceeding shall be payable out of her own separate property,' and not otherwise."[50]

As earlier stated, prior to this Act and the preceding one of 1870, a married woman could not sue as *femme sole* except under exceptional circumstances the first of such circumstances being:

> " ...if the husband was civilly dead, or if she carried on a trade within the custom of the City of London.... In the last case her power to sue was confined to suit in the City Courts, but even there her husband must be joined, and did not extend to the courts of Westminster, where the ordinary common law rule that a *feme covert* could not sue alone in the superior courts was strictly enforced."[51]

The other exceptional circumstances were where she could sue as co- plaintiff with her husband "in which case the action was regarded as the husbands' "[52], or (in Chancery) "by her next friend, unless by leave of the Court, on giving such security for costs as the Court might require", or by "her next friend in Chancery without her husband, and an application to stay an action unless he was joined was refused. On the other hand, she

---

[50] S.N. Grant- Bailey, *Lush on the Law of Husband and Wife, 4th ed.*, (London: Stevens and Sons Limited, 1933) p. 573.
[51] *Ibid* p. 573.
[52] *Ibid* pp. 573-4; see also *Reeve v. Dalby,* 2 Sim. &Stu. 464; *Meddowcroft v. Campbell,* 13 b. 184, where she sued by her next friend, her husband being co- plaintiff. Where the husband sued the wife's trustee, claiming a conveyance to himself of certain property, and made his wife a defendant, it was held that the husband thereby admitted that the wife was entitled to her separate use: *Earl v. Ferris,* 19 Beav. 67, *Butterfield v. Mott* (1884), W.N. p.164.

could not in general be sued without joining her husband unless she obtained an order of the Court."[53]

As can be seen, the Act of 1882 greatly altered the status of a married woman, and section 17 thereof was cardinal in bringing to fruition the altered status. This is the section that is of primary concern to this Paper.

2.4 JUDICIAL INTERPRETATION OF S. 17.

According to all the five Law Lords in the case of *Pettit v. Pettit,* section 17 of the Married Women's Act 1882 (following on section 9 of the Act of 1870) was merely a procedural section, relating to:

> "any question between husband and wife as to the title to or possession of property," conferring on the "judge no greater discretion than he would have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion, section 17 now disappears from the scheme and the rights of the parties must be judged on the general principles applicable in any court of law when considering question of title to property, and though the parties are husband and wife, these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related...."[54]

Another important point that the Law Lords made was that marriage did not result in any common ownership or co- ownership of the property and the term "*family assets*" was superfluous and devoid of any legal meaning in as far as it did not refer to assets

---

[53] *Ibid* p. 574.
[54] Per the dictum of Lord Upjohn in *Pettit v. Pettit supra note* 5, p. 405.

separately owned by one spouse. Lord Reid stated that property belonging to a spouse remained the exclusive property of that spouse and could not be regarded as family property. To do so would amount to introducing a new conception into English law, and not merely developing existing principles.[55]

The other Law Lords concurred with him, with Lord Morris of Borth –Y- Gest explaining that there was never a suggestion in family law that the status of marriage was to result in any common ownership or co-ownership, or indeed that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another.

Section 17 was, from the outset, laden with difficulties, with many cases[56] showing acute differences in opinion in the Court of Appeal. According to Lord Reid, some of these difficulties arise due to the diverse nature of the facts before the court: sometimes both spouses have contributed in money to the purchase of a house: sometimes the contribution of one spouse, has been otherwise than in money: sometimes one spouse owned the house and the other spent money or did some work improving it.[57] What was never in doubt was that section 17 was merely procedural one and as explained by Lord Romer in *Cobb v. Cobb,* [58] the power of the court was limited to ascertaining the respective rights of husband and wife to disputed property.

---

[55] *Ibid* p. 972.
[56] Examples are analysed in *Pettit v. Pettit, supra note* 5.
[57] *Ibid* p.388.
[58] [1955] 2 ALL E. R. 696 p.700; [1955] WLR 736 p. 737

Following the enactment of the Matrimonial Proceedings and Property Act 1970, proceedings under section 17 can now be commenced by either party even after divorce, provided that such proceeding are commenced within three years of the decree of divorce *absolute*.[73]

As stated earlier, section 17 is a procedural provision only, empowering courts to determine in a summary way what the parties' rights in particular property are a matter of strict law and declare them accordingly. There is no power under section 17 to make orders adjusting property rights such as the court can make under section 24 of the Matrimonial Causes Act 1973.[74] According to Passingham[75], section 24 (1) (a) is designed to enable the court, where the marriage has irretrievably broken down, to adjust the property rights of the parties by ordering that property which unquestionably belongs to one of the spouses be transferred to the other or to, or for the benefit of, a child of the family. Such orders can be made in respect of any property to which either spouse is entitled, whether in possession or reversion, and whether the property was acquired before or after the celebration of marriage, but not, of course, in such a way as to affect any rights which a third party may have in that property.

This change in law is well captured by the Court of Appeal in *Wachtel v. Wachtel*[76], which made two important findings and clarifications. Firstly, as Seago[77] explains, the

---

[73] S.39.
[74] *Supra* note 2 p 405; Black, J.M. & Bridge, A.J., *A Practical Approach to Family Law*, 2nd ed., (Blackstone Press Limited, London, 1989.) p. 394.
[75] *Supra* note 24.
[76] [1973] Fam. 72.
[77] Seago, P. & Bissett- Johnson, A., *Cases and Materials on Family Law,* (Sweet & Maxwell, London, 1976) p. 288.

months after the introduction of the Matrimonial Proceedings and Property Act 1971 (whose principles were re-enacted in the Matrimonial Causes Act 1973) there was some evidence that the bitterness and desire to portray the respondent in the worst possible light that had been a feature of the old divorce law became a feature of proceedings relating to ancillary relief. However with the decision by Lord Denning in *Watchel v. Watchel* it became clear that the courts were to adopt a different approach altogether.

Lord Denning pointed out that under the previous divorce law the concept of the matrimonial offence that had been paramount to all had been altered by the introduction of the concept of irretrievable breakdown. He observed that "there will no doubt be a residue of cases where the conduct of one of the parties is ... both 'obvious and gross', so much that to order one party to support another whose conduct falls in to this category is repugnant to anyone's sense of justice.[78]

He explained that in such a case the court remained free to decline to afford a financial support or to reduce the support, which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so, he held, could be impose a fine for supposed misbehavior in the course of a unhappy married life.

The second important point that emerges from this case relates to the now expanded powers of the court and Lord Denning observed that previously the court had limited

[78] *Ibid* p. 289.

powers in regard to the capital assets. They could determine the property rights of the parties. They could vary any ante- nuptial or post- nuptial settlements. But they could not order a transfer of property from one to the other. It could not even award a lump sum until 1963. The way in which the courts made financial provision was by way of maintenance to the wife. But following the Act of 1970 the court has power, after a divorce, to effect a transfer of the assets of one to the other. It set out in section 5 various criteria for doing so. The Act of 1970 was not in any sense a codifying statute. It was a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages have been dissolved under the Act of 1969. the provisions of the Act of 1970 were designed to accord the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end.

Passingham [79] explains that amongst the matters to which the court is required to have regard in exercising its powers to grant ancillary relief are, as was held in *Fribance v. Fribance,*[80] the property and other financial resources of the parties. In *Samson v. Samson,*[81] it was held that the procedure under section 17 of the Act of 1882 was not limited to real property but could apply to property of any kind: to wedding presents (as to which the answer may well be that those from the husband's family and relations belong to him, and those from hers to her), stock and shares, furniture or the credit balance in a banking account or even the benefit of a hire – purchase agreement. Passingham explains further that prior to the Matrimonial Causes (Property and Maintenance) Act 1958, section 7, there was no way in which the court, in proceedings

[79] *Supra* note 25 p. 195.
[80] *Fribance v. Fribance,* [1956] p. 99.
[81] [1960] 1 ALL E.R. 653

under section 17 of the Act of 1882, could give a judgement ordering the payment of money. Whilst one spouse remained in possession of property in respect of which the title was disputed the section could enable the court to determine the question of title. If that spouse had disposed of the property, and expended the proceeds of sale on the acquisitions of other assets, or simply spent them, the summary procedure under the section was not available. Such was the finding of the court in *Tustall v. Tunstall*[82] The court now has power to make orders as to the ownership of property which represents the proceeds of sale or order the payments by one spouse to the other of such sum as is appropriate.[83]

These are momentous reforms and they have the effect of radically altering the face of section 17 of the Act of 1882. The point is clear and it is that the Act of 1882 has been found to be inadequate and, with such inherent difficulties, it would be unwise to apply it in solving property disputes between spouses.

Passingham[84]explains this succinctly when he says:

> "Repetition is boring but it is surely not in vain to emphasize again that in matrimonial causes it will generally suffice to rely upon the power of the court under the Matrimonial Causes Act, 1973 rather than *upon the difficulties resulting from section 17 of the Act of 1882.* Bagnall, J., put the point so well in *Cowcher v Cowcher*[85]when he said:
> 'But I cannot escape the thought that Parliament evinced an intention that in the vast majority of cases justice would be done by exercising the capital and income resources of the parties rather than isolating one asset – the matrimonial home – and by inferring a dubious consensus from equivocal facts fitting that particular asset uncomfortably into the framework of a resulting trust.'"

---

[82] [1953] 2 ALL E.R. 310.
[83] Matrimonial Causes (Property and Maintenance) Act 1958, S. 7 (3) and (4).
[84] *Supra* note 25 p. 202.
[85] [1972] W.L.R. 425, 437.

What, then, are the difficulties posed by section 17 of the Act of 1882?

CONCLUSION.

English law has developed tremendously since mid – 1800, and the overall effect of these developments, particularly following the Acts of 1967, 1970 and 1973 was not only to simplify the law, but enlarge the powers of the court when dealing with settlements of property disputes between spouses and ex-spouses. Indeed, even though section 17 has not been repealed or replaced, these developments seem to have removed it from the scheme of matrimonial disputes and as stated in *Pettit v. Pettit*[86], the rights of the parties must be judged in the same manner and on the same principles applicable to the settlement of claims between persons who are not spouses.

But the MWPA remains relevant and applicable in England, as it is the rock upon which these reforms have been carried out, and indeed, all reforms in England have been aimed at improving the application of the MWPA, not doing away with it.

[86] *Supra* note 5.

CHAPTER THREE

3 PROBLEMS OF SECTION 17.

3.1 INTRODUCTION.

This chapter looks at the substantive and procedural problems that section 17 of the MWPA presents in settlement of property disputes between spouses and ex-spouses. In doing so the chapter examines these problems from both English and Kenya's perspective. Property and personal rights are distinguished, as the distinction is crucial in dealing with third parties. This chapter likewise looks at gender inequalities and comes to the conclusion that section 17, as it is applied in Kenya, is oppressive, discriminatory and there is a need for reform in family law.

3.2 PROPERTY AND PERSONAL RIGHTS DISTINGUSHED.

It is important at this stage to briefly discuss and distinguish "property" rights and "personal" rights. According to Cretney,[87] use of the word "property" in different senses by lawyers and laymen is a fertile source of confusion in this complex and controversial field. In attempting a definition of a property right, he quotes Lord Wilberforce in *National Provincial Bank Ltd. v. Ainsworth*[88] who observed that such a right, in legal language, must be "definable, identifiable by third parties, capable in

[87] Cretney, S.M., *Principles of Family Law, 3rd* ed., (London: Sweet and Maxwell, 1979) p. 220.
[88] [1965] A.C. 1175 at P. 1248.

its nature of assumption by third parties, and have some degree of permanence or stability."

While rights may be similar, they can be either proprietary or personal and differentiating the two is crucial: if my right is proprietary I can, in principle, assert it against third parties, even innocent purchasers. If it is personal, then I cannot enforce it against a third party at all. I may be able to sue the grantor of the right for damages (for breach of contract) but that may not be an adequate remedy (e.g. if he is insolvent).[89] This was the case in the *National Provisional Bank Ltd. v. Ainsworth* where the wife had deserted the husband, and whist it was not in doubt that she had a right to be provided with housing by her husband, and that she could have obtained an injunction to stop him from mortgaging the dwelling house, and thereby interfering with her right, her right was incapable of binding the chargee. The House of Lords held that "the rights of husband and wife must be regarded as purely personal ... these rights as a matter of law do not affect third parties."[90]

From a sociologist's point of view, the difference in approach from the lawyers' concept of properity is shown in this quotation:

> "the family in the sense of household community is an economic entity with funds of money, with moveable and often immovable property dedicated to common use. Since, in our societies, marriage is the basis of the normal family, it follows that marriage must have a profound effect upon the property of the spouses."[91]

---

[89] Cretney, *supra* note 87 p. 220.
[90] *Per* Lord Upjohn at p. 1233; cf. *Caunce v. Caunce* [1969] 1 W.L.R. 286 where it was held that the wife had a proprietary right.
[91] Cretney, *supra* note 87 pp. 220- 221, quoting O. Kahn – Freund, *Matrimonial Property Law (*ed. W. Friedmann, 1955), pp 267-268.

The confusion that arises from this approach is that it implies that *use* of property must have a direct relation with property rights, whilst in fact usage by a spouse of the other's exclusive property, for example, a motor vehicle, cannot by itself confer a right to the user.

Thus the expression "family assets" which was used by Lord Denning in *Hine v. Hine* and by Lord Diplock in *Ulrich v. Ulrich*[92] may be, as it is in relation to adjustment of property rights consequent upon the breakdown of a marriage, a convenient one to describe property acquired by either spouse and intended for the common use or enjoyment of both spouses or their children, such as the matrimonial home and its furniture; but it has no connotation as to the ownership of such assets.[93]

3.3 GENERAL DIFFICULTIES OF S. 17.

Having made this brief distinction, I now turn to the general difficulties associated with section 17.[94] As Passinghman[95] rightly points out, "[T] he subject of the property rights of husband and wife is in one sense no part of the law relating to matrimonial causes, except in so far as the courts, when making a decree of divorce, nullity or judicial separation, have power to modify existing rights...."

---

[92] [1968] 1 W.L.R. 180, 189.
[93] Cretney, *supra* note 87 p. 197.
[94] But there is need to point out that this paper not primarily concerned with the problems of section 17 *per se*, but with the difficulties that have been encountered in its application in Kenya following the granting of a decree *absolute*.
[95] *Supra note 25 p. 194.*

Section 17 is associated with a host of difficulties. Many questions touching on property arise following separation or divorce:

- Is property "inherited by or gifted to one spouse either before or during coverture subject to an order under section 17?"[96]
- Do judges have power to apportion proprietary rights, which never existed previously to a spouse?
- Do judges have the power to order the sale and distribution of matrimonial property?
- In cases where matrimonial property is encumbered by a charge or mortage, how should the court handling an application under Section 17 deal with the unpaid loans?
- Does the court have jurisdiction to deal with shares in company in which one or both spouses are shareholders?[97]

These are but a few of the difficulties that face judges dealing with section 17.

3.4 **GENDER INEQUITIES.** .

Lord Hobson[98]observed that some injustices that may exist in property rights between husband and wife involved matters of policy which were outside the realm of judicial

[96] *Pettit v. Pettit supra* note 5 p388.
[97] *Ibid* p. 790.
[98] *Ibid* p. 987.

interpretation and these could only be corrected by Parliament through appropriate legislation.

Lord Diplock, whilst on the place of section 17 in *Pettit v.Pettit*,[99] explained this gender injustice when he stated that in situations where the wife had made no initial contributions to the cash deposit and legal charges and no direct contribution to the mortgage installments, nor any adjustment to her contribution to other expenses of the house half of which could be inferred was referable to the acquisition of the house, then in the absence of express agreement between the parties, there was no material to justify the court in inferring that it was a common intention of the parties that she should have any beneficial interest in the matrimonial home conveyed into the sole name of the husband merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct was no less consistent with a common intention to share the day-to-day expenses of the households, while each spouse retained a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift.

Therefore, and as rightly observed by the court in *Watchel v. Watchel*[100], it did not matter that a wife had made other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etcetera. In England however, this "injustice" was addressed by the enactment of the Matrimonial Proceedings and Property Act, 1970 which empowered the court to make appropriate property adjustment orders.

---

[99] *Ibid* p. 793.
[100] *Supra* note 76 p. 71.

Parliament in England even went further and enacted the Matrimonial Causes Act 1973, whose section 24 re-enacted the power granted by section 5 of the Act of 1970 which under subsection (1) (f) gave the court the power to have regard, when dealing with a question on the transfer of property, to, among other considerations, "the contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family."

It is not that these important developments are unknown to the Attorney General of the Republic of Kenya. The Court of Appeal in *Kamore v. Kamore*[101] observed that:

> "Until such time as some law is enacted, as indeed it was enacted in England as a result of the decisions in *Pettit v. Pettit* and *Gissing v. Gissing* to give proprietary rights to spouses as distinct from registered title rights, section 17 of the Act must be given the same interpretation as the Law Lords did in the said two cases. Such laws should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings Act of 1970. The Matrimonial Causes Act of 1973 also made a difference."

Yet this is in direct contrast to what the Court of Appeal had stated in *Kivuitu v. Kivuitu*[102] where Omolo, Ag. JA was of the opinion that a wife's non-monetary contribution should be taken in to account. In concurring with Omolo, Ag. J.A., Kwach, J.A. in *Nderitu. Nderitu*[103] argues that a wife's contribution, and more particularly a Kenyan African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. In his opinion, is incumbent therefore upon a trial judge hearing an application under section 17 of the Act to take into

---

[101] [2002] 1 EA 89.
[102] *Supra* note 9.
[103] C.A. NO. 203 of 1997 (unreported).

account this form of contribution in determining the wife's interest in the assets under consideration.

I do not for a moment think that the two Learned Judges did not understand the law: rather I think their decisions arose out of the frustration of dealing with a foreign piece of legislation that has not developed alongside everything else in Kenya. The Court of Appeal may have captured their frustration when it observed, in *Peter Mburu Echaria v. Priscilla Njeri Echaria*[104] "...it is our respectful view that both Omolo Ag. J.A. and Kwach J.A., *though undoubtedly guided by a noble notion of justice to the wife were ahead of the Parliament* when they said the wife's non-monetary contributions have to be taken into account and a value put on them." [Emphasis mine]

The law in this regard is unfair and discriminatory and this is compounded by the effect of the practical reality in Kenya, and the developing world generally, are less likely to have directly contributed to the acquisition of "matrimonial" property. Introducing English values in Kenya in this area of property ownership where the vast majority of women are squatters at the whims of men is to loose sight of reality and justice.

The Constitution of Kenya appears to entrench the discriminatory[105] and unjust application of the law when it states, under section 82 (1) &(4) thus:

---

[104] [2007] eKLR.

[105] S. 82 (3) defines discrimination as: "In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

S.82 (1). Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(4) Subsection (1) shall not apply to any law as far as that law makes provision-
(a)....
(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

The supreme law of the Kenyan not only abets discrimination in family law, it has taken the extra trouble to have it in black and white!

3.5 PR0CEDURAL DIFFICULTIES.

Then there is the procedural inconsistency. In *Kivuitu v Kivuitu,*[106], the Originating Summons was taken out by the *divorced* wife under section 17 of the Married Women's Property Act, 1882, on 10th September 1981. Omolo, Ag. JA (as he then was) specifically stated this fact of the applicant being a divorced spouse and then proceeded to reproduce the prayers in her summons and of importance to note is prayer number 1 which read:

> That the property...having been the matrimonial home of the plaintiff and the defendant herein and *consequent upon the decree of divorce granted in the High Court Divorce Cause No. 34 of 1972* between the parties herein, the court be pleased to order that the property...be sold and the proceeds to be shared in equal shares between the plaintiff and the defendant"[107] [Emphasis mine]

---

[106] *Supra* note 9.
[107] *Ibid* p. 3.

In commencing his judgement, the Learned Justice Omolo,[108] states:

> "My Lords, we have before us an appeal and a cross-appeal filed by Mary Anne Mutanu Kivuitu and Samuel Mutua Kivuitu respectively against the judgement of the High Court at Nairobi (Aganyanya, J.) by which it was ordered that the parties, *who were once a husband and wife.... Though the parties have been divorced for a long time, I shall, for ease of reference, simply refer to them as husband and wife."*

Three indisputable facts immediately become clear.

Firstly, the wife moved the court under Section 17 of the Married Women's Property Act, 1882, nine years after the decree *absolute* was pronounced. Secondly, despite their being divorced for that long[109] the court still referred to them as husband and wife. In other words, the court was of the opinion that in as far as they were involved in a dispute founded on their marriage, whether subsisting or not, the matter at hand being the distribution of "matrimonial" property, the court still viewed them as husband and wife for purposes of section 17. Indeed, in the entire three concurring judgments of Omolo, Masime and Gachuhi JJ.A. the divorced litigants were continuously referred to as husband and wife. Gachuhi J.A., in his considered judgement, stated that the *Originating Summons had been taken out by a wife against a husband* [Emphasis mine]

Yet the litigants being referred as husband and wife are not only divorced, but have remarried, as the court observes when Justice Gachuhi, in summarizing their history has this to say:

---

[108] *Ibid* p 1.
[109] The parties had in fact since remarried.

> "The wife was at times employed and at times was in business. She must have assisted in domestic matters while the husband paid the mortgage loan. The parties have children. Their marriage broke down later. Divorce proceedings were instituted and the marriage was dissolved. The wife moved away from the matrimonial home while the husband remained with the children and *has now remarried"* [Emphasis mine]

The emphasis on the remarriage is important because a party cannot remarry unless a decree *absolute* has been granted.

Thirdly, the Learned Court of Appeal Judges are fully cognisant of the fact that they are entertaining proceedings commenced by a divorced wife and that those proceedings have been commenced under section 17 of the Married Women's Property Act, 1882. To demonstrate the contradiction and inconsistency that then emerges, it is important to refer to Justice Ringera's dicta in *Ying v Ren*[110] where he came to the conclusion that Kenyan court's have no jurisdiction to entertain proceeding commenced by divorced couples under section 17.

Justice Ringera is not alone in going down this path. He was in fact agreeing with a similar but brief ruling made by Justice Effie Owuor in *Saida Karimbux v. Mohammed Y. U. Karimbux.*[111] Justice H. P. G. Waweru later adopted this reasoning in *Esther Njeri Waruhiu v. Paul Kang'ethe Waruhiu*[112]

---

[110] *Supra* note 2.
[111] *Supra* note 13.
[112] *supra* note 14.

In *Rose Mbithe Mulwa –vs – David Musyimi Ndetei*[113], Kamau P. J. Ag J, in coming to the same conclusion as that in these three rulings stated that until such a time as the Legislature in Kenya intervened as was the case in England, the very wording of section 17 of the MWPA, unambiguously demonstrated that the remedy provided thereunder is only available to a wife or husband during the subsistence of marriage and in any event prior to the issuance of the decree *absolute*.

Yet if it be correct that the Court of Appeal in *Kivuitu v. Kivuitu* proceeded on a wrong premise by entertaining an application brought by a divorced wife under section 17 of the Married Women's Property Act, 1882, is it open then for the High Court to declare, by implication, that the Court of Appeal was wrong? If the decision of the Court of Appeal is bad law, upon whom does it behove to declare it so and if it be so declared, what are the legal implication on *Kivuitu v. Kivuitu* and the myriad other cases brought to court under section 17 and decided upon by the courts? Do they amount to mistrials and if they do, what becomes of actions taken pursuant to ruling and judgments delivered on what will then be an erroneous and misguided presumption of jurisdiction which was never there in the first place?

There is need to note yet another apparent contradiction. If *Kivuitu v. Kivuitu* was decided without jurisdiction, why then does the Court of Appeal continue to use it as a proper precedent on matters of settlement of property disputes between spouses? Two of

[113] *Supra* note 15.

the latest decisions made by the Court of Appeal, *Muthembwa v Muthembwa*[114] and *Echaria v. Echaria*[115] refer to *Kivuitu & Kivuitu* as a proper precedent.

3.6 CONCLUSION.

The Court of Appeal in *Echaria v. Echaria*[116] was of the opinion that the MWPA was an antiquated piece of foreign legislation and that there was need for Parliament to enact "the necessary legislation on matrimonial property." The court, however, did not state what that necessary legislation was or what form it ought to take. But it can be inferred that by stating that the English Acts of 1967, 1970, and 1973, had positively reformed the law in England, it may be inferred that the court was of the view that law reforms should borrow from these Acts. These Acts did not do away with the MWPA but simply modified it to suit the peculiar circumstances of England, enlarging the scope of section 17 to include engaged couples and boyfriends/girlfriends, and granting courts wider powers in dealing with property disputes, including power to adjust existing property rights.[117] This means that regardless of the shortcomings and difficulties that are associated with section 17, the MWPA is still relevant but in need of reform.

---

[114] C.A.No.74 of 2001 (unreported).
[115] *Supra* note 104 p. 19.
[116] *Ibid* pp. 19-20.
[117] Section 24 Matrimonial Causes Act, 1973, which re-enacted the powers bestowed upon the courts by section 5 of the Matrimonial Causes Act, 1970.

CHAPTER FOUR

4. THE STATE OF FAMILY LAW REFORMS IN KENYA.

4.1 INTRODUCTION.

This chapter focuses on the resolution of the conflict in judicial decisions on the place of section 17 after divorce. It also examines the state of family law in the area of marriage and divorce in Kenya and the attempts that have been made at reforms. The chapter also deals with the problems that have faced law reformers, particularly in Parliament, and issues of gender-based discrimination that has been a great impediment in these reform attempts.

4.2 HOW CAN THE CONFLICT IN JUDICIAL DECISIONS ON S.17 BE RESOLVED?

On legal problems and the human response to them in society, S.C. Wanjala[118] quotes Reese and Rosen Berg thus:

> In a basic respect laymen and lawyers are doubtless alike when they think about legal problems. They are conscious that many transactions - business, social, personal; planned and unplanned - cut across state boundaries yet they do not instinctively turn their minds to the possible legal complications these multi-state contacts may generate. This seems true for judges and legislators as well as for ordinary citizens.... The

[118] "Conflicts of Laws in Society Generally" in J. B. Ojwang' and J. N. K Mugambi (editors) in *The S. M. Otieno Case: Death and Burial in Modern Kenya*, (Nairobi University Press) p. 101.

> uncertainties of local laws regarding familiar legal problems, such as highway accidents and making wills and contracts, keep citizens and their lawyers amply puzzled; they have no need to speculate about conflicts' complexities, such as what difference it makes that the matter at hand straddles state lines or national boundaries.[119]

Justice Ringera observed in *Ying v. Ren*[120] that until such a time as the Legislature intervened as was the case in England, section 17 would remain available to husband and wife. By implication the judge was stating that courts have no power to extend the ambit of section 17, even the have in the past entertained proceedings under the section that were brought to court divorced persons. This appears to stem from the general principle that judges do not have power to amend any law contained in a statute, except where such law is inconsistent with the Constitution of Kenya, in which the judge will simply be making a declaration that such law is null and void to the extend of such inconsistency.[121]

Lord Reid, in *Pettit v. Pettit*[122] explained that the power of the court to develop law was limited and could not extend to matters of policy. He stated that whilst courts could develop or adapt existing rules of common law to meet new conditions, this could only be done in "appropriate cases". In determining what constituted an appropriate case, he was of the opinion that it was important to distinguish between cases dealing with lawyer's law dealing with "matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy on which laymen are as well able to decide as are lawyers." In the latter case, these were matters of public policy and therefore exclusively in the province of Parliament. The

---

[119] Willis L. M. Reese and Maurice Rosen Berg, *Conflict of Laws Cases and Materials*, 8th ed., (Foundation Press, 1984) p. 1 *et. Seq*
[120] *Supra* note 4.
[121] Section 3 of the Constitution of Kenya.
[122] *Supra* note 5 pp390-391.

other law Lords concurred with him, with Lord Morris of Borth-Y-Gest stating that the answer the solution in such case lay with "those who decide policy and enact law."[123]

Therefore the only way to settle the conflict in judicial decisions on the place of section 17 is by enactment of an Act of Parliament modeled, at least on this one question, along sections 5 and 24 of the English Acts of 1970 and 1973 respectively. Such amendment will specifically define the province of the section, taking in to account the developments that taken place through the years, particularly that fact that there can arise property disputes between couples who may not necessarily be married in the strict sense of the word, but whose relationships can give rise to property disputes similar to those of married persons. Such relationships include couples living together but who do qualify to be termed as husband and wife under the common law rule of presumption of marriage because, for example, they have lived together for less than three years, or do not even live together but carry on their lives as husband and wife. Another example of such relationships is that of couples who are engaged. In certain circumstances, these relationships may in fact qualify to be referred to as families.

According to Cretney[124], the meaning of the word family can be a matter for elaborate sociological and anthropological discussion. Lawyers in contrast usually adopt a simple approach. In England today, it is common for legislation[125] to provide its own definition,

---

[123] *Ibid* p. 410

[124] Cretney, *supra* note 87 p. 3

[125] As in s.1 (1), Family Income Supplements Act 1970. For the purpose of that Act a family consists of the following members of a household- (a) one man or single woman engaged, and normally engaged, in remunerative full- time work; and (b) if the person mentioned in paragraph (a) above is a man and the household includes a woman to whom he is married or who lives with him as his wife, that woman; and (c)

but the need for such definitions has only become acute in recent years, as legal recognition has been given to relationships other than those created by marriage. In Kenya, however no recognition is given to these "relationships" and so they are outside the ambit of family law.

Even though family law is largely concerned with the creation and termination of marriage,[126] in England legal recognition has been given to relationships other than those created by marriage. Traditionally, marriage was an essential prerequisite for the creation of a legally recognized unit. However under section 2(2) of the Law Reform (Miscellaneous Provisions) Act 1970, engaged couples can make applications under section 17 of the Act of 1882.[127]

The consequences of entering into a marriage contract are laid down by the law, even though consent to enter in to the contract is essential and it does not matter what the parties 'intentions' may have been. Appleton C.J., an American judge, has stated:

> "When the contracting parties have entered into the married state, they have not so much entered into a new relation, the rights duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not contract. It was of contract that the relationship should be established, but, being established, the power of the parties as to the extent or duration is at an end, their rights under it are determined by the will of the sovereign as evidenced by

---

the child or children whose requirements are provided for, in whole or in part, by the person or either of the persons mentioned in the preceding paragraphs."

[126] Cretney, *supra* note 87 p.1.

[127] The contract of marriage has been simplified, but not always necessarily to the benefit of the wife. In the American case of *State v. Ward* [(1944) 28. S.E. 2 d 785] the defendant, in answer to a charge of statutory rape, asserted that the complainant was his wife at common law. This defence was upheld. To put the matter in a more modern setting an American writer (Ploscowe, *Sex and the Law (1951).* P. 17) has commented that the agreement (which is all that is necessary to form a marriage) "may be entered into in the privacy of one's own bedroom, in an automobile after a picnic in the country, or after a night's debauch."

> law. They can neither be modified nor changed by any agreement of parties. It is a relation for life; and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from their relation, as long as it continues, are such as the law determines from time to time, and none other."[128]

In view of the important legal consequences of entering into a marriage contract, it is vitally important that law be just an equitable. Family law in Kenya today, as explained in Chapter 3, has been much criticized, particularly on the ground that it is complex, uncertain and unfair to married women. At common law husband and wife become one: "the very being or legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband."[129] Indeed, "originally marriage was one of the few respectable careers open to a woman (other than an authoress or governess). The poor woman, however, might always enter domestic service, work in a factory or even down the mines."[130]

4.2 FAMILY LAW REFORM ATTEMPTS IN KENYA.

Law exists to provide "the citizenry with a sound and stable framework for their interactions with one another"[131] and to achieve this, it must be capable of growing together with the labours and aspirations of the citizenry, adapting to new challenges and responding to public opinion. By failing to respond accordingly, Kenyan law reform agenda has failed. In a nutshell, our family law in this regard is bad law.

---

[128] *Adams v. Palmer* (1863) 51 Maine 480, 483.
[129] Cretney, *supra* note 87 p. 222.
[130] Seago, P. & Bissett-Johnson, *supra* note 77 p. 3.
[131] *Supra* note 96.

Yet the foregoing does not mean that there have been no attempts at reforming family law in Kenya. There, indeed, have been some attempts to that end, the most recent being the Gender Responsive Laws Project which encompassed the Marriage Bill 1993, the draft Matrimonial Property Bill,[132] the Domestic Violence (Family Protection) Bill 2002, and the Equality Bill 2002. This project offered an ample opportunity for dialogue on the key reform areas.

The Government of Kenya's main objective in initiating this project was to "review and update Kenya's statutory law regime in the area of family relations with the aim of enacting for the use of Kenyans modern, simplified, user- friendly, and gender responsive legislation,"[133] The ultimate aim of the project was to have laws that capture the key ideologies of a modern family regime; law that is defined by its simplicity, its ability to contextualize aspects of gender equality while tackling the situation–sensitive challenges and pressures brought to bear by the forces of globalisation and economic liberalisation.

Of particular relevance to this paper, however, are the Matrimonial Property Bill 2007 and the Equality Bill 2007. The Matrimonial Property Bill 2007 attempts to set out the general principles to guide on interpretation and to root out ambiguities, recognise the right of a married woman to acquire and own property as *femme sole,* guarantees equality of women in polygamous unions and restates the truth that the mere fact of marriage does not of itself create property rights. The Bill also recognizes pre-nuptial agreements, draws

---

[132] Drafted by the International Federation of women Lawyers (FIDA) and the International Commission of Jurists (ICJ).

[133] Report by Mohammed Muigai Advocates to the Kenya Law Reform Commission, *Review and Analysis of the Marriage Bill 1993, The Matrimonial Property Bill, the Gender Equality Bill and the Family Protection (Domestic Violence) Bill 2007,* p. 1.

a distinction between matrimonial property and separate property, attempts (in my view, without success) a definition of what constitutes matrimonial property, the circumstances under which a spouse can acquire an interest in separate property owned by the other and introduces the necessity of obtaining the consent of a spouse before charging matrimonial property, obviously following in the footsteps of the reforms in England.

But despite its noble intentions, the Bill may create more confusion, especially in determining what constitutes matrimonial property. Matrimonial property is defined as the matrimonial home or homes, household goods and effects in the matrimonial home or homes, immovable property, owned by either spouse which provides the basic income for the sustenance of the family....[134]

When it is read together with Part 1 of the Bill, problems immediately emerge. "Matrimonial home means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home".[135] What then happens to the concept of separate property? If a spouse buys separate property and allows the family to reside in it, does it mean that the sole ownership has been forfeited? The Bill seems to take a sociologist definition of property, which is that usage, means ownership (e.g. I drive my wife's car with her permission, therefore I have proprietary rights to the car) which is wrong as earlier argued under Chapter 3.[136] The same applies to household goods and effects and regard must be had on the intentions of the parties from the outset. In this regard the Bill fails in its attempt to create the vitally important distinction between

---

[134] S. 7 (1) (a) to (c).
[135] S.2.
[136] Cretney, *supra* note 87, p. 35.

matrimonial property and separate property, which is the ideal property regime to adopt. This is ironic because the Bill sets out to recognize and assert a married woman's right to acquire and own property independent of her husband even during coverture.

Secondly the Bill fails to recognize the possibility of property disputes between couples that are engaged, or any other relationship that might resemble marriage but which by dint of the law may not be treated as such. Examples have been given in the preceding section.

But the foregoing not withstanding, the Bill makes a very important contribution in the field of family law in that it not only provides a simple procedure for settling property disputes between spouses and ex-spouses,[137] the procedure under it is available to husband and wife, and to those who were once husband and wife. This would settle the question of conflict in judicial decisions on the procedure for settling property disputes between spouses and ex-spouses.

The Equality Bill, though not limited to family law, was intended to generally promote equality, including equal integration, equal influence and full equality in all functions in society on the basis of women's and men's equal status and to counteract direct and indirect discrimination on the grounds of gender, race, ethnicity, religion, disability or any of the prohibited grounds".[138]

---

[137] All applications under the Bill shall be made to the magistrates' courts in whose jurisdiction the property in dispute is situated.

[138] Report by Mohammed & Muigai, *supra* note 133 p. 9.

Be that as it may, this Bill, had it been passed, would, in my opinion, have been inconsistent with sections 82(4) and 91 of the Constitution of Kenya which specifically entrench gender discrimination and would therefore be null and void![139] But this is not to say that attempts should not be made to reform the law. Earlier attempts at reform have been made, the first following the appointment of a Commission to review laws relating to succession on 17th March 1967 and thereafter to review laws relating to marriage divorce and status of women.[140] Both Commissions encountered a lot of socio- political and cultural opposition and hostility, even though a Bill relating to succession was passed in 1972, but it did not come to force until July 1981, ten years later.

In 1993, the Attorney General appointed a Task Fore to Review the Laws Relating to Women in Kenya, which submitted its report in 1999 (after 6 years!) and among its recommendations was the enactment of the Gender Responsive Laws heretofore mentioned, and thus the Matrimonial Property Bill 2007 and the Equality Bill 2007 (among others) nine years after the said recommendation.

The Court of Appeal in the *Echaria* case faulted the law reform agenda in the country but it does appear to me that whilst the Law Reform Commission and the Attorney General cannot escape blame in this sad comedy of incompetence and ineptitude, Members of Parliament must shoulder their share of blame as impediments to reform. At present

---

[139] S.3 Constitution of Kenya. "This is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[140] Eugene Cotran, "Marriage and Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?" 40 (2) *Journal of African Law, p. 194-204 (1996)*

Kenya has fragmented marriage laws, with five separate legal regimes that regulate marriage, to *wit:*

a) Christian marriages under the Marriage Act[141] or the African Christian and Divorce Act;[142]
b) Civil marriages under the Marriage Act;
c) Hindu marriages under the Hindu Marriage and Divorce Act[143]; all of which are monogamous;
d) Islamic marriages, recognized under the Mohammedan Marriage, Divorce and Succession Act[144] which are potentially polygamous except among the Shia/ Imami Ismailis; and
e) African customary marriages under African customary law, which are potentially polygamous.

These different statutes are a great source of confusion and so "a primary object of the unsuccessful law reform initiatives since independence has been to harmonize this laws to bring them together under one statute".[145] Thus the Marriage Bill was conceived in 1976, introduced into Parliament on 8th June 1976, withdrawn a month later and reintroduced in 1979. It was soundly rejected by Members of Parliament in August 1979 "for allegedly being 'un-African', 'copied from English law,' taking 'no account of

[141] Cap 150 Laws of Kenya.
[142] Cap 151 Laws of Kenya.
[143] Cap 157 Laws of Kenya.
[144] Cap 155 Laws of Kenya
[145] *Supra* note 109 p.13.

African customs and traditions' and 'giving too many rights to women."[146] The other common claim against the Bill by parliamentarians was that it was an importation of principles of English law and was defined by Christian attitudes rather than African traditions.[147] "Another major objection to the Bill was its recognition of the matrimonial property rights of women and parental responsibility in the case of children born outside marriage. Here the arguments were multifarious. In relation to the matrimonial home, a Member of Parliament opposed a provision that only married parties have power and rights over the same, positing that the extended family has a proprietary interest in the matrimonial home, and must decide issues of its use, holding and alienation."[148]

Ironically, other countries have relied heavily on the philosophy and content of the failed Marriage Bill in Kenya. The Tanzanian Law of Marriage Act, for example, is modeled along the Kenyan Marriage Bill with very few alterations. So is the case with the Matrimonial Causes Act of Botswana, and the Domestic Relations Bill of Uganda.[149] Initiatives in marriage law reform are not unique in Kenya. In the world all over, and particularly in Africa, many countries have either reviewed their marriage laws in recent years or are on the verge of doing so. A few examples are Tanzania, Botswana, South Africa, Tunisia and Egypt. In Tanzania, the process of review and unification of marriage

---

[146] "The Rejection of the Marriage Bill in Kenya: Notes and News," 23 *Journal of African Law*, 109-114 (1979).
[147] Phoebe M. Asiyo, "Legislative process and gender issues in Kenya," in Ooko- Ombaka and Mary Adhiambo (editors), *Women and Law in Kenya* (Public Law Institute, Nairobi, 1989) 41-49, at 43.
[148] *Ibid* p. 44; *Supra* note 109 p. 20.
[149] *Supra* note 109 p. 14.

laws began immediately upon independence, culminating in the adoption of the Law of Marriage Act in 1971.[150]

[150] *Ibid* p. 13.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS.

Section 17 of the Act of 1882, and indeed the entire Act, is an "antiquated" foreign legislation that has not kept abreast with other socio-political developments in Kenya. The Court of Appeal in *Echaria v. Echaria* [151] found that the existence of the Act of 1882 in Kenya amounted to shackling the county to an obsolete antique that had been found wanting by its country of origin more than thirty years ago. In the court's opinion, justice could only be done by enacting legislation akin to the 1967, 1970 and 1973 Acts of England.

As has been explained by Passingham,[152] in England today it will generally suffice to rely upon the power of the court under the Matrimonial Causes Act, 1973 rather than upon the difficulties resulting from section 17 of the Act of 1882. These difficulties do not augur well for justice and the impediment of Parliament notwithstanding, there is an urgent need for the repealing of the Act of 1882. The Matrimonial Property Bill, 2007 should be improved by:

- Clarity in the definition of what constitutes matrimonial property. The mere occupation by a spouse of another's property cannot of itself turn that property into a matrimonial home. Matrimonial home should simply be defined as the property occupied by the spouses and with the common intention that it shall be

[151] *Supra* note 104 p. 19.
[152] *Supra* note 25 p. 202.

the matrimonial home. This will take care of spouses who contribute to its acquisition indirectly, whilst in the same vein safeguarding the right to separate ownership of property. Separate ownership of property is the ideal situation but it ought not to be stretched to the point of spouses having owning nothing jointly. It may even be ideal to have a presumption of community of ownership of, say, the matrimonial home;

- The Bill's scope should be expanded to include the other relationships that have been discussed in the preceding chapter;
- The powers of the court need to be specifically stated. It is not enough to say that courts, in interpreting the Act, will take into consideration the "relevant" international law principles and protocols to which Kenya is a signatory: this will only give rise to court room arguments. The Bill should state that the court has power to make property adjustments and cash awards, in addition to power to act in the best interest of the whole family.

The Bill forecloses on the MWPA but borrows heavily from the reforms in England brought about by the 1967, 1970 and 1973 Acts. Courts ought to have enlarged powers in regard to capital assets and in particular, they should, after a divorce, be empowered to effect a transfer of the assets of one to the other. The proposed law should be a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages have been dissolved, according the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that

end.[153] To effectively achieve this, the discrimination implicitly encouraged in personal law by section 82 (4) of the Constitution of Kenya must be done away with and the easiest way to do so is by repealing the said section, not waiting for a comprehensive review of the Constitution, which might never be. This discrimination may very well have been a contributing factor in Justice Kuloba's uncalled for diatribe against women generally in *Kimani v. Njoroge*.[154]

Finally, bearing in mind that all marriages under the five different legal regimes in Kenya, in the event of a divorce and dispute on property, are subject to the procedure under section 17 of the Act of 1882, there is need for the unification and harmonization of the existing bifurcated systems of marriage law to ensure certainty and predictability.[155] This can be done by the publication and passing of the Marriage Bill, 1993.

---

[153] Seago, P. & Bissett-Johnson, *supra* note 131 p. 290.

[154] H.C.C.C. No. 1610 of 1995 (O.S.) (unreported). For details see pages 30 to 33 where the Judge paints women as selfish, greedy, counterfeits, dummies, wasters and the cause of Mankind's fall from grace in the Garden of Eden. He adds that "the wise say that each woman possesses at least three or four souls."

[155] W. Mueller- Freinfels, "The Unification of Family Law,"16 *American Journal of Comparative Law, 175-218 (1968)* in *Supra* note 106 p. 14.

BIBLIOGRAPHY

BOOKS

ADAM, J.N. & BROWNSWORD, R., *Understanding Law,* 2nd ed. (Sweet & Maxwell, London, 1999).

ANDERSON, J. N. D., *Family Law in Asia and Africa*, (George Allen & Unwin Ltd. London, 1968).

BLACK, J.M. & BRIDGE, A.J., *A Practical Approach to Family Law,* 2nd ed., (Blackstone Press Limited, London. 1989).

CLARK, Jr., HOMER H., *The Law of Domestic Relations in the United States,* 2nd ed., (West Publishing Co., St. Paul, Minn., 1988).

CRETNEY, S.M., *Principles of Family Law,* 3rd ed., (Sweet & Maxwell, London, 1979).

DWORKIN, *R., A Matter of Principle,* (Harvard University Press, Massachusetts, 1985).

_____, *Taking Rights Seriously* (Harvard University Press, Massachusetts, 1978).

ELIAS, J.T.O., *Judicial Process in the Newer Commonwealth,* (University of Lagos Press, 1990).

FULLER, L., "The Morality of Law (1969)", in M.D.A. Freeman (ed.) *Lloyds Introduction to Jurisprudence 7th ed.*, (Sweet & Maxwell, London, 2001) p 51.

FREDMAN, S., *Women and the Law*, (Oxford University Press, Oxford, 1977).

FREEMAN, M.D.A., *Lloyds Introduction to Jurisprudence,* 7th ed., (Sweet & Maxwell, London, 2001).

GRAY ABINGDON K.J. *Reallocation of Property on Divorce* (Brook Professional 1977).

HAMES, J., *Applications Under Section 17 of the Married Women's Property Act, 1882,* 2nd ed., (Oyez, London, 1965).

HARRIS, S.W., *Legal Philosophies*, 2nd ed., (Edinburgh, Dublin, London, 1997)

HART, H.L.A., *The Concept of Law,* 2nd ed., (Oxford at the Clarendon Press, 1951)

KELSEN, H., "Pure Theory of Law," 1967 in M.D.A. Freeman (editor), *Lloyd's Introduction to Jurisprudence,* 7th ed. (Sweet & Maxwell, London, 2001) p276.

KENNY, C.S., *History of the Law of England as to the Effects of Marriage on Property* (1879).

KUNZ, C.L., *The Process of Legal Research*, 4th ed. (Aspen Publishers, Inc. London, 1993).

LLEWELLYN, "The Bramble Bush 1951" in M.D.A. Freeman (ed.) *Lloyd's Introduction to Jurisprudence* 7th ed. (Sweet & Maxwell, London, 2001) p830.

LUSH, C.M., *Lush on the Law of Husband and Wife,* 4th ed. (Stevens, London, 1933).

MARTIN, M.J.D., *An Introduction to Legal Systems* (Sweet & Maxwell, London, 1968).

McCOLGAN, A., *Discrimination Law: Text, Cases and Materials,* (Hart Publishing, Oxford & Portland, Oregon, 2000).

NEUMANN, R.K., *Legal Reasoning & Legal Writing* (Little, Brown & Co., Boston, 1990).

PASSINGHAM, B., *Law and Practice in Matrimonial Causes,* 3rd ed., (Butterworths, London, 1979).

PLOSCOWE, *Sex and the Law, (*1951).

REISS, E., *Rights and Duties of English Women. A Study in Law and Public Opinion.* (1934).

SEAGO, P. & BISSETT- JOHNSON, A., *Cases and Materials on Family Law,* (Sweet & Maxwell, London, 1976).

STEPHEN, *Liberty and Fraternity* (1873).

SWEET & MAXWELL'S Family Law Statutes, 3rd ed., (Sweet & Maxwell, London, 1981).

THURMAN, A., "The Symbols of Government, (1935)" in M.D.A. Freeman (editor) *Lloyd's Introduction to Jurisprudence,* 7th ed. (Sweet & Maxwell, London, 2001) p. 830.

TOLSTOY on divorce, 7th ed., (Sweet & Maxwell, London, 1971)

WILLIS, L.M.R. & MAURICE, R.B., *Conflict of Laws Cases and Materials,* 8th ed., (Foundation Press, 1984).

RESEARCH PAPERS/ JOURNALS

ASIYO, P. M. "Legislative Process and Gender Issues in Kenya" in Ooko- Ombaka and Mary Adhiambo (editors), *Women and the Law in Kenya, (Public Law Institute, Nairobi, 1989).*

COTRAN, "Marriage and Divorce and Succession Laws of Kenya: Is Integration or Unification Possible?" *40 (2) Journal of African Law.*

GITIA, S. J. W., *Presumption of Marriage & Property Rights for Cohabitees,* (LL.B Dissertation, University of Nairobi, 2003).

MACHARIA, M. J., *The Emerging Trend in the Devolution of Matrimonial Property in Kenya: The Case for a new Matrimonial Causes Act,* (LL. B Dissertation, University of Nairobi, 2002).

Double Standard: Women's Property Rights Violations in Kenya (Human Rights Watch, Vol. 15, No. 5 (A), March 2003).

MCGREGOR, O.R., "The Social Position of Women in England 1914", (1955), *British Journal of Sociology, Vol.6.*

MOHAMMED, M., ADVOCATES, *Report to the Kenya Law Reform Commission: Review and Analysis of the Marriage Bill, The Gender Equality Bill and the Family Protection (Domestic Violence) Bill 2007*

MUELLER- FREINFELS, W., "The Unification of Family Law, '16 *American Journal of Comparative Law.*

MUKIRI, P., *Matrimonial Property Rights with Reference to the Family Law System in Kenya,* (LL. B Dissertation, University Nairobi, 1990.)

PANKURST, C., "The Legal Disabilities of Women" in Villiers (editor), *The Case for Women's Suffrage,* 1907.

RANJI, N. L., *Gender Equality & Law Reform in Marriage & Family Law in Kenya,* (LL. B Dissertation, University of Nairobi, 2000).

Reform of Marriage Laws in Zimbabwe (Zimbabwe Women Lawyers Association, 346.016 REF).

WACHIRA, G., "A Gender Perspective of Court Cases Related to Property and Inheritance Rights in Kenya", in Kanyi, W. and Ngunjiri M, (editors) *Gender Perspective on Property and Inheritance Rights – Kenya* (The Collaborative Centre of Gender & Development, 2002).

WANJALA, S.C., "Conflicts of Laws in Society Generally", in J.B.O. Ojwang' and J.K.N. Mugambi, (editors) in *The S.M. Otieno Case: Death and Burial in Modern Kenya,* (Nairobi University Press).

"The Rejection of the Marriage Bill: Notes and News." *23 Journal of African Law* (1979).