

Gender Equality: A Reflection on Matrimonial Property Act Awareness among the Gusii of Kisii Sub-County, Kisii County, Kenya

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Abstract: “Why does a society have one set of rules for men and another set of rules for women? Every society must have the same set of rules for both men and women to follow. Only then can the society become a progressive one.” (Shannon, 2009). Kenya has taken important steps in the last decade to ensure women’s equality in marriage and to secure their property rights within marriage, including through adoption of the 2010 Constitution and the 2013 Matrimonial Property Act. However, evidence shows that there are still significant gender disparities and that the distribution and control of productive resources such as land, property or livestock still favours men. Women, particularly those living in rural areas, have less secure land rights and own and control less property. “Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property; “matrimonial property” has the meaning assigned to it in section 6; “spouse” means a husband or a wife (National Council for Law Reporting with the Authority of the Attorney-general matrimonial property act no. 49 of, 2013). The purpose of this study is to establish the extent to which the act is enacted among the Gusii of Kenya. The study utilized a descriptive research design and data was collected by use of questionnaires and interview schedules. The work was supported by an Israeli kibbutz innovative in collective ownership, production, consumption, and child care, and in part also because it is erroneously assumed to have once had a gender-egalitarian ideology and structure, it is taken to be a valid test case for many theories explaining or justifying gender inequality or gender equality. Possible results were shared and disseminated among stakeholders who were to serve a major contribution to enhancement of matrimonial property act. The study gave recommendations based on the findings of what needs to be done to reduce the effects of gender inequality.

Keywords: Gender, Equality, Kibbutz, Matrimony, Property act.

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Background

According to Aristotle, there are two kinds of equality, numerical and proportional. A form of treatment of others or as a result of it a distribution is equal numerically when it treats all persons as indistinguishable, thus treating them identically or granting them the same

quantity of a good per capita. In contrast, a form of treatment of others or distribution is proportional or relatively equal when it treats all relevant persons in relation to their due. In relation to matrimonial property rights, numerical equality presupposes 50/50 distribution whereas proportional equality presupposes division based on the needs of each party or what they have contributed to the acquisition of the property. Existing legislation recognizes non-monetary contribution. The issue then becomes how to determine the value of non-monetary contribution that women make in their homes (a feminist approach, A spouse may apply to the Court for a matrimonial property order only if the habitual residence of both spouses is in Alberta, whether or not the spouses are living together, the last joint habitual residence of the spouses was in Alberta, or the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta. If a statement of claim for divorce is issued under the Divorce Act (Canada) in Alberta, the plaintiff or the defendant may apply for a matrimonial property order.

An application for a matrimonial property order shall be made by statement of claim. A matrimonial property order may only be made if; a judgment of divorce has been granted; or a declaration of nullity of marriage has been made with respect to the marriage; if one of the spouses has been granted a judgment of judicial separation or if both of the spouses have obtained a declaration of irreconcilability under the family law act, if the Court is satisfied that the spouses have been living separate and apart for a continuous period of at least one year immediately prior to the commencement of the application, if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse, has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or has made or intends to make a substantial gift of property to a third party, with the intention of defeating a claim to property a spouse may have under this Part, or if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse (Matrimonial Property Act- Alberta Canada, 2010).

Dividing property owned by you and your spouse during marriage is an important part of divorce. To ensure a correct division of marital property, judges require that all marital assets be properly disclosed and valued. Knowing how your state's laws affect your ability to sell property before a divorce is granted will help avoid complications when it comes time to divide assets.

In some states, like Massachusetts, when one spouse files for divorce, an automatic restraining order goes into effect restricting both spouses from selling or otherwise transferring marital property. If you violate this order, you can be held in contempt of court. Further, even if a divorce has not yet been filed or no restraining order has yet been issued, you are not completely free to sell off personal property or real estate. If your intent is to reduce the amount of property subject to division, like selling your beach house to a relative for less than fair market value, a court may conclude that you dissipated assets. This could reduce the amount you receive when the marital property is divided.

Botswana Customary states that the *matrimonial* domicile of a marriage between persons subject to a *Botswana* customary law (not being a marriage under any customary law) in *Botswana* such marriage shall not affect the *property* of the spouses which shall be held, may be disposed of. Community of property and community of profit and loss or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses one of whom is domiciled in *Botswana*, unless such spouses have, by an

instrument in writing, signed by each of them prior to the solemnization of their marriage and in the presence of two persons, one of whom shall be an administrative officer or justice of the peace or a commissioner of oaths, who shall subscribe thereto as witness, express their wish to be exempt from the provisions of this Act. Such instrument shall be as nearly as possible in the form set out in the First Schedule and shall be registered in the Deeds Registry within 90 days after the execution thereof and shall not be valid unless so registered (Married persons property-Botswana, 2014).

Provided that if any instrument submitted for registration within the said period of 90 days has on the face of it any defect the Registrar shall return it to the person by whom it was submitted setting out the defects and requiring the instrument to be returned to him within such period of time, not being less than 60 days, as he may in his discretion allow, with such defects corrected; if the instrument is returned to the Registrar within the time allowed by him with the defects corrected, then it shall be registered by the Registrar and shall be valid notwithstanding that it was registered more than 90 days after execution (Married persons property-Botswana, 2014).

The matrimonial act in Kenya was enacted in 2013 and the act states that despite any other law, a married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable; to enter into a contract; and to sue and be sued in her own name. Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property (Matrimonial property act no. 49, 2013). Owino (2017) notes that during the past few years, Kenya has revised some of its laws and repealed statutes that governed matrimonial property. These include the Matrimonial Causes Act, the Married Women Property Act and the repealed Constitution.

To this effect, the 2010 Constitution states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Further, women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. It is not clear whether these 'equal rights' refer to 50/50 division of rights on matrimonial property or whether it refers to equality based on contribution of each spouse.

According to the constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules (2013) Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. Property rights in polygamous marriages. If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives. Despite where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives (Matrimonial property act no. 49, 2013).

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse contributes towards the improvement of the property, the spouse who contributes acquires a beneficial interest in the property equal to the contribution made. Any liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it. Any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree. Parties to a marriage shall share equally any liability incurred during the subsistence of the marriage for the benefit of the marriage; or reasonable and justifiable expense incurred for the benefit of the marriage (Matrimonial property act no. 49, 2013).

During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including; the customary law relating to divorce or dissolution of marriage; the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and; the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise (Matrimonial property act no. 49, 2013).

A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds. A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court. A spouse shall not be evicted from the matrimonial home by any person except; on the sale of any estate or interest in the matrimonial home in execution of a decree; by a trustee in bankruptcy; or by a mortgagee or charge in exercise of a power of sale or other remedy given under any law. The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses. Subject to this Act and any agreement between the spouses before the marriage, marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property (Matrimonial property act no. 49, 2013).

Where matrimonial property is acquired during marriage; in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and; in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal. Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient. A spouse is not liable, solely by reason of marriage, for any personal debt contracted by the other spouse prior to their marriage. (Matrimonial property act no. 49, 2013).

A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person. An application under subsection (1) (a) shall be made in accordance with such procedure as may be prescribed; (b) may be made as part of a petition in a matrimonial cause; and (c) may be made

notwithstanding that a petition has not been filed under any law relating to matrimonial causes. 18. Provisions on delegated powers (1) The Rules committee established under the Civil Procedure Act (Cap 21) shall make rules to regulate any matter of practice or procedure under this Act. (2) Without prejudice to the generality of subsection (1), such rules may prescribe— (a) the procedure to be followed and the forms to be used under this Act; (b) the time within which documents are to be filed and served under this Act. 19. Cessation of application of Married Women Property Act the Married Women Property Act shall cease to extend to or apply in Kenya (Matrimonial property act no. 49, 2013).

Methodology

The Republic of Kenya is a country in Eastern Africa, with a population of approximately 41.61 million people. It lies on the equator and is bordered by Ethiopia (North), Somalia (East), Tanzania (South), Uganda (West), and Sudan (Northwest), with the Indian Ocean running along the southeast border. It has an extension of 582,646 sq. km. The country is named after Mount Kenya-before 1920, the area now known as Kenya was known as the British East Africa Protectorate. Kenya is a diverse nation of 42 distinct ethnic groups. Official languages are Swahili and English and the currency is Kenyan Shilling.

The study utilized a Mixed methods research design which involved collecting, analyzing and integrating quantitative and qualitative data. The study was carried out in Kisii central sub-county Location of Kisii County which is located between 0 30' and 1 0' South latitudes and 34 38' and 35 0' East longitudes. The study area borders Nyamira County to the North and East, Narok County to the South and Homabay and Migori Counties to the west. The paper used primary data sources to investigate the state of matrimonial property ownership, the current status and finding out gaps that exist from a gender perspective.

The main respondents were study sampled married men and women from the GusiiKisii community who gave their views about property ownership based on the matrimonial property ownership. The respondents totalling 50 in number that were sampled by use of simple random sampling by following the basic criteria of one having been married procedure. The study utilized questionnaire, Focus Group Discussion (FGD) and an interview schedule for those that have been married for at least five years and being 25- 50 years of age. The study adopted qualitative approach design and it utilized a question and structured interviews to key informants. To collect data primary interviews were conducted of a land's registration officer, three (3) widows, two (2) young married women contemplating divorce, an elderly male a professor in the university. The collected data was analyzed by use of content and, narrative analysis to put facts together so as to have an understanding of the awareness of people of Gusii on matrimonial property rights.

Findings

The respondents were all men and women of marital status but differed in age ranging from 25 years -over 50 years. Their academic background ranged from those with class seven/eight qualification, form iv, undergraduate, masters and those with PhD. The response rate was 85% with 30 males responding out of the expected 35 males and 20 females responding out of the 25 expected females.

Almost all the respondents responded to owning property but when it came to which type of property is owned the responses varied. respondents were given options ranging from land, fixed assets which presumably refer to land, cars and a home, most women responded to owning a car and not land, not a home or not even a building. On whether the property they

own is co-owned, most respondents noted that property was personal with a third of the responded noting that the property was co-owned. It was found that the property most respondents own is acquired than inherited as is expected among the Abagusii people of Kenya. Based on those who bought property a question was asked about the percentage ownership of the property ownership, most men noted that percentages were not applicable, less than half of the respondents noted had 50% ownership, a small percentage noted they have 100% ownership with nothing going to the spouse while about 5% indicating that property ownership was at 70/ 30 percent.

On whether the property is co-ownership majority about half noted that the property is not co-owned with anyone while another percentage about a quarter of the respondents noted that the property was co-owned with a spouse and another quarter noted that the property was a family entity.

On property registration as required by law, most at least about 85% indicated that their property was registered with the appropriate entities again those who had not registered their property were asked why they had not registered their property almost of the respondents noted that it was not applicable and with a few noting not being aware. This is probably are those whose property was inherited. Those who noted that their property was registered were asked to respond in whose name it was registered in, majority responded that the property was self-ownership, while responded that the property was registered in a family name and 5% noting with spouse.

Respondents were asked whether a spouse had tried to sell the property without consent and whether objections had been raised by a co-owner and if there have been refutations, all it was noted that almost all respondents respond ended. to the nay. This is probably because most property is either self-owned or family owned or self -acquired or property is male owned and there a woman who could complain is subordinate.

Respondents were asked if they were aware on the law regarding matrimonial property ownership, 34 out of 50 respondents responded being aware with 11 reporting not being sure and 5 noting that they were completely unaware of such a law. And when asked if they were aware of the law on joint property interest protection. Interestingly all respondents responded being aware, but the challenge might be whether the knowledge we are able to put the knowledge into practice. And finally, on whether the respondents were aware that it is mandatory for a spouse to consent to any transfer of matrimonial property. On this question 41 out of 50 noted they knew and 9 out of 50 noted they did not know about such compulsion on a need for a spouse to cont before transfer of matrimonial property.

On whether the respondents are aware of the contents of the constitution an interview with a ministry of lands office noted that;

“Most people are not aware about the matrimonial property rights and even those aware do not take the law seriously”

When asked if the ones who are aware belong to which gender.....he noted

“those who are aware of what the constitution says are basically men with a small percentage of women who don't seem to be bothered with issues of owning land”

One of the interviewees a land's officer was asked if fathers and sons give land to daughters and sisters, he noted that,

“the constitution compels to do so, when they become difficult the law is enforced to have justice done”

He was asked another question on whether land registrations of matrimonial land ownership is currently gender balanced in terms of ownership? The land’s officer noted....

“most land is still a man business; land is still registered in a man’s name even when the parcel is purchased by both parties- in this case a couple

The land’s officer was asked if women were purchasing and registering the land in their names? He noted that....

“Women are not bothered about land ownership”

On decision making about purchasing land, selling and leasing property as regards to gender involvement. The lands officer said.

“decision making on issues of what happens to land purchasing, selling and leasing is to a large extent a man a fair, women are not involved”

Finally, the land’s officer was asked on what interventions should be carried to deal with these issues of gender inequality as regards to property ownership? He noted....

“first and fore most there is need to create awareness especially to women on the rights that they have as regards to matrimonial property. They need to be aware of the support they have as regards to matrimonial property ownership and what to do if rights are infringed”

Three widows were interviewed as regards to management of matrimonial property after the demise of their husbands. One of the interviewed widows a teacher noted that...

“My husband has been dead for the last 7years and I have not faced any challenge since my husband had only two (2) sisters and no brother making it difficulty for anyone to pose a challenge except neighbours trying to change boundaries”.

When the widows were asked if they were aware of the matrimonial property act, the three responded being knowledgeable and when asked if they will give their children part of their matrimonial property regardless of gender, they noted that they will not discriminate children alongside gender.

A young married lady that has been married for six years noted that the six years she has been married are wasted years since the property they accumulated so fast including a farm with dairy animals with a home and another big farm elsewhere, two plots in Nairobi were all sold without the wife’s consent not even knowledge. Based on that behavior she is contemplating divorce for lack of future trust...

“Am better walking out of this engagement early in marriage because the indicators are clear than wait for miracles to start happening”

An elderly male a professor of a university on a 50/50 rule of sharing matrimonial property and whether he is aware of this act governing matrimonial property had this to say...

“am aware about matrimonial property act of 2013, and am okay with the 50/50 rule as regards matrimonial property ownership and am no doubt in my mind to hold any property that my wife is not aware of, my property is her property”

On whether he will share his matrimonial property to his children without bothering of their children are male of female. The professor simply said ...

“My children are my children and I treat them equally I make them aware of what the matrimonial property act and I follow the law to the letter”

Conclusions

From the findings noted above, the study concludes property with family owned needs to be registered as required by the law and even when it is co-owned, it should be registered jointly or even give it a name that depicts both owners. It has come out clearly that share holding is either 100% or on a 50/ 50% and 70/ 30% which is towards a positive direction. It came out that most people are aware of the law regarding matrimonial property ownership and are then required to put the tenets in it into practice.

Recommendations

- 1) There is need for deliberate efforts to educate women to own land and have building on them.
- 2) The spouses need to share owned property in equal measures or still try to see away of co-owning of property.
- 3) Women need to study the act regarding matrimonial property rights and privileges so that they are well informed.

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