

Research Article



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COVID-19 effects on gender equality and the application of the matrimonial property act of 2013 among the Gusii people of Kisii county, Kenya

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**Abstract**

The purpose of this study is to establish the extent to which the Matrimonial Property Act is applied among the Gusii of Kenya and the effects of the COVID-19 pandemic on the steps that had been so far realized in the community under the said law. Further, the purpose of this study is to establish the extent to which the Matrimonial Property Act has impacted the gender equality and economic situation among the Gusii people of Kenya. The study utilized a descriptive research design. Data was collected by use of questionnaires and interview schedules. Possible results were shared and disseminated among stakeholders who serve as a major contributor to the enhancement of the implementation of Matrimonial Property Act. The study gave recommendations based on the findings of what needs to be done to reduce the effects of Covid-19 on gender equality in Gusii, Kenya.

Keywords: COVID-19, gender, equality, law, matrimonial property act, property

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Introduction

According to the World Bank (2020), the Corona virus, also known as Covid-19, whose main symptoms are respiratory problems started from Wuhan China in December, 2019. It spread very fast to all parts of the world. Further the World Bank (2020) records that on 11th March, 2020 the virus was named by the World Health Organization (WHO) a global pandemic. It has scared all. However, it has affected mostly the vulnerable, marginalized and women who are already struggling with gender inequality. According to Stanley and Prettitore (2020), previous epidemics and post-conflict or post-disaster situations, show that women are likely to be further disenfranchised of their rights if not protected. They further argue that during the AIDS epidemic, widows and orphans often lost property to other family members and were left homeless, even as they dealt with their own health emergencies. There is clear evidence from the Ebola crisis that women's customary rights were protected if their husbands died of Ebola virus and were allowed to own property through marriage and are free from disinheritance. In ordinary circumstances widows face a higher risk of inheritance (Korkoyah & Wreh, 2015).

According to Aristotle, there are two kinds of equality, numerical and proportional (Aristotle, 757b-c). It is observed that "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."¹ In relation to matrimonial property rights, numerical equality presupposes a 50/50 distribution whereas proportional equality presupposes a division based on the needs of each party or what they have contributed to the acquisition of the property.

Before the 2013 Matrimonial Property Act, existing legislation recognized non-monetary contribution by a spouse. The situation then was guided by Section 82(4) of the repealed Constitution which provided that marriage law would be guided by the personal law of the parties to the marriage. This, coupled with the many legislations and regimes of personal law such as customary law, Hindu marriage law and the Islamic marriage law that were applicable in that old constitutional dispensation complicated the equality between women and men in terms of property ownership. This left the *de jure* equality in books but *de facto* inequality in practice. For instance, the court had occasion to consider this issue in the case of *Wambugu W/O Gatimu vs Stephen Nyaga Kimani*.² In it, the court was of the view that under the Kikuyu customary law which it was applying to the case, a married woman was not permitted to inherit her father's property. This practice deprived women of ownership of property since upon marriage they would be heirs only for life to the husbands' property. Cotran (1969, p. 8) states that:

Inheritance under Kikuyu law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried.

¹ <https://plato.stanford.edu/entries/equality/>

² (1992) 2 KAR 292

This customary practice put women outside the purview of consideration in property ownership except where they were unmarried. Even then, distribution of the deceased father's property was not equal: the unmarried woman would receive a very small portion compared to her brothers, with the eldest one being given the largest portion in comparison to others. Moreover, before the 2010 Constitution, division of matrimonial property between spouses was dependent on the contribution of each spouse. The contribution was viewed from a monetary angle. It depended on how much money each spouse gave towards the acquisition and development of the property. Indirect contribution was not considered. The then famous case of *Peter Mburu Echaria v. Priscilla Njeri Echaria*³ espoused this principle. At best, both the law and practice that were given approval by the case were seen as oppressive and discriminatory to women. Women were not empowered under African customary laws regarding property ownership. Such practices, the enactment of a number of laws after the 2010 Constitution sought to correct.

Literature review

After the 2013 law was enacted, the courts in Kenya have taken a more pragmatic approach by considering what each spouse put in towards matrimonial property. Women are taken to have an equal capacity to contribute to the development or accumulation of matrimonial property. This entitles them to a share of any size in comparison to the husband when distribution, upon divorce, is considered. Even then, there are a number of issues that pertain to this approach given that previous to the new approach, women were not empowered to effectively compete in resource acquisition hence contribution also. The other issue then that becomes pertinent is how to determine the value of non-monetary contribution that women make in their homes. Had this approach under the new (2013) law given women a chance to equality in property ownership among the Gusii people of Kenya? The answer to this question is far from being known unless a number of studies are conducted to ascertain the intersection between the application of the law and the long-held customary practices of the people.

Using a feminist approach, there would be need for any society to experience equality of both gender in terms of property ownership and economic wellbeing or resource distribution. In the nineteenth century, when feminism took root, in both the United States and Western Europe, a woman who considered herself feminist was often viewed as a proponent or fighter for equal rights and freedoms for all in any democratic society (Nye, 1988). In the nineteenth century arguments regarding women's rights, a number of issues including property, the right to vote, marriage and even sexual freedom top of the agenda for feminists. Before then, women were basically treated as inferior to men, for instance, in Europe (Loue & Mendez, 2004; Perkin, 2002). To take a look at it from the perspective of many of the patriarchal societies in Africa, such as under the Trokosi system in Ghana, women were the property of men (Boaten, 2001). This was a practice prevalent amongst the Gusii people on whom the current study focuses. Choti (2015) writes that "[The] marital bond is another dimension of the Gusii culture that denigrates women. In marriage, the Gusii woman is treated as the "property" of the man, a fact reinforced through bride price and an entrenched patriarchal system" (Choti, 2015, 149). Women thus owned nothing for themselves. All that they owned was for men and they were meant to serve and benefit men.

³ [2007] eKLR Nairobi Civil Appeal No.75 of 2001.

Whereas after independence in Kenya, the situation regarding women's equality and ownership of property among the Gusii people has been changing for the better it has not been as fast as expected. Despite laws being enacted to favour progressive change, the deep patriarchal system has been difficult to uproot. Moreover, the past state of disability of women in terms of accessing resources and tools of empowerment such as education did not make it easy for a majority of them especially in the rural areas, to date, to come out of the inequalities that have persisted over the years. Therefore, enactment of laws and enforcement outside of the home environment does not completely free the Gusii woman from the shackles of cultural practices that make her find herself in a vulnerable and unequal status with the man. This is a position that is divergent from the nineteenth century one in Europe where law was seen as the main drive for social change towards equality of women. According to Nye (1988), the equality in terms of property in any democratic society was taken to be more dependent on equality of suffrage which would then give women an opportunity to vote for legislation that would correct injustice to them. Taking Nye (1988)'s observation on the then feminist practices in Europe and USA, women's participation in building a democratic society through suffrage would emancipate them from inequality in terms property. Would that be the position regarding the application of the 2013 Matrimonial Property Act of Kenya since women have voted their representatives to Parliament and the House has enacted the law in favour of that position? This is the big question! It still rings in the mind of virtually every Kenyan given that it is seven years since the new law was enacted and ten years since the 2010 Constitution was promulgated.

In Kenya, the courts have always taken a holistic approach to the issue: that irrespective of where the spouse lives in relation to the matrimonial property in issue, the level of contribution can be proven. The court does not automatically issue a restraining order to either party unless the other asks for it. But the presumption is that once a party files a suit for distribution of the matrimonial property, that property immediately becomes under the control and direction of court under the doctrine of *lis pendens*. The doctrine has been applied in a number of cases in Kenya.⁴ Comparatively, in some jurisdictions, this is not the case. For instance, in some states in Canada, a spouse may apply to the Court for a matrimonial property order only if the habitual residence of both spouses is in Alberta.⁵ According to Section (3) (1) of the Family Property Act of Alberta Province, it matters not whether the spouses are living together, as long as 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 Alberta law, the plaintiff or the defendant may apply for a matrimonial property order.⁶

Division of property owned by spouses during a marriage is an important part of divorce. According to Section 31 of the Family Property Act, to ensure a correct division of matrimonial property, judges require that all marital assets be properly disclosed and valued. Knowing how

4 For instance, it was discussed in detail in the case of *M.O. Oseko & another V David Awori & 2 others* [2007] eKLR

5 Matrimonial Property Act, Revised Statutes of Alberta 2000, Chapter M-8, Province of Alberta <https://www.qp.alberta.ca/documents/Acts/M08.pdf>, Alberta Queens Printer

6 Family Property Act, Revised Statutes of Alberta 2000 Chapter F-4.7 Current as of January 1, 2020 <https://www.qp.alberta.ca/documents/Acts/F04P7.pdf>, Alberta Queens Printer

a state's laws affect one's 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 of the United States of America, when a spouse files for divorce, an automatic restraining order goes into effect restricting both spouses from selling or otherwise transferring marital property (Turco, 2018). If one violates this order, he can be held in contempt of court. Further, even if a divorce cause has not yet been filed or no restraining order issued yet, one is not completely free to sell off personal property or real estate. If his intent is to reduce the amount of property subject to division, for instance, selling his beach house to a relative for less than fair market value, a court may conclude that he dissipated assets. This could reduce the amount he receives when the marital property is divided.

Nearer home, in Botswana the the issue of domicile is important in settlement of the distribution dispute between a wife and a husband upon divorce. The court has stated that, "[This] controversy has nowhere been satisfactorily resolved, though the general tendency is to subject the proprietary rights of all Africans whether married according to customary law or under statute or in Church to the governing principles of customary law. This has usually been done by legislation. In Botswana the relevant provision is Section 7 of the Married Women's Property Act which provides:

"Subject to the provisions of this section and of the Dissolution of African Marriages (Disposal of Property), Act notwithstanding that the matrimonial domicile of a marriage (between Africans (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 and unless disposed of by will, shall devolve according to customary law".⁷ Kenya has manifested a clear intention to make a step from the previous discriminatory practices and legislation that existed through customary laws. This has been done through the Matrimonial Property Act of 2013 which came in to give effect to Article 45 of the 2010 Constitution which provides for equality of spouses before, during and after a marriage. This sets the background for examining the legal basis for the Matrimonial Property Act of 2013.

Legal basis for the matrimonial property act

The Matrimonial Property Act of Kenya was enacted in 2013 was assented to on 24th December, 2013 and commenced on 14th January, 2014. Its enactment followed the promulgation of the 2010 Constitution which provides for equality of men and women, and especially, Article 45 which contains provisions regarding family, in Kenya. Article 45 (1) provides that the family is the natural foundation of the unity of society while Article 45(2) gives the basis on which a family is founded – marriage. It states further than marriage is to be between consenting adult members of the opposite sex, of the society. A direct interpretation of that Article is to the effect that in Kenya when adults of the same sex, whether male or female purport to marry, they will not be permitted, not found a family and that in effect shall lead to the disintegration of the society. It is not permissible. It therefore goes without saying that they cannot as a couple or 'family' own property whether on an equal or unequal basis, as contemplated in the next sub-Article of Article 45.

Article 45(3) of the 2010 Constitution is the provision that gives a basis for the enactment

of the Matrimonial Property Act of 2013. However, before discussing it in detail, it is worth examining its origin. Prior to the 2010 Constitution Kenya was a signatory to a number of human rights instruments at both the international and regional levels. These instruments provide for the equality of men and women in all aspects of life, including marriage and ownership of property. When the 2010 Constitution was enacted, it provided for the many international treaties and conventions ratified by Kenya, and the general rules of or customary international law to be part of the laws of Kenya. This is by virtue of Article 2(5) and (6) of the 2010 Constitution. On that basis, the many instruments which provide for equality in relation to matrimonial property apply in Kenya. Most of them provide for non-discrimination of women on account of their status, and that stretches to the aspect of ownership of property.

One such instrument is the Universal Declaration of Human Rights (UDHR).⁸ Article 17(1) of the Declaration provides that everyone has the right to own property either individually or in association with others. This provision presupposes that women, whether married or not have the right to own property as they desire. Moreover, Article 16 (1) of the Declaration is more or less the same words as Article 45(3) of the 2010 Constitution in regard to equality of spouses at the time of marriage and afterwards. The equality contemplated here includes ownership of property.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹ comes in to emphasize on the aspect of equality of both men and women (which contemplates also spouses to a marriage) in owning property. Article 2 (2) prohibits discrimination of anyone on account of many grounds amongst which is "property". This means that whether one, including a woman, owns or does not own property, he or she should not be discriminated against. Article 3 of the Covenant then provides for the equal enjoyment of the rights in it by both men and women. The Convention on Elimination of All Forms of Discrimination against Women¹⁰ (CEDAW) gives a detailed raft of rights which women enjoy by outlawing all forms of discrimination against women – old and young. More specifically, Article 15 (1) provides for the obligation on the state to accord women and men equality before the law. In regard to property ownership, Article 15(2) stipulates that "[In] particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals." Thus, the provision envisages a situation where women have the right to own property and pass it on to any person of their wish freely, and should need arise that the matter of property is to be considered by the court, women should have as much right as men to litigate on or present any evidence thereon before any competent court as men would. Additionally, by Article 15(3), where a woman owns property and wishes to either sell it or bequeath it to any individual, she should not be restricted in any way. This right regarding equality in relation to property is provided for in a more elaborate manner in Article 16 (1) (h). It provides that "[The] same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." In regard to the economic and social life, states

8 Adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris

9 Adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came in force from 3 January 1976.

10 ~~Adopted by the United Nations General Assembly on 18 December, 1979. instituted on 3 September 1981~~
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parties are obligated under Article 13 of the Convention to do away with discrimination of men and women and ensure, on a basis of equality between the sexes, same rights to family benefits. Family benefits here include property. Article 14 is dedicated to elimination of discrimination on women in rural areas against many forms, particularly, in relation to development resources. While taking steps to ensure women in rural areas are not discriminated against, states parties are obligated under Article 14 (2) to ensure that such women have rights “[To] have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.” It is noteworthy here that many women within Kisii County are basically in rural areas. Therefore, this provision is very applicable to their status and the state’s duties under the Convention. It has been resolved, and states parties have thereby been advised, under United Nations Resolution 15 (1998)¹¹ that when a state permits discrimination against women in terms of acquiring and securing land it amounts to a violation of their human rights law.

In the regional human rights system, the African Charter on Human and Peoples Rights¹² (ACHPR) provides for the guaranteeing of the right to property. This does not limit it to men. It extends to the right of every member of society, women included. To give clarity on many of the issues which affect women in Africa, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹³ (PRWA) provides for how to actualize a number of such issues. In relation to property, Article 21 addresses the issue of inheritance. In Article 21(1) it actually creates a right by a widow to inheritance of a deceased husband’s property. It states that “[A] widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.” In essence, this provision recognizes the fact that in the past, many customs of the African people disinherited widows of their deceased husband’s property. It often made widows to seek ‘refuge’ or ‘protection’ in a community appointed relative once they lost their husbands. Thus, in many cultures such as the Luo culture, women had to be inherited by either the brother or close relative of the deceased husband immediately before or after marriage, Failure to agree to this custom often led to the woman being declared an outcast hence should be ostracized from the community or chased away from it. This deprived women completely of property. Under the same provision, there seems to be a discriminatory phrase, however, because it seems to provide that if the widow does not own the matrimonial house she may lose the right to live in it unless she inherits it from the deceased husband. Article 19 (c) of the Protocol further provides for women being given access to and control over productive resources. These include land. By the Article, the state parties are then called upon to guarantee women’s right to property. Moreover, apart from women being given access to justice and equality before the law as provided for under Article 18 of the Protocol, under Article 7 (d), they are also entitled to equitable sharing of any joint property which may have been acquired during the marriage in case there happens to be a separation, divorce or annulment of the marriage. On top of that,

11 UN Resolution 15 (1998) of the Sub-Commission on the Promotion and Protection of Human Rights, ‘Women and the Right to Land, Property and Adequate Housing’ (1998), at paras 1 and 3

12 Adopted by the OAU Assembly on 28 June 1981, came into force on 21 October 1986

13 Adopted by AU in July 01, 2003. Came into force in 2005 https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf

by virtue of Article 6 (j) a woman has the right, during her marriage, to acquire property, and administer or manage it as she wishes, without interference from the husband or any other person. Under Principle 21 (1) of the Guiding Principles on Internal Displacement,¹⁴ if a person were to be an internally displaced person (IDP) as recognized in international law, that person should not be deprived of property and possessions arbitrarily. The person, in this instance, does not single out anyone. That means, women whether married or not are included, and their property protected under that Principle. At the same time, under Principle 21 (2) the property of IDPs should be protected against pillage, direct or indiscriminate attacks, destruction as a result of collective punishment, among others. Also, by virtue of Principle 21 (3), in case an IDP leaves behind property, it should be protected against many negative actions as stated immediately above. Principle 4 (2) prohibits discrimination on many grounds including property. Again, at the sub-regional level of the Great Lakes of the African human rights system, the Protocol on the Property Rights of Returning Persons¹⁵ the property rights of women returnees of either refugees or IDPs are protected. This is more so in terms of laying a basis for resolution of disputes on recovery of their property, as provided for under Article 2 (3); the special protection of attachment by women returning from refugee or IDP conditions to land; and giving a basis for remedying the loss or destruction of properties of IDPs and refugees or due to construction of large-scale developments.

The law, as contained in the above instruments and many others, having been entrenched in the 2010 Constitution by virtue of Article 2(6) as noted before, then, gives Article 45 a strong basis for establishing a legal framework which is intended to fundamentally change the property systems of the communities of Kenya. Article 45 is couched in terms of the content and spirit of Article 16 of the UDHR, part of Article 10 of ICESCR, Article 23 of ICCPR, and Articles 16 (1) (a), (b) (c) and (h) of CEDAW and Article 18 (1) of ACHPR. Article 45 (1-3) provides that:

The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. (3) 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.

The necessary implication of these provisions is that parties to a marriage enjoy equality in terms of ownership of property at the time they decide to marry, during the existence of that union and at the time of dissolution. Thus, they have every right to freely contribute to the accumulation of property during the marriage, they can, unfettered, include property acquired prior to the marriage in that of the marriage or not, and each has a right to freely deal in the property individually held as they desire. This provision formed the basis for enacting the Matrimonial Property Act of 2013. It was basically to alter the legal regime created by the Married Women's Property Act of 1882 which was a statute of general application which had

¹⁴ Adopted by the United Nations <https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>

¹⁵ Adopted by the Heads of State in African sub-regional level of Great Lakes on 30 November, 2006 entered into force in 2008

since outlived its usefulness, in the era of a robust Bill of Rights in the 2010 Constitution.

The matrimonial property act, 2013

The 2013 Matrimonial Property Act was enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property.¹⁶ Section 4 of 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. By virtue of Section 4 which refers to Section 6 of the Act which excludes any property held in trust and any property that may be included as matrimonial property by agreement between the parties to a marriage, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property. Owino (2017) notes that during the past few years Kenya has revised most of its laws and repealed those statutes that governed matrimonial property. These include the Matrimonial Causes Act, the Married Women Property Act and the repealed Constitution. However, it is the view of this study that in so doing, Kenya has brought in new laws tending to reflect the reality of the practice and situation in Kenya. To this effect, the 2010 Constitution brings in a new dimension in regard to equality in marriages. Under Article 27(1) it provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. And under Article 27(2), the same law clarifies the form of equality it envisages. It states that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Therefore, under Article 27(3) women's right to equality with men is clearly stated by providing that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. And by virtue of Article 45 (3), 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 Section 7 of the Matrimonial Property Act of 2013, then, 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. Thus, under Section 8 of the Act, 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. Subsection 2 of Section 8 provides for a situation where a wife in a polygamous marriage has a clear by agreement with the spouses that she shall have her matrimonial property with the husband separate from that of the other wives. In such a case, any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

Regarding property acquired by one spouse before or during the marriage and the

property acquired during the marriage does not become part of the matrimonial property, then under Section 9 of the Act, but the other spouse contributes towards the improvement of the property, then the spouse who contributes acquires a beneficial interest in the property equal to the contribution made. This is very important in regard to this study because often the argument among the Abagusii people has been whether the wife contributed to the acquisition of the matrimonial property or its development. During the period the Matrimonial Property Act of 2013 has been under application to the community, the study herein has found that virtually all women respondents stated that they, in one way or other contributed to the development of the properties which they live in, whether ascertained as matrimonial property or not. By virtue of Section 10 of the Act, 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. Furthermore, 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. Thus, under Section 10(3) of the Act, parties to a marriage 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. The study found that many respondents were of the view that expenses or liabilities were being shared jointly, without trying to ascertain who contributed what sum: many spousal relationships were being lived by mutual trust that all is being done for the common good of the family.

In terms of Section 11 of the Act, at the time of division of matrimonial property between and among spouses, subject to the values and principles of the Constitution, the customary law of the communities in question ought to be considered. This would include the customary law relating to divorce or dissolution of marriage, the principle of protection of rights of future generations to community and ancestral land 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. But under Section 12, 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.

Of urgent application especially during the period when the Covid-19 pandemic has put women in matrimonial homes, especially women who were not formally employed and most of whom, as the study found, have lost their source of incomes or livelihood is whether such women should be left to live in matrimonial homes. Therefore, it is worth noting that under Section 12 (3), 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. Against this backdrop, the effect on Covid-19 on the gains made by way of the application of the Act under the Abagusii people become directly in issue. For this reason, the study examines briefly the basis for the application of the Covid-19 safety and health guidelines in Kenya and hence directly among the Gisia people of Kenya. This is because the study found that the application of these guidelines has greatly impacted negatively the equality steps that the implementation of the Matrimonial Property Act of 2013 has had among the Gisia people.

Basis for application of COVID-19 guidelines in Kenya

The Covid-19 pandemic took Kenya, and indeed the entire world by surprise. Its negative effects both socially and economically are almost immeasurable. Of great worry to the country is the pandemic's effect on the health of the people of Kenya. This translates to its effect on the right to health which is either at individual level or community or public level. It is for this reason that the government of Kenya came up with a raft of guidelines on the management of the pandemic in Kenya. Although this study will single out the guidelines that have affected the progress made on the application of the Matrimonial Property of 2013 on the Gusii people, it would be important to mention some of the general ones or documents that contain some of them here. The guidelines include, but are not limited to, Interim Guidelines on Management of Covid-19 in Kenya,¹⁷ and Kenya Covid19 RMNH Guidelines¹⁸ issued by the Ministry of Health; Guidelines for Business Operations During Covid-19¹⁹ issued by the Ministry of Trade and Industry; Guidelines Subsequent to the Declaration of Covid-19 (Corona Virus) as a Global Pandemic and the Confirmation of a Case of Corona Virus Infection in Kenya²⁰ issued by Parliament; and Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic²¹ issued by the Chief Justice and President of the Supreme Court on behalf of the Judiciary. Some regulations in all these guidelines have in one way or other an impact on the proprietary rights and equality of women and men as discussed above and as findings of this study show. In addition to the guidelines, some subsidiary laws were enacted by the respective Ministries. For instance, on 6th April, 2020, the Ministry of Health published Kenya Gazette Supplement No. 41.²² Many other regulations which constitute subsidiary legislation for example those that provided for observance of curfew throughout the Republic between 7 pm and 5 am which were revised to between 9 pm and 4 am daily, those governing keeping social distance of at least 1.5 metres, those on wearing of masks in public places, those restricting movement in and out of certain places, those restricting businesses during certain hours or in certain places, those relating to burial within 24 hours of of deceased persons who were confirmed as having succumbed due to the disease have been published in the Kenya Gazette.²³

The above guidelines, regulations and subsidiary legislation are based on Kenya's obligation to assure and fulfill the provision of the right to health and safety of its citizens. This is pursuant to Article 43 (1) of the 2010 Constitution which provides that "Every person

17 https://www.health.go.ke/wp-content/uploads/2020/06/Updated-Case-Management-Guidelines-26_03_20-1.pdf

18 <https://www.health.go.ke/wp-content/uploads/2020/04/KENYA-COVID19-RMNH.pdf.pdf>

19 http://www.industrialization.go.ke/images/downloads/COVID-19/GUIDELINES_FOR_BUSINESS_OPERATIONS_DURING_COVID19-V1_JUNE2020.pdf

20 <http://www.parliament.go.ke/sites/default/files/2020-03/GUIDELINES%20CONSEQUENT%20ON%20THE%20DECLARATION%20OF%20COVID%20-19%20%28CORONA%20VIRUS%29%20AS%20A%20GLOBAL%20HEALTH%20PANDEMIC%20AND%20THE%20CONFIRMATION%20OF%20A%20CASE%20OF%20CORONA%20VIRUS%20INFECTION%20IN%20KENYA.pdf>

21 <http://kenyalaw.org/kl/index.php?id=10310>, Gazette Notice No. 3137

22 THE PUBLIC HEALTH (COVID-19 RESTRICTION OF MOVEMENT OF PERSONS AND RELATED MEASURES) RULES, 2020, Legal Notice No. 50

23 For a detailed study on the numerous subsidiary legislation enacted by the national government in relation to the Covid-19 pandemic to date, see, **Public Legal Information on Kenya's Response to**

COVID-19 <http://kenyalaw.org/kenyalawblog/kenyas-response-to-covid-19/> Retrieved on 15/08/2020

has the right- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.” This is given more live through the Public Health Act²⁴ which provides for how matters that affect the public health generally are handled. In addition to this, the Public Order Act²⁵ has come into the aid of government in the management of the pandemic by its application by the Ministry of Interior and Government Coordination when it issued restrictions on the movement of people in and out of certain places and during the curfew times as stated above. This legislation is also given a firm foundation by the government’s commitment to the provision to its citizens of the right to health as obligated under provisions of a number of international instruments which she is party to. For instance, Article 25(1) of the UDHR and Article 12 of the ICESCR. Other provisions of instruments which indirectly relate to the health of women include Article 5 (e) (iv), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,²⁶ Arts. 11 (1) (f), 12 and 14 (2) (b) of the 1979 CEDAW, Article 24 of the 1989 Convention on the Rights of the Child,²⁷ Articles 28, 43 (e) and 45 (c) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²⁸ and Article 25 of the 2006 Convention on the Rights of Persons with Disabilities.²⁹ With these and other soft law instruments, Kenya is obligated to ensure that the Covid-19 pandemic does not affect its citizens greatly. However, in the process of Kenya endeavoring to protect her people from the effects of the pandemic, she has ended up drastically affecting the equality of women in terms of property matrimonial rights contrary to how it had initially been envisaged. This is the reason that necessitated this study.

Methodology

The Republic of Kenya is a country in Eastern Africa, with a population of approximately 47.6 million people.³⁰ It lies on the equator. It is bordered by Ethiopia (North), Somalia (East), Tanzania (South), Uganda (West), and Sudan (Northwest), with the Indian Ocean running along the southeast border. It is an expanse of 582,646 square kilometers. The country is named after Mount Kenya – there before known as Mount Kirinyaga. Before 1920, the area 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.

With this background information, the researchers delved into the study to find out how the new laws on Matrimonial Property have impacted the economic wellbeing and equality status of women among the Gusii people. The study utilized a mixture of research design, that is to say, both quantitative and qualitative. Data was collected, collated and analysed using

24 Chapter 242 Laws of Kenya

25 Chapter 56 laws of Kenya

26 **Adopted** by the UN General Assembly in 1965, came into force 4 January, 1969

27 **Adopted** by the United Nations General Assembly on 20 November 1989, came into force on 2 September 1990

28 Adopted by the General Assembly resolution 45/158 of on 18 December 1990, came into force on 1 July, 2003

29 Adopted by the General Assembly by resolution 61/106 on 13 December 2006, *entered into force* on 3 May 2008

30 2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics. <https://www.knbs.or.ke/?wpdmpromo=2019-kenya-population-and-housing-census-volume-iv-distribution-of-population-by-socio-economic-characteristics>

instruments tested for accuracy. There was pre-field data collection testing on the efficiency and accuracy of the questionnaire. The study was carried 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.

It 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 that the study sampled were married men and women from the Gusii Kisii 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 backgrounds ranged from those with Class Seven or Eight qualifications, to those with High School ones, that is to say, Form IV or VI, to Undergraduate, Masters and doctoral degrees holders. 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 Abugusii 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, 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 them. Majority of the respondents noted that it was not applicable while a few indicated that they were not aware the need to register. These probably are those who 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 responded ended. to the nay. This is probably because most property is communally owned, individually owned or family owned, self -acquired or property is male owned and where it is male-owned, a woman who would complain about its use and disposal is subordinate. The study was in-depth, focused on the property ownership relationships and the effects of the pandemic on women's equality status or perceptions on equality. Some of the responses are directly clear on the interplay between the two aspects that it would be appropriate to give some of the responses verbatim.

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 consent before transfer of matrimonial property. On whether the respondents were aware of the contents of the 2010 Constitution and the Matrimonial Property Act, 2013, an interview with an officer from the Ministry of lands noted that **"Most people are not aware about the matrimonial property rights and even those aware do not take the law seriously"**. When asked about the gender of the ones who are aware, he noted that **"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, another land's officer, was asked if fathers and sons give land to daughters and sisters. He noted that, **"the Constitution compels people to do so, but when they become difficult the law is enforced to have justice done"**. He was asked also whether land registrations of matrimonial land ownership is currently gender balanced in terms of ownership. The officer noted **that "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 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 **that the "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 that ***“first and foremost 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 difficult 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 she said: *“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”*** Further, respondents were asked if Covid-19 had had any effects on their lives as relates to matrimonial property rights. Some of the respondents replied with sad and captivating stories. For instance, a lady responded as follows:

“I used to do the business of selling vegetables and fruits outside the main market in Kisii town. Three years ago, my husband and I bought a property measuring about one eighth of an acre. It cost us nine hundred and fifty thousand. The plot is at Nyamataro estate of Kisii Town. I paid Ksh. 350, 000 which was all the savings I had made for four years in my business. My husband who is a teacher and business person (running a shop off the junction between Migori, Kisumu and Kisii) paid the balance. We have started building on the parcel. The two-bedroom house is halfway complete but we stay in it. Hell broke loose on me when the government announced the second and third cases of the Covid-19 pandemic in Kenya. The raft of measures put in place completely crippled my business. My fellow business

women – vegetables and fruit vendors – and I were chased from our business places by the Kisii County officers and police. We were not given alternative business places and our trade licences were not respected, to date. From then on, I lost all my business and earnings. I started depending on my husband whose business also almost closed down because of few customers coming in. But thanks to God that he is employed by the government. Therefore he earns a salary and some money from the shop. The worst of the nightmares for me is that I no longer contribute to the construction of the house. My share literary froze while that of my husband continues to go up every day. I have no say in the house anymore apart from being a mere house wife – a total dependant on him. With the stresses that I come across every day in that home, I fear I may be kicked out of the house at home point in time. Where do I go at that time?”

A male respondent on effects of Covid said...that the pandemic has not affected him much but will report what he has seen as effects it has had in families in relation to matrimonial property rights:

“Most women have lost their businesses hence increasing the level of inequality and reducing their empowerment as some who had loans have been caught up with many dues of non-payment. Some have had their properties sold or auctioned, especially by chamas (self-help groups) which had lent them and not paid back. Additionally, most women are unable to access credit facilities easily because of the fear of the lenders losing their monies due to the uncertain business environment currently. Women who used to contribute towards acquisition of matrimonial property no longer do so. Most of them, in the rural Kisii and even in urban centres were, prior to the pandemic engaged in small businesses such as the vegetable selling and fruit vending, are unable to contribute to ‘chamas’ as regularly as they used to do. Their savings are not there any more as they are depleted. Curfew due to Covid-19 has limited their business opportunities, for those who used to do businesses.”

On the question of curfew enactments most women stated that their businesses used to thrive between 6 pm and 8 pm daily, a time when most people leave offices and hurry home, that was tough and dry even with the introduction of the 7 pm – 5 am curfew. The women noted that things improved a bit with the shortening of the curfew times to between 9 pm and 4 am as they can do business to slightly late hours. Moreover, the expansion of the morning curfew time from 5 am to 4 am gives opportunity to those who used to source items from far to wake up early and hit the road for the items to sell. Before that time, the longer hours of the curfew limited their opportunities. One other responded when asked to respond as to how covid has affected men and women and matrimonial property ownership said:

“One great effect is that of affecting the customary adjudication process of inheritance and family property distribution when a husband dies. Under normal

circumstances, the Kisii customary practice endeavoured to give a recognised widow of a deceased husband an opportunity to ascertain which of the properties of the husband she could inherit. Ordinarily, under the Gusii customary laws and practice, when a married man or woman passed on under normal circumstances, the practice was that the elders/ community would notify anyone who owed or was owed anything by the deceased to declare it. The elders/ leaders would then go through the process of verifying the claim or debt and ascertain the clear position of the deceased person's properties. These would then be passed over to the household, under the control of the widow and sons of the deceased until such time as would be determined otherwise, for instance, by way of succession proceedings in court. This gave a widow a chance to access property of the deceased person easily. This is no longer the case during this pandemic. These days when it is discovered that the deceased husband died due to Covid-19 or related demise the MoH Guidelines on the Covid-19 pandemic have had a serious effect on that. In particular, the Guideline states that a burial of a Covid-19 pandemic person takes effect immediately and not later than 24 hours. This has affected how adjudication of the property issues of a deceased man is carried out by the community as the people abandon such a home. Under these guidelines, most of the customary practices particularly about the ascertainment and inheritance of the properties of a deceased husband has put the women in a more vulnerable situation than was before the pandemic. The situation before the pandemic would be said to have been much better with the application of the MPA 2013, since some of the issues had often been captured.

Moreover, other effects of the pandemic have been noted among the women folk of the Gusii community, following the research carried out herein. Since traditionally many women did not have access to properties and money earning resources, they have been dependent more on men than on their own. It was also noted that if women got subjected to quarantine, they were forced to pay for cost themselves they have been abandoned by their husbands, some for reasons that finances are limited or due to selfish reasons. This has impoverished them more, as it was noted from the respondents. This has increased the level of inequality among many, between men and women. Some women are unable to afford legal fees and access to justice during this time because of reduced earnings and that the courts themselves are not functioning optimally

Some of the respondents indicated that there are increased unplanned pregnancies which weighed heavily on the savings and resources of women, and that as a result of that, some women not been able to go about their usual jobs due to the unplanned pregnancies. Additionally the imposition of a curfew by the national government has subjected women to greater health risks for the reason that they cannot go to hospitals at night if illness strikes, for fear of reprisals by the authorities/ police or due to threat of violence and arrests by police. This has impacted on their ability to be productive in terms ownership of property. Some respondents also indicated that at times women, just like other men, have shied off from seeking medical attention for fear of being diagnosed of Covid-19 when similar symptoms

occur. This is due to the underlying fear of being subjected to quarantine and its attendant costs. When asked the effect of that, many responded that they feared the risk of having their level of properties going down as a result incurring unexpected or un-planned expenses.

Conclusion

From the findings above, the study concludes that property family owned needs to be registered as required by the law and even when it is co-owned, it should be registered jointly or given a name that depicts joint ownership. The study found out that property is either jointly shared at either 100% or on a 50-50% or 70-30% which points towards a positive direction although there were cases where the shareholding was at 90-10 % with the husband at 90% and the wife at 10% interestingly the study found that whereas most people are aware of the law regarding matrimonial property ownership they have not put the tenets in it into practice. It was found that a good percentage of both men and women are aware of property ownership and the act of 2013 but on sharing property to cushion daughters and sister is still far from reality. The study found that the matrimonial property act is well known yet a good percentage of both men and women still believe that property belong to a man and that even the wife is property number one to the man hence a need for continuous sensitization especially on the support the government is giving to check that justice is being done. As regards to matrimonial property ownership and what to do if rights are infringed many of respondents especially men said they knew while when didn't know. It also came out that Covid-19 has had a big negative impact on the equality between men and women in terms of property ownership. For instance, many women suddenly lost their source of livelihood and development hence rendering them dependent on men, which is a situation similar to the long past cultural practices which the new laws were enacted to correct: a sad reality!

Recommendations

The study recommends that deliberate efforts be mounted to educate women to the importance of land ownership and have acquired knowledge on the matrimonial property ownership. Spouses need to share owned property in equal measures or still try to see away of co-owning of property as equal partners in the union. Women need to study the act regarding matrimonial property rights and privileges so that they are well informed to seek redress when conflict ensue. Women should be financially cushioned against such sudden unprecedented change of proprietary. Communities need to be sensitized on how to deal with pandemics by saving for such times. Men being the heads of families, in the Abagusii cultural context, should organize their property and do a will so as to support their wives in case death as lack of documentation exposes the wife to suffering.

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