



KABARAK UNIVERSITY

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Matrimonial Property Agreements: The Future Of Matrimonial Property Law In Kenya

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Introduction – Matrimonial Property Jurisprudence Pre MPA 2013

- ▶ In the traditional African conception of marriage, there was no such thing as matrimonial property.
- ▶ The first law on matrimonial property in Kenya is the Married Women Property Act of 1882 , an act of general application under the Judicature act.
- ▶ Provided for the right of women to hold and own property that is separate from the husbands
- ▶ It was a result of the industrial revolution in Britain, which witnessed women joining the paid workforce.

Introduction Cont'd

- ▶ MWPA criticized for failing to recognize realities of marriage life because it required evidence of contribution
- ▶ Application of Section 17 of MWPA resulted in inconsistency. *Karanja*—a third based direct, *Kivuitu* - 50% based on direct and indirect contribution
- ▶ *Muthembwa*, Increased value of trust property, 50% of improvement. *Nderitu*, Customary marriage, 50% indirect. *Fatia Essa*, Muslim marriage, 50% indirect, *Echaria*, back to insisting on proving direct contribution.
- ▶ All these based on section 17 of MWPA. Need for a new law for consistency after 2010 constitution

Introduction Cont'd –MPA 2013

- ▶ Section 2 defines contribution, section 6 Matrimonial property.
- ▶ Section 6 (3) introduces pre – nups and 6(4) provides grounds for setting aside
- ▶ Section 8(2) envisions possibility of pre nups in polygamous marriages, but only between each wife and husband
- ▶ Section 9 on contribution is not subjected to section 6(3)
- ▶ Section 10(2)envisions an agreement on spausal liability in respect of matrimonial property

Statement of the problem

- . Brevity, and assumption of simplicity of pre nups
- . Does not address the reality of and Marriage Act's provisions of polygamous unions. In terms of consent of parties to a pre nup
- . In a polygamous union. What is the status of a first prenup over a second prenup, is there obligation to disclose?
- . Prenup V direct and indirect contribution.
- . As a result, law on pre nups is likely to develop. Its important to look at other jurisdiction's growth and learn from them.

Study objectives

Why South Africa

- . It is an African country, culturally closer to Kenya, especially because of recognition of polygamous unions
- . Prenups are provided for in law, and courts have taken an approach of interpreting these prenups and guiding their development
- . Recognition of indirect contribution to matrimonial property through normal marital roles just like Kenya.
- . Decisions likely to persuade Kenyan courts

Why United Kingdom

- . Study limited to England and Wales
- . Concept of separate ownership of property is similar to Kenya.
- . Has not recognized pre nups but is developing through case law a criteria for enforceable pre nups
- . Recognizes concepts like constructive trust of matrimonial home and effects
- . Decisions likely to persuade Kenyan courts

Brief literature review

Methodology

. Legal doctrinal approach-

South Africa

- The idea of Pre- nups was brought into South Africa by the Dutch
- All marriages are marriages in community of ownership unless parties opt out through a pre- nup agreement.
- “Community of ownership” means that all the assets and liabilities of the parties at marriage will now be owned jointly by both parties
- In case of divorce each party is entitled to 50% of the property in the marriage
- Parties are barred by law from access credit, stand surety, litigate against a third party, mortgage, or burden any thing, including household items without a written consent of the other spouse(Section 15 Matrimonial Property Act South Africa)

South Africa Cont'd

Parties may agree in these pre-nups to either include accruals or exclude them

Accruals are defined as the difference in wealth of the parties. When parties have entered into marriage without community of ownership with accruals, then the difference in wealth will be divided equally upon divorce.

There are requirements for disclosure of wealth either before marriage or within 6 months of marriage

The law forces a conversation on matrimonial property on newlyweds or prospective spouses

South Africa Cont'd

- . Polygamous marriages are automatically marriages out of community of ownership *Mayelane v Ngwenyama and Others* 2013 4 SA 415
- . Parties to subsequent marriages are required to enter into a contract and register it in court for approval
- . Section 7(6) of the RCMA, provides that a "a husband in a customary marriage who wishes to enter into a further customary marriage with another woman ... must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages
- . Monogamous customary marriages are automatically marriages in community of ownership. *Gumede v President of RSA and Others* CCT50/08 ZACC2

UNITED KINGDOM(England and Wales)

- There is complete separate ownership of matrimonial property
Act of marriage has no effect on ownership of property
- Equity may be used to create a constructive trust in respect of matrimonial home and household goods
- On principle pre nups are void on grounds of public policy because such contracts undermine marriage as a lifelong union - *N V N(Jurisdiction, Pre nuptial Contracts)[1999] 2 FLR 745*
- The courts may recognise pre nups for foreign marriages.*
- It is possible to consider aspects of pre nups but this must be subjected to the over riding yardstick of equality. *White v White [2000] 2FLR 745*

UNITED KINGDOM(England and Wales)

Courts have developed 'safeguards' that they consider if they are to accept aspects of prenups.

Access to independent legal advice about the agreement at the outset.

Full and frank financial disclosure of both parties' assets

The agreement must not be entered into less than 21 days before the marriage.

Neither party was under pressure or duress to sign the agreement against their will.

agreement has to be fair and realistic..

Prenuptial agreements should be reviewed to take into account children and other events **Radmacher (formerly Granatino) v Granatino [2010] UKSC 42**

UNITED KINGDOM(England and Wales) Cont'd

- . There is provision for separation agreements dealing with financial arrangements which are binding as long as there were intentions to create legal relations.
- . Other contracts between spouses are allowed in the course of marriage. Employment, sale etc provided there is intention to create legal relations
- . There is a lot of pressure to recognize pre nups and it is now being considered by the family law commission

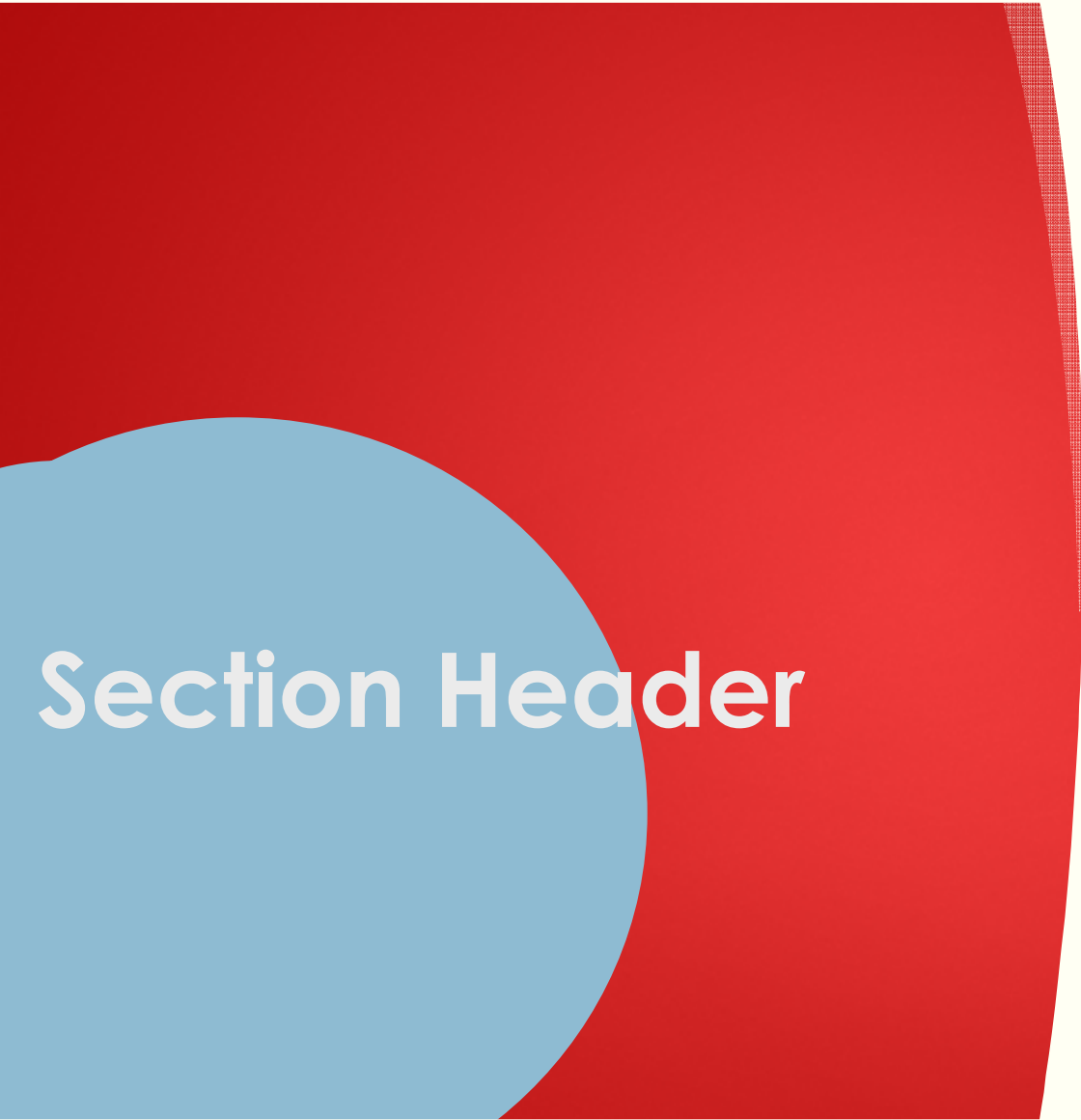
Conclusions

- Kenyan law on pre nups obviously needs to be reviewed. Its so inadequate and uncertain.
- The brevity of these provisions seem to assume that they are simple
- Pre nups are not simple. They are complex contracts that need a proper legal framework to contain and guide them.
- without any legal framework, the courts will have to determine on a case to case basis as to whether to recognize, the weight to attach to certain terms, etc.
- The net effect is that the introduction of pre nups has complicated rather than simplified Matrimonial Property Claims

Recommendations

- Legislative reform to address the following
 - Provisions governing prenups addressing recognition and enforceability
 - Provisions tailored to address the concept of indirect contribution
 - Provisions tailored to address presence of children

Areas for further study



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