

Chapter 8

Economic Abuse

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Economic abuse: “Money withheld by an intimate partner or family member, household resources (to the detriment of the family’s well-being), prevented by one’s intimate partner to pursue livelihood activities, a widow prevented from accessing an inheritance. This category does not include people suffering from general poverty.”

8.1 Right to Matrimonial Property



FIDA Kenya v The Attorney General & another [2018] HC

Principle or Rule Established by the Court’s Decision

Legal provisions relating to matrimonial rights in property, and any concomitant obligations, must take into consideration both monetary and non-monetary contributions provided during the marriage.

Judge: Mativo | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Petition dismissed	High Court, Nairobi (Kenya)	Petition No. 164B of 2016; delivered on 14 May 2018	Economic abuse

Case Summary

Section 7 of the Matrimonial Property Act provides that, “*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.*”

Various non-governmental organisations filed suits challenging the constitutionality of Section 7 of the Matrimonial Property Act. They alleged that it unfairly discriminates against the rights of women to share marital property equally. Specifically, it was argued that:

- i. Requiring a wife to prove their contribution towards the acquisition of property infringes the rights of women to own

marital property equally, as specifically averred in Article 45(3) of the Constitution. Article 45(3) of the Constitution provides that, “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.”

- ii. The inequality is exacerbated when Section 7 of the Matrimonial Property Act is read together with Section 10 of the Matrimonial Property Act. Section 10(2) provides that, “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.” Section 10(3) provides that parties to a marriage “shall share equally any liability incurred during the subsistence of the marriage and reasonable and justifiable expenses incurred”.

The Court determined that Section 7 was a reflection of the principle of equality in Article 45(3) of the Constitution because the term “contribution” in Section 7 is sufficiently wide to encompass non-monetary contributions (often provided by the wife) as well as monetary contributions. Since non-monetary contributions, traditionally made by women, are clearly provided for in the Act (Section 9), courts would be in a position to properly evaluate the interests of the parties and make a just and equitable distribution of the property.

Thereafter, the Court found that:

The impugned section does not contradict... the Act which provides for liabilities incurred during marriage to be shared equally. The provision was meant to curb situations where one party to a marriage would be left to settle debts incurred during the subsistence of the marriage.

Points to Note

- The Court observed that:

Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be “unduly strained”. It should avoid “excessive peering at the language to be interpreted”.

- Courts have a duty to promote the spirit, intent and objectives of the Constitution, and must prefer a generous construction over a merely textual or legalistic one, so as to afford the fullest possible guarantees.

- The Constitution prohibits unfair discrimination, which means it prohibits differential treatment that is demeaning. The Court was of the view that unfair discrimination happens when:

... a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

Other cases/decisions referred to	
Country/jurisdiction	Case
ECtHR	<i>Willis v The United Kingdom</i> [2002] No. 36042/97, ECHR – IV
UK	<i>White v White</i> [2000] UKHL 54
	<i>Miller v Miller & McFarlane</i> [2006] UKHL 24
	<i>R. v Nor. Elec. Co.</i> [1955] O.R. 431
USA	<i>U.S. v Butler</i> [1936]

M.G.N.K. v A.M.G. [2016] CA

Principle or Rule Established by the Court's Decision

In assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness.

Judges: Karanja, Warsame and Azangalala | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 280 of 2012; delivered on 22 April 2016	Economic abuse

Case Summary

The parties married in August 1987. In 2008, the wife filed an originating summons seeking a division of matrimonial property acquired by the parties in the course of the marriage. The wife appealed against the initial determinations made.

The Court of Appeal was required to determine whether the trial judge was correct to:

- Ascribe beneficial ownership of two properties to the husband.
- Order the sale and division of the proceeds of other jointly owned properties.

The Court of Appeal found that:

- i. In assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness. Against this background:
 - a. The first property was acquired prior to the marriage and entirely funded by the husband. There was no direct or indirect contribution from the wife.
 - b. The second property had been registered in joint names. In such circumstances, there is normally a rebuttable presumption that each party made equal contribution towards its acquisition and that therefore each has an equal beneficial interest in the property. In this case, there was clear evidence the wife had made neither direct nor indirect contributions towards the purchase of the property. Rather, she had unlimited access to the husband's bank account and used family income and assets to acquire other properties, which were registered in her name only. The presumption of equal contribution to the second property was therefore rebutted. To allow the wife to have a joint equitable interest in this property as well as her solely owned properties would effectively amount to double enrichment.
- ii. In this case, there were competing claims by the husband and wife to specific jointly owned plots of land. Any division of the plots would have meant that one party would have been awarded less than half of the overall value, contrary to the equitable division of the joint ownership. Under Section 7 of the Married Women's Property Act of 1882 (prior to the Matrimonial Property Act of 2013), the Court had the power to make such order or orders as justice may demand when determining any question as to title or possession of property between a husband and a wife. The judge's decision to order in the circumstances that the plots be sold and the funds divided equally was a just approach to take.

Points to Note

- Despite the joint registration of one of the properties, the appellant was not entitled to a share of the same because she had used family income and assets to acquire other properties, which were registered in her name only. On the facts, the respondent clearly rebutted the presumption of equal contribution.
- The Matrimonial Property Act does not have retroactive effect. However, it was enacted to breathe life into Article 45(3) of the Constitution and this should always be taken into consideration when making orders.

Obiter Dictum

"In a marriage set up, it is not realistic to expect partners to keep track of their respective contributions towards the purchase of family property because at the time of such purchase, divorce is not on their minds. It is therefore pretentious to expect any of them to be able to show their exact contributions towards the acquisition of the subject property. Notwithstanding the difficulty in determining the exact contributions of each spouse towards the purchase of family property, the court still has the duty to apportion family property to the best of its ability taking into account not only the personal earnings of each spouse and how it was applied in the family, but also each party's indirect contribution not only to the purchase of the subject property but also to the welfare of the family as a whole".

Peter Mburu Echaria v Priscilla Njeri Echaria [2007] CA

Principle or Rule Established by the Court's Decision

The status of being a "wife" does not, without more, amount to a "contribution" towards property that would entitle the wife to a share of property.

Judges: P. Tunoi, E. O'Kubasu, E. Githinji, P. Waki
and W. Deverell | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed in part	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 75 of 2001; delivered on 2 February 2007	Economic abuse

Case Summary

This was an appeal from the order of the High Court, where it had found that the parties, a couple who had been previously married, equally shared a farm measuring 118 acres. The High Court made this order on the basis that the wife had made a substantial indirect contribution in kind to the family, including taking on the onerous duties of being an ambassador's wife. These contributions therefore entitled her to receive an equal share of the property in dispute.

The issues that the Court of Appeal had to determine included:

- i. Whether the Court could take into account a spouse's non-monetary contribution, made by way of domestic duties, in the distribution of matrimonial property.
- ii. Whether the Court, making orders under Section 17 of the Married Women's Property Act, could order a transfer of a proprietary interest in land from one spouse to another.

The Court of Appeal ruled that:

- i. Drawing from the findings in *Pettitt v Pettit* [1969] 2 WLR 966, *Burns v Burns* [1984] 1 All ER 244 and *Button v Button* [1968] 1 WLR 457, the trial court erred in accepting the “*status of being an ambassador’s wife as indirect contribution towards the acquisition of the property*”. Accordingly, the status of the marriage alone would not entitle a spouse to an interest in property registered in the name of the other spouse. In addition, the performance of domestic duties, or being economical in spending on the housekeeping, would not amount to a financial contribution.
- ii. Section 17 of the Married Women’s Property Act of 1882 gave the courts discretion to grant appropriate remedies on ascertainment of the respective beneficial interest in a disputed property. The same remedies as are available in law in property disputes in ordinary actions are also available in disputes between husband and wife under Section 17. The Court had jurisdiction to allocate shares of the disputed property as it may deem just and to order the transfer of the share to the rightful beneficial owner to give effect to its decision. In this case, it was just that the respondent should retain her beneficial share of the farm if she so wished.

Points to Note

- The status of the marriage alone would not entitle a spouse to an interest in property registered in the name of the other spouse.
- In addition, the performance of domestic duties, or being economical in spending on the housekeeping, would not amount to a financial contribution.
- Section 2 of the Matrimonial Property Act 2013 now defines contributions to include non-monetary contributions, including domestic work and management of the home, childcare, companionship and management of property.

Other cases/decisions referred to	
Country	Cases
UKUK	<i>Pettitt v Pettitt</i> , 2 WLR 966 [1969]
	<i>Gissing v Gissing</i> , 2 All ER 780 [1970]
	<i>Wachtel v Wachtel</i> , 1 All ER 829 [1973]
	<i>Burns v Burns</i> , 1 All ER 244 [1984]
	<i>Button v Button</i> , 1 WLR 457 [1968]
	<i>Cobb v Cobb</i> , 1 All ER 781 [1955]
	<i>Hine v Hine</i> , 1 WLR 1124 [1962]
	<i>Falconer v Falconer</i> , 1 WLR 1333 [1970]

Principle or Rule Established by the Court's Decision

The recognition of equal rights on the dissolution of marriage does not require automatic equal apportionment of property. Contributions to property must be considered. A wife's indirect contributions to property, whether in monetary or non-monetary form, should be taken into consideration in determining the extent of her interest.

Judges: P. Waki, P. Kiage and J. Azangalala | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 128 of 2014; delivered on 3 March 2017	Economic abuse

Case Summary

PNN and ZWN were husband and wife, married in 1961. During the course of their marriage, they made sizeable investments. In April 2004, the wife sought a declaration, under Section 17 of the repealed Married Women Property Act of 1882, that several properties registered in her husband's name had been bought on trust for her, and another seeking a termination of the trust and apportionment of the property. She claimed that the property had been acquired jointly during coverture and that she had contributed, both directly and indirectly, towards its acquisition. The husband denied the claims, stating that he had solely acquired and developed the property and that he was the registered proprietor.

The High Court allowed her application in part, and found that some of the property acquired during the course of the marriage was matrimonial property. The High Court further held that the wife had made direct and indirect contributions towards the acquisition of the property and awarded her a half share in those properties. The husband appealed, faulting the findings of the High Court.

The issues that the Court of Appeal was called on to determine included (among other things) whether the provision relating to equal rights in marriage and on the dissolution of marriage in Article 45(3) of the Constitution was applicable.

The Court found that the provisions of the Constitution, as well as international covenants on equality of the parties, would apply retrospectively to matters filed before promulgation of the Constitution of Kenya 2010. In promulgating a new Constitution, the people of Kenya intended that there be a fundamental transformation in society. Therefore, while each case must be determined on its own merits, the Constitution

ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and inalienable to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation.

The Constitution declares that marriage is a partnership of equals. No spouse is superior to the other. In those few words, all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So, in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law [Justice Kiage].

Marital equality as recognised in the Constitution does not mean that matrimonial property should be divided equally. Neither the Constitution nor general law imposes, compels or lionises the doctrine of 50:50 sharing or division of matrimonial property. The *Echaria* decision was correct in the broad sense that direct or indirect contributions should be considered in weighing up how to apportion assets fairly. However, Section 2 of the Matrimonial Property Act now goes further and recognises that contribution towards acquisition of property takes both monetary and non-monetary forms. It adds little to Section 2 to seek to apply *Echaria* as a separate principle.

In the instant case, the wife properly proved direct and indirect contribution towards the property in dispute.

Points to Note

- The right to equality is inherent and inalienable to all human beings.
- This case is notable because the Court ruled that the recognition of equal rights on the dissolution of marriage does not require automatic equal apportionment of property. Contributions to

property must be considered. A wife's indirect contributions to property, whether in monetary or non-monetary form, should be taken into consideration in determining the extent of her interest.

Obiter Dictum

Justice Kiage: "In view of my stated understanding of what **Section 45(3)** means and what it does not mean, I do not see that taken in context, the analytical approach taken by the five-Judge bench (who determined *Echaria v Echaria*) in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of **Echaria** is violative of the marital equality principle of **Article 45(3)**. I would therefore eschew any bold pronouncement that it is no longer good law and should be interred. What has changed, from my point of view, is the narrow conception of contribution espoused by **Echaria** in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act.

"In sum, I do think that it would be unrealistic to presume that marriage per se always engenders a blissful, convivial and idyllic existence of mutual support and synergistic exploits. I suppose it does in many marriages. It is true, however, that the marital state may sometimes be a trap where creativity is by slow degrees chilled out of existence and parties may feel entombed in sterility. A spouse may be so uncooperative, so wasteful, so distant, so all-over that he or she has hardly provided the warmth of companionship on the basis of which it might be said they made a non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not because, but rather in spite of their lazy, selfish, wasteful, wayward, drunken or draining mate. In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution and notwithstanding their negation or diminution of the efforts towards its acquisition.

"In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of *Njoroge v Njoroge* (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages..."

Other cases/decisions referred to	
Country/case	Decision
UK <i>Fribance v Fribance</i> [1955] 3 ALL ER 789	A court has the power to direct an inquiry under the Married Women's Property Act even during the time that marriage is subsisting.

8.2 Succession



Ngoka v Madzomba [1999] HC

Principle or Rule Established by the Court's Decision

A custom must be properly established through evidence before the court can consider a cause of action based on such a custom.

Judge: Waki, J | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed	High Court, Mombasa (Kenya)	Civil Appeal 49 of 1999; delivered on 15 November 2002	Economic abuse

Case Summary

The respondent had paid a dowry in relation to the marriage of his son. Following the marriage being contracted, the respondent's son died. Another of the respondent's sons had then attempted to inherit the widow, citing Mijikenda customary law. However, the widow refused. Instead, the widow chose to have a relationship with the appellant, whom she married. As a result, the respondent filed suit. The trial magistrate found in favour of the respondent. The appellant sought to contest the ruling.

The issue that the High Court had to consider was whether the custom as claimed by the respondent was properly proved before the Magistrates' Court.

The High Court ruled that:

- i. The Constitution of Kenya recognises customary law and the law has established the manner in which it ought to be applied. A custom would be applicable only if it is not repugnant to justice and morality or inconsistent with any written law. The existence of the custom in question must therefore be proven to exist by way of evidence so as to determine whether it is repugnant or inconsistent with the law.
- ii. While the magistrate may have been familiar with the customs the parties practised, there was no evidence or pleading at all, nor did he cite any authority on customary law on dowry or on inheritance of a wife.
- iii. In the circumstances, no cause of action had been established and therefore the appeal was allowed.

Obiter Dictum

"Whether a woman, a widow, should be inherited by other people without her consent in this day and age are clearly a human rights issue, and specifically a women's rights issue. It is also a health issue considering the worldwide scourge of the AIDS pandemic. "Finally, women, in whatever communities are no longer commercial objects of before, and it is time for customary law diehards to wake up to that reality.

"I applaud the widow in this case for refusing to be inherited. I find any custom that would force her to be inherited against her will would be repugnant to justice and a morality and in a breach of human rights. The only reason why the respondent went to court to claim refund of dowry is because of the widow's refusal to be inherited by his other sons. He felt miffed and slighted. He had tried to claim the dowry earlier when the husband was alive but he failed."

Points to Note

- Although the judgement turned upon proof of custom, the judge made notable comments about the custom of inheriting a woman.
- Women, in whatever community, are no longer the commercial objects of the past.
- Any custom that, in this day and age, requires a widow to be inherited against her will is repugnant to justice and morality and in breach of human rights, specifically women's rights. Such customs should be condemned considering the AIDS pandemic.

In the Matter of the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] HC

Principle or Rule Established by the Court's Decision

There is no distinction between female and male children regardless of their marital status when it comes to inheritance rights.

Judge: Mumbi Ngugi | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
First widow to get her share of estate prior to distribution of estate to rest of beneficiaries; married daughters have right to inherit father's property equally with brothers unless they specifically renounce this right	High Court, Kericho (Kenya)	Succession Cause 16 of 2010; judgement delivered on 28 February 2017	Economic abuse

Case Summary

This case related to a dispute arising out of the distribution of the estate of the deceased, comprising 56 acres of land. The dispute was between his two widows.

The Court appointed the two widows as administrators of the estate of the deceased, but, when the second widow filed affidavits proposing the distribution, she proposed that the “lion’s share” of the property go to herself and to her children. She also omitted to consider the married daughters of the first widow.

The first widow complained that:

- i. The property was jointly acquired with her deceased husband through a loan, which she substantially contributed to paying, and which was paid long before the second widow was married in 1976. Her averments were that she was entitled to at least 10 acres of the land in recognition of her substantial contribution to its acquisition. The remaining 46 acres would then be distributed in accordance with Section 40 of the Law of Succession Act (LSA), relating to the estate of a polygamous deceased person.
- ii. The law does not discriminate between married and unmarried daughters and therefore the omission from the proposed distribution of the estate was contrary to the law.

The High Court ruled that:

- i. On the facts, it accepted that the first widow had contributed to the repayment of a loan taken out to purchase the deceased’s land.
Section 40 of the LSA provides that, “*Where an intestate has married more than once... his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*” Strict application of this provision would not recognise any contribution by one spouse over the other in the distribution of the estate. Any court perpetrating injustice on the basis of Section 40 of the law is abdicating its constitutional responsibility. The unfairness and discrimination brought about by Section 40 to the first widow could only be addressed by considering her contribution before distribution of the remainder of the estate.
- ii. The law of intestacy treats all children equally regardless of gender and marital status, and all are entitled to inherit equally unless they expressly renounce their rights. Looking at it any other way would

amount to discrimination, which is expressly prohibited in the Constitution. The contention by the second widow was therefore unacceptable and had no basis in law.

Consequently, the Court ruled that the first widow was entitled to 10 acres out of the estate of the deceased. The remaining 46 acres were found to constitute the free estate of the deceased, to be distributed in accordance with Section 40 inclusive of the married daughters unless they expressly renounced their interest in writing.

Points to Note

- The provisions of Section 40 of the LSA are not cast in stone and the Court has discretion not to apply these provisions if they will lead to unfairness and inequality to any party.
- There is no distinction between female and male children regardless of their marital status, and all are entitled to inherit equally unless they expressly renounce their rights.

Esther Wanjiru Kiarie v Mary Wanjiru Githatu [2016] HC

Principle or Rule Established by the Court's Decision

Even where a statute articulates expressly how property should be distributed when a deceased dies intestate, the court retains discretion to distribute the estate fairly and equitably.

Judge: G. Kanyi Kimondo | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Resulting trust found in favour of objector	High Court, Eldoret (Kenya)	Probate & Administration Cause 244 of 2002; delivered on 8 March 2016	Economic abuse

Case Summary

This matter involved a dispute between the objector (first widow) and the petitioner (second widow) for the distribution of the property of their late husband, who died intestate. The first widow had seven living children (one had died) and the second widow had three children. An earlier decision of the Court of Appeal had declared both the petitioner and objector widows of the deceased under Kikuyu customary law and by virtue of presumption of marriage, respectively.

The objector's case was that her late husband had married her in 1968, and the majority of the assets that formed the subject matter of this cause

were acquired between 1968 and 1984, long before the petitioner started cohabiting with the deceased. Throughout her marriage to the deceased, she engaged in commercial farming jointly with him. The objector was also running her husband's butchery, which later grew into a hotel. It was during this time that they acquired seven of the immovable properties, all of which were registered in the name of the husband, which according to her was the custom. She alleged that a resulting trust in her favour arose over these properties. She therefore had a right to a half share of them before distribution to the deceased's other beneficiaries. She alleged that only one immovable property and three motor vehicles were acquired after 1985 and after the petitioner came on to the scene.

The petitioner, who started cohabiting with the deceased in 1986, conceded that, when she married him, he already had a majority of the assets. She disputed that the objector had contributed to the acquisition of the property or that she managed the deceased's businesses. She insisted that all the assets be distributed equally between the widows and children in accordance with Section 40 of the LSA.

According to Section 40 of the LSA, where a deceased person has married more than once under any system of law that permits polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. Thereafter, the distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.

In dealing with the question of whether the objector should get half of the assets acquired prior to 1984 or whether the entire estate should be distributed equally to the two houses, the Court adopted a very progressive approach. In its view, even though Section 40 provides for distribution according to the houses where the deceased was polygamous, this provision of the law did not take away the discretion of the Court to distribute the estate fairly and equitably.

Having found that the majority of the immovable assets were acquired between 1968 and 1984 during the marriage of the deceased and the first widow and when the petitioner was not in the picture, the Court observed that it would be gravely unjust to apply Section 40 blindly in a case such as this, where the first widow, who had worked tirelessly, would be relegated to the same position as the last born child of all subsequent widows.

The Court declined to be tied to what it referred to as the archaic provisions of Section 40 and instead applied the more progressive provisions of Article

45(3) of the Constitution of Kenya 2010, which refers to equality of parties to a marriage. It therefore found that there was a resulting trust created in favour of the first widow and concluded that she was entitled to half of the properties acquired before the second widow came to the scene. The other half acquired during this period and all other properties acquired after this date would be distributed in accordance with Section 40 of the LSA, subject to valuation.

Point to Note

In this case, the Court took a progressive approach to the distribution of an estate. Rather than distributing property equally between two widows, it took account of actual contributions to property.

Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguithi & 6 others [2014] HC

Principle or Rule Established by the Court's Decision

- Customary law will not take precedence over a constitutional right for all parties to be treated equally.
- The decision by a child to get married has no bearing as to whether such a child is entitled to inherit the property that comprises the estate of their deceased parents.

Justice: L. Kimaru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
LSA to be applied to distribution of estate	High Court, Nairobi (Kenya)	Probate & Administration Cause No. 1140 of 1990; delivered on 31 July 2014	Economic abuse

Case Summary

This ruling stemmed from an application where the applicants wanted the respondent and her sisters, all of whom were daughters of the deceased, to be excluded from being listed as beneficiaries of the estate of the deceased. The respondents alleged that, under Kikuyu customary law, it is only sons who can inherit; married daughters are supposed to inherit from the families into which they have married, and that, before they can be allowed to inherit from their father, they each have to “*provide full disclosure of the properties that they own or likely to inherit in the clan or family where they are married*”.

The issue that the Court had to determine was whether Kikuyu customary law should be applied as averred by the applicants in the distribution of the properties that comprise the estate of the deceased.

The Court found no merit in the applicants' arguments, and adopted previous findings of the Court that:

The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate.

The Court therefore held that Kikuyu customary law would not apply, and that the LSA was the proper law to apply to distribution of the estate. It pronounced as follows:

Section 29(a) of the Law of Succession Act recognizes "children" of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. The Kikuyu Customary Law, in so far as it discriminates between the male and female children of a deceased person is a retrogressive custom which cannot supersede the Constitution and the Law of Succession Act.

As such, the Court declared that the deceased's daughters were beneficiaries of the estate, in terms of the LSA, and would stand to benefit from the estate.

Obiter Dictum

"The time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women are buried in history."

Points to Note

- Whereas the Constitution of Kenya recognises culture and as the foundation of the nation, it is not to be used as a basis for discrimination.
- Article 11 of the Constitution which recognises culture promotes only the positive aspects of culture, and not practices that are discriminatory, discriminatory or retrogressive.

Kikuyu customary law, in as far as it discriminates between the male and female children of a deceased person is a retrogressive custom which cannot supersede the Constitution of Kenya, 2010 and the Law of Succession Act. Other cases/decision referred to

Country/case

South Africa | *Nonkululeko Letta Bhe & 3 others v Magistrate, Khayelitsha & 4 others* [2003] Case No. CCT 49



Mujawimana et al. v Bank of Kigali Ltd (BK) [2016] SC

Principle or Rule Established by the Court's Decision

The fact that the rights holder on the property that was attached as a mortgage in the mortgage loan contract did not consent to it implies the mortgages were illegally furnished.

Judges: Kayitesi Zainabu, Kayitesi Rusera Emily
and Nyirandaruta Agnès | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Decision overturned	Supreme Court (Rwanda)	Supreme Court Case No. RCOMAA 0008/14/CS of 22 July 2016	Economic abuse

Case Summary

The deceased had obtained a mortgage from the Bank of Kigali Ltd, secured against his house. He died before he had fully repaid the credit. The Bank of Kigali successfully sued his heirs before the Commercial High Court for reimbursement of the mortgage.

The heirs of the deceased and his wife initiated a new lawsuit at the Commercial Court for the annulment of the mortgage contract. It was alleged that the mortgage was void from the outset because they had never been informed about it, nor had the wife signed it. The Commercial Court ruled that the mortgage could not be annulled because it was never registered with the Registrar General. It had therefore never legally existed. The Commercial Court ordered the heirs to pay damages and counsel's fees to the bank. The Commercial High Court upheld the judgement.

They appealed to the Supreme Court. The Supreme Court held that a mortgage contract binds the parties even when the mortgage is not registered. The Supreme Court also held that the fact that the spouse, who had rights in the property, did not consent to the mortgage implied that the mortgage was furnished illegally. Therefore, the mortgage contract between the Bank of Kigali Ltd and the deceased had to be quashed.

Points to Note

- This case stands out because it recognises the right of a spouse to consent to any encumbrance over property in which there are joint interests and the right to request an annulment of a contract creating an encumbrance without the prior consent of both spouses.

- When the bank concludes mortgage loan contracts, it is the duty of the bank to apply for registration of these mortgages, particularly when the beneficiary of the loan has given to the bank the right to apply for mortgage registration.
- Failure to register the mortgage does not invalidate the contract since registration aims only at informing the public that immovable property was furnished in mortgage.
- Transfer of rights in immovable property through sale, donation, exchange, mortgaging, leasing and renting by a representative of the family requires the prior consent of all other rights holders in the family.
- Therefore, the agreement of both spouses shall be required for the acknowledgement of any right attached to the shared property.
- Absence of consent of both spouses in mortgaging the co-owned property invalidates the mortgage contract.

Mukamusoni Catherine v Mukagasana Domitilla [2013] HC

Principle or Rule Established by the Court's Decision

Judicial precedents that require that parties be treated equally regardless of gender should take precedence over discriminatory customs. Men and women therefore have equal rights to succession.

Judge: Murekatete Francine | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Customary position overturned	High Court (Rwanda)	High Court Case No. RCA 0087/12/HC/KIG of 10 May 2013	Economic abuse

Case Summary

In 1994, Kabera Charles and his spouse Usabuwera Jeannette passed away without leaving a child. Initially, 50/50 claims were lodged in relation to the estate. Kabera Charles' sister, Mukagasana Domitilla (the respondent), contended that she should be entitled to her brother's 50% share of any assets. Usabuwera Jeanette's father sought to inherit her share.

Usabuwera Jeannette's father died prior to the adjudication of the case and the respondent inherited the entire estate, relying on custom. The father's heirs, including Usabuwera Jeannette's sister (the applicant) were not summonsed to appear at the adjudication. They only came to know of

the adjudication when the respondent started selling houses. The appellant lodged a third-party opposition to defend her interest.

The appellant contended that the respondent should not exclusively appropriate the assets concerned based on custom. It was averred that to rely on such custom was inconsistent with the Constitution as well as the international conventions ratified by Rwanda, which all provide for equality before the law without any form of discrimination. Therefore, the heirs of Usabuwera Jeannette (including the applicant) are legally entitled to the property.

In the absence of any evidence of intention to the contrary adduced by the respondent, the Court decided that family members of the deceased husband and wife had to be treated equally. The estate should be split 50/50 between the heirs of Kabera Charles and those of Usabuwera Jeannette.

Point to Note

With regard to matrimonial property issues, this case is of a particular interest because it shows that courts should not allow customs to bar women from inheritance. Instead, in the absence of written law regulating the matter, courts will rely on judicial precedents of the same nature in determining whether women and men have equal right to inherit. In such circumstances, they may also consider customs and usages, general principles of law and written legal opinions.

Rutabayiru v Batamuliza [2016] SC

Principle or Rule Established by the Court's Decision

The interest of each cohabiting partner in property cannot be determined solely by using income from employment. Other contributions to the welfare of the household will be taken into consideration.

Judges: Mugenzi Louis Marie, Gakwaya Justin
and Munyangeri Innocent | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Decision upheld	Supreme Court (Rwanda)	Case No. RCAA 0013/13/CS of 3 June 2016	Economic abuse

Case Summary

Ms Batamuriza sued Mr Rutabayiru in the Intermediate Court, requesting an equal share of property comprising two houses, farm land, two vehicles and

home furniture. She contended that they jointly acquired the property in the course of their cohabitation from 1991 to 2003.

Rejecting her claim, the Court explained that Article 39 of the Organic Law No 59/2008 of 10 September 2008 on Prevention and Punishment of Gender-Based Violence (the GBV Law) could not be relied on because the parties ceased to cohabit since 2003, prior to the enactment of that law. Article 39 provided for the equal division of assets. Analysing the contributions to property, the properties were registered in Rutabayiru's sole name. Batamuriza had failed to produce sufficient evidence indicating her financial contribution in acquiring those properties.

Batamuriza appealed to the High Court. The High Court upheld the appeal and apportioned the property equally. Although Article 39 was not applicable, the Court was entitled to reach a similar conclusion as to 50/50 apportionment, taking into account judicial precedents and scholars' opinions about contributions to the household, including non-financial contributions.

Rutabayiru appealed to the Supreme Court. The Supreme Court confirmed the High Court's ruling, affirming that the interest of each cohabiting partner in property cannot be solely determined using income from employment. Other contributions to the welfare of the household will be taken into consideration.

Points to Note

- The case is important because it protects the right to property of cohabiting partners in the event of separation, even when registration of the property was in the name of one partner.
- Partners who are not legally married but have through combined efforts contributed to acquiring property are equally apportioned a share of that property when separating from each other.
- The key element is to prove that both have contributed in different ways to the welfare of the household.
- It is not enough to assert that the property belongs to those whose names appear on the property deed. A party claiming ownership of the property must demonstrate its origin, acquired through either custom or purchase, and that the other partner did not contribute on its origin.
- Because the parties separated before promulgation of the GBV Law, sharing of the property between the two partners had to be based on the pertinent provision of the Constitution relating to rights to property.