

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO OF 2016

IN THE MATTER OF ARTICLES 20, 21, 22(1) and (2) & 23(1) and (3)
AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), 2(6), 10, 27, 28, 40(1) and (2),
45 (3), 60 (1)(a)& (f) & 68(c) (iii)&(vi) OF THE CONSTITUTION OF KENYA**

AND
**IN THE MATTER OF SECTIONS 6(1)(c) and 7 OF THE MATRIMONIAL PROPERTY
ACT 2013**

BETWEEN
FEDERATION OF WOMEN LAWYERS KENYA
(FIDA-K)..... PETITIONER

AND
THE HON. ATTORNEY GENERAL..... RESPONDENT

PETITION

TO:
THE HONOURABLE JUDGE
HIGH COURT OF KENYA
NAIROBI

This Humble Petition of the **FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K)** whose address for the purpose of this Petition is **c/o M/s W. Ndegwa & Associates Advocates, 1st Floor Summit House Room 109 University Way P.O. Box 32852-00600 Nairobi** states as follows:

A. NAMES AND DESCRIPTION OF THE PARTIES AND THE CAPACITY TO SUE AND TO BE SUED

1. The Petitioner is a non-governmental, non-profit and non-partisan duly registered under and in accordance with the pertinent laws of the Republic of Kenya. The Petitioner has for the past 30 years developed expertise relating to discrimination experienced by women and girls in Kenya through provision of legal services to indigent women, engagement in legal, policy and legislative reform, treaty monitoring, research, education and advocacy.
2. The Petitioner institutes these proceedings as provided for under Article 22 in their own interest as one of the Petitioners and on behalf of all other women as provided for under Article 22 of the Constitution.
3. The Petitioners are claiming that rights and fundamental freedoms of women in the Constitution and more specifically the Bill of Rights have been denied, violated, infringed and are threatened.
4. The Respondent is the Attorney General of Kenya sued as the principal legal adviser to the government and is enjoined to these proceedings pursuant to his obligation provided as under Article 156 and more specifically as the
 - i. The principal legal adviser to the Government of the Republic of Kenya
 - ii. The State Officer constitutionally authorized and mandated to represent the Government in Court or in any other legal proceedings to which the government is a party. Service of Court process shall be affected through the Petitioners' Advocates offices.
5. The Respondent is said to have acted in a manner that has denied, violated, infringed or threatened the Petitioners' constitutional guarantee despite having the constitutional mandate and obligation to respect, uphold and defend the Constitution of the Republic of Kenya.
6. This Honourable Court has jurisdiction to hear and determine the Petition herein under Article 23.

B. BRIEF FACTS OF THE CASE

i) MATRIMONIAL PROPERTY ACT (MPA) 2013

1. The MPA is an Act of Parliament that provides for the rights and responsibilities of spouses in relation to Matrimonial property and for connected purposes.
2. The Petitioner, through its network of lawyers and female clients has received numerous concerns on certain provisions of the MPA and their constitutionality or otherwise.
3. **Section 6 (1) (c) of the MPA** defines matrimonial property as: “any other immovable and movable property **jointly** owned and acquired during the subsistence of the Marriage”.
4. The Petitioner submits that the aforesaid provision precludes property which is registered in the sole name of one spouse to the detriment of the other. The Petitioner further affirms that majority of married women in Kenya do not hold any property jointly with their husbands but they are indeed joint owners as they helped to acquire the same as matrimonial property.
5. The Petitioner avers that this provision will be used to deprive many married women of their fundamental rights to land and property contrary to Articles 40, 60 and 68 of the Constitution because if their names are not on the ownership documents of the property, the said property is not matrimonial property.
6. **Section 7 of the MPA** provides that ‘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.’
7. The Petitioner avers that the provision of “according to the contribution of either spouse towards its acquisition” is contrary to Article 45(3) of the Constitution: that parties shall have EQUAL rights at the time of marriage, during the marriage and at the dissolution of the marriage.
8. This provision further, infringes on the rights of married women to own property after the dissolution of a Marriage as they MUST prove their contribution towards its acquisition and while the definition of contribution has been expanded to include non-monetary contributions, the bulk of the property will belong to the spouse who has made monetary contributions and has proof of the same.

9. This legal provision leaves at a distinct disadvantage the married women who contribute to acquisition of their matrimonial properties but have no tangible proof of the same and serves to disenfranchise and disempower women economically.
10. This provision is in stark contrast to **Section 10(2)** of the MPA which states 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) of the MPA states that parties to a marriage **shall share equally any liability incurred during the subsistence of the marriage and reasonable and justifiable expenses incurred.**
11. From the foregoing, if liabilities are to be equally shared, assets too must be equally shared at the dissolution of the marriage.

A. RELEVANT PROVISIONS OF THE CONSTITUTION

1. Article 2 of the Constitution of the Republic of Kenya declares the Constitution as the supreme law of the Republic and that it binds all persons, public or private, and all state organs at both levels of government.
2. Article 2(4) of the Constitution declares any act or omission in contravention of the Constitution as invalid.
3. Article 2(6) provides that any convention ratified by Kenya shall form part of the law of Kenya under this Constitution
4. Article 3(1) of the Constitution of the Republic of Kenya obligates every person, public or private, to respect, uphold and defend the Constitution.
5. Article 10 of the Constitution of Kenya spells out the National Values and Principles of Governance which bind all state organs, state officers, public officers and all persons whenever any of them:
 - a. Applies or interprets the Constitution;
 - b. Enacts, applies or interprets any law; or
 - c. Makes or implements public policy decisions.
6. Among the National Values and Principles of Governance under Article 10 of the Constitution of Kenya are; the rule of law, human dignity, human rights, non-discrimination, transparency and accountability.

7. Article 19 of the Constitution of Kenya provides that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies.
8. Article 20(1) of the Constitution provides that the Bill of Rights applies to all law and binds all State organs and all persons.
9. Article 20(2) of the Constitution secures for every person an entitlement to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
10. Article 20(3)(b) requires of this Court, in applying a provision of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
11. Article 27 of the Constitution provides *inter alia*, that:
 - a. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - b. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - c. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
 - d. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - e. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)."
12. Article 28 of the Constitution guarantees for every person inherent dignity and the right to have that dignity respected and protected.
13. Article 40 (1) of the Constitution guarantees that every person has the right, either individually or in association with others, to acquire or own property –
 - (a) Of any description; and
 - (b) In any part of Kenya.

40(2) Parliament - shall not enact a law that permits the State or any person –

 - (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description, or;
 - (b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the ground specified or contemplated in Article 27 (4).

14. Article 45(1) of the Constitution provides that the family is the natural and fundamental unit of the society and the necessary basis of social order and shall enjoy the recognition and protection of the state.
- 3) Parties to a Marriage are entitled to equal rights at the time of Marriage during the Marriage and at the dissolution of the Marriage.
- Article 45(4) of the Constitution provides that Parliament shall enact legislation that recognises—Marriages concluded under any tradition, or system of religious, personal or family law.
15. Article 48 stipulates that the state shall ensure access to justice for all persons and if any fee is required it shall be reasonable and shall not impede Access to Justice.
16. Article 60 (1) provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—(f) elimination of gender discrimination in law, customs and practices related to land and property in land.
17. Under Article 68(1) Parliament shall—(c) enact legislation— (iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of Marriage;
18. Article 259 of the Constitution requires that the Constitution of the Republic of Kenya is interpreted in a manner that:
- a) Promotes its purposes, values and principles;
 - b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c) Permits the development of the law; and
 - d) Contributes to good governance.

VIOLATIONS OF RIGHTS AND FUNDAMENTAL FREEDOMS AS GUARANTEED UNDER THE CONSTITUTION, REGIONAL AND INTERNATIONAL LAW

i) THE MATRIMONIAL PROPERTY ACT 2013

- a. Section 6 (1) (c) of the MPA defines matrimonial property as: “any other immovable and movable property **jointly owned and acquired** during the subsistence of the Marriage”.

- b. The aforesaid provision precludes property which is registered in the sole name of one spouse to the detriment of the other and this provision is contrary to **Article 40 (1) and (2)** of the Constitution.
- c. Section **6(1) (c)** of the MPA also deprives spouses of equal rights upon dissolution of the Marriage contrary to **Article 45(3)** of the Constitution.
- d. Section **6(1) (c)** of the MPA mandates matrimonial property to only be property jointly owned contrary to **Articles 60(1) (f) and 68(c) (iii)** of the Constitution.
- e. **Articles 60(1)(f) and 68(c) (iii)** have reformed land legislation to enable **Section 28** of the Land Registration Act no. 3 of 2012 to legislate for spousal interests to be overriding interests whether or not registered, therefore **Section 6(1) (c)** runs contrary to Section 28 of the Land Registration Act.
- f. **Section 7 of the MPA** provides that 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.
- g. The provision of “according to the contribution of either spouse towards its acquisition”, is contrary to **Article 45(3)** of the Constitution which provides for parties to have equal rightsat the dissolution of the Marriage.
- h. This provision further, infringes on the rights of married women to own property after the dissolution of a Marriage as they must prove their contribution towards its acquisition and while the definition of contribution has been expanded to include non-monetary contributions, the bulk of the property will vest in the spouse who has made monetary contributions and has proof of the same.
- i. This legal provision leaves at a distinct disadvantage women who contribute to acquisition of their matrimonial properties but have no documentary proof of the same.
- j. This legal provision is in stark contrast to **Section 10 of the MPA** which states that **spousal liabilities shall be equally shared** unless otherwise agreed.

The fore stated provisions of the MPA have also violated the following regional and international treaties that Kenya has ratified and which, by virtue of Article 2(6) of the Constitution, forms part of the law of Kenya; **the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on Human and Peoples Rights (Banjul Charter), the International Covenant on Civil and Political Rights**

(ICCPR) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

1. Article 7 (d) of the Maputo Protocol provides:

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of Marriage. In this regard, they shall ensure that: d) in case of separation, divorce or annulment of Marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the Marriage.

2. Articles 3 and 18(3) of the Banjul Charter provides:

- (1) Every individual shall be equal before the law*
- (2) Every individual shall be entitled to equal protection of the law*
- (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.*

3. Article 26 of the ICCPR states:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.*

Articles 15 and 16 of CEDAW provides:

- (1) States Parties shall accord to women equality with men before the law.*
- (2) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
 - (c) The same rights and responsibilities during marriage and at its dissolution;*
 - (h) 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.*

THIS PETITION is further supported by the affidavit of **CHRISTINE OCHIENG** and upon such other and/or further grounds as may be adduced at the hearing hereof.

PRAYERS

Your Lordship, in light of the foregoing constitutional, regional and international human rights violations, your Petitioner therefore humbly pray for:

- 1) A DECLARATION that Section 6(1) (c) of the MPA is in conflict, inconsistent and contravenes Articles 27,40, 45(3), 60(1), 68(c) (iii) of the Constitution and is therefore null and void;
- 2) A DECLARATION that section 7 of the MPA to the extent that it bases division of matrimonial property upon contribution, is invalid as it is in conflict, inconsistent and contravenes Articles 27,40, 45(3), 60(1) of the Constitution and is therefore null and void;
- 3) An order of MANDAMUS compelling the Respondent to publish a Statute Miscellaneous Amendment Act revoking the aforesaid Sections within thirty days of delivery of judgment;
- 4) Costs of this Petition be granted to the Petitioner.
- 5) Any other order that the court may deem fit to grant.

DATED AT NAIROBI this day of 2016

W. NDEGWA & ASSOCIATES
ADVOCATES FOR THE PETITIONER

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