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PARTITION IN LIFE AND IN DEATH: INTESTATE SUCCESSION AFTER THE MATRIMONIAL PROPERTY ACT, 2013

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Abstract

Kenya's law on intestate succession is out of step with the 2010 Constitution and with recent reforms in family law. This article interrogates the logical inconsistency between the intestacy provisions of the Law of Succession Act (LSA) of 1981 and the Matrimonial Property Act (MPA) of 2013. While the MPA places great emphasis on a spouse's contribution as the basis for entitlement, the LSA leaves no room for ring-fencing a spouse's contribution from the intestate estate. A surviving spouse's property rights, specifically the widow's, are compromised further by the LSA's over-inclusive definition of a widow under section 3(5) which opens up the intestate estate to rival claims without requiring any proof of contribution. Section 40 which deals with distribution of an intestate estate in polygamous families disregards spousal contribution by ranking widows as equal numerical units with all children of the deceased. This article makes proposals toward synergy between the two areas of law, arguing that otherwise the disconnect between them fails to accord full protection to spouses' (especially widows') rights to property during marriage and at its termination.

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I. Introduction

Kenya's Constitution of 2010 designates the elimination of gender discrimination 'in law, customs and practices related to land and property in land' as one of the principles undergirding the chapter on land and environment. Toward this end, Article 68(c)(iii) mandates parliament to enact a law regulating and protecting matrimonial property, in particular, the matrimonial home, during and upon dissolution of marriage. Taken together with other constitutional provisions on equality and non-discrimination[1], this constitutional moment arguably marks a very significant transition. It marks a departure from acceptance of the conventional or traditional perception that married women's connection to resources in the family context is tenuous and limited to user rights.[2] It signals the law's intent to recognize the vesting of proprietary rights which it terms 'matrimonial property', a concept that had not hitherto been legislated in Kenya.

This constitutional aspiration was given effect in the enactment of the Matrimonial Property Act (MPA) three years later, ending a 116-year period of relying on the 1882 Married Women's Property Act, an English statute of general application.[3]

The central concern of this article is that while legislation in the area of matrimonial property has made steps toward alignment with the constitution, legislation in the area of succession has made no attempt at such alignment. The Law of Succession Act (LSA) was enacted in 1972 and became operational in 1981.[4] The Constitutional and Human Rights Division of the High Court agreed with the petitioners in *Ripples International v Attorney General & Another; FIDA (Interested Party)* that there is disharmony between the Constitution and the LSA's provisions on intestate succession.[5] However, even this petition did not address the issue central to this article: the attention given to defining and recognising the contribution of each spouse in the context of matrimonial property is absent altogether in the context of intestate succession.

This article argues that the LSA needs urgent reform to align with the new constitutional dispensation, and with the legislation on matrimonial property, in order to accord full protection to spouses' rights to property during marriage and at its termination[6], whether such termination is by divorce or by death. The disconnect

1 The Constitution of Kenya 2010, arts 2, 10, 27, 28, 40 and 45.

2 Patrick Omwenga Kiage, *Family Law in Kenya: Marriage Divorce and children* (Law Africa Publishing 2016) 241.

3 Matrimonial Property Act (MPA), No.49 of 2013, which repealed the Married Women's Property Act of 1882 (England). The English statute was applicable to Kenya by virtue of section 3 of the Judicature Act, which lists English statutes of general application operating as of 12th August 1897 as part of Kenya's laws. For discussion of the historical trends marking the statute's application to Kenyan cases see, Celestine Nyamu-Musembi, "'Sitting on her husband's back with her hands in his pockets': Commentary on judicial decision-making in marital property cases in Kenya" (2002) *International Survey of Family Law* 229.

4 Legal Notice No.93 of 1981.

5 *Ripples International -v-AG & Another; FIDA (interested party*), Constitutional Petition E017 of 2021 [2022] KEHC 13210 (KLR) [17] [38] [hereinafter *Ripples* case].

6 See Constitution of Kenya 2010, art 45(3); see also Marriage Act 2014, s 6(a).

in the current state of the law makes attainment of the principles of spousal equality a mere sham, a mirage of hope that dies with the death of a spouse, specifically, the death of the husband.

This article is divided into five sections, the first of which is this introduction. The second section analyses the legal framework on matrimonial property. The third section analyses the legal framework governing intestate succession, highlighting the features that make it disharmonious with the legal framework on matrimonial property. The fourth section draws attention to the great divide that has defined judicial opinion in court cases that stand at the intersection of matrimonial property and intestate succession. The fifth section concludes the article with proposals for legislative reform toward synergy between the two areas of law.

II. Legal Framework on Matrimonial Property

This section analyses the legal framework on matrimonial property, focusing on salient features that have a bearing on this article's concern about the dissonance between matrimonial property and intestate succession.[7]

A. Separate Property and Proof of Contribution

By virtue of section 13 of the MPA, the Kenyan parliament pronounced Kenya a separate property marital regime.[8] Section 13 states that save for property that falls into the category of 'matrimonial property'[9] and subject to any agreement entered into by the parties prior to marriage (prenuptial agreement), the fact of marriage does not affect the parties' ownership of property, or their right to acquire, hold or dispose of any property. Marriage in and of itself does not confer or alter property rights.

Ownership of matrimonial property is vested in the spouses according to their respective contributions to its acquisition or as determined by any prenuptial agreement.[10] Entitlement to matrimonial property is therefore on the basis of contribution. Where legal title to property acquired in the course of the marriage is in the name of one party to the marriage, the other party can prove their entitlement

7 For discussion of trends that have emerged from judicial application of the Matrimonial Property Act see Sussie Mutahi, 'The Matrimonial Property Act 2013 in Action: Empirical Analysis of a Decade of Decided Court Cases', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 115.

8 Marital property regimes are classified as either 'separate property' or 'in community of property' regimes, or a hybrid of the two. Separate property regimes tend to have English common law origins, while community of property regimes are identified with civil law or Roman-Dutch roots. See Joseph W. Singer *Property Law: Rules, Policies and Practices* ((1993, Little Brown and Company), 1078-1080; Alice Armstrong and others, 'Uncovering Reality: Excavating Women's Rights in African Family Law', (1993) 7 *International Journal of Law and the Family,* 314, 344-6.

9 Section 6 of the Matrimonial Property Act (hereinafter MPA) defines matrimonial property as the matrimonial home or homes, household effects and any property jointly acquired during the subsistence of a marriage. 'Matrimonial home' is defined in section 2 as any property leased or owned by either one or both spouses that is occupied or utilised by them as their family home.

10 MPA, s7.

to a share of it by providing evidence of their contribution to it. This is captured in the presumption of a resulting trust in section 14(a). Contribution may take three forms: direct monetary contribution to the purchase; indirect monetary contribution, for instance, through meeting other family expenses thus facilitating the acquisition; or non-monetary contribution. Section 2 of the MPA defines non-monetary contribution to include domestic work, childcare, companionship, management of a family business or property, and farm work.[11]

There are only three instances when the MPA does not treat proof of contribution as the starting point in determining parties' interests in matrimonial property. The first instance is when there is a prenuptial agreement- the court will honour the parties' own agreement, unless it is challenged on grounds of fraud, coercion or manifest injustice. The second instance is with respect to joint registration. Section 14(b) states that where property acquired during marriage is registered in the names of the parties jointly, the law will presume that their beneficial interests in the property are equal.[12] The presumption is rebuttable- a party may contest it by proving greater contribution or absence of intent to confer equal interests. The third instance relates to shares in matrimonial property in a polygamous marriage: all property acquired before the entry of a subsequent wife is presumed to be held by the husband and his first wife in equal shares.[13] So too any property that can be shown to have been intended to be held by a specific wife and the husband to the exclusion of the other wives, as is discussed further in the sub-section that follows.

A 2016 petition by the International Federation of women Lawyers (FIDA-Kenya) challenged the MPA's focus on contribution as inconsistent with Article 45(3) on equality in marriage.[14] FIDA-Kenya argued that section 7 was discriminatory in its effect, taking into account the prevalent practice of registering property such as land in the name of only one spouse, typically the husband.[15] FIDA-Kenya argued that a contribution approach was inconsistent with Article 45(3) on spousal equality, as well as the equality and non-discrimination provisions of the Constitution.[16] The view that these constitutional provisions should be interpreted to mean that at dissolution of marriage, matrimonial property should automatically vest on a 50:50

11 MPA, s2.

12 This presumption predates the MPA. It was the articulated in *Kivuitu-v-Kivuitu* (1991) K.L.R. 241 and captured as s14(b) of the MPA. It has since been affirmed in *MGNK v. AMG* [2016] eKLR.

13 MPA s8(1)(a).

14 *Federation of Women Lawyers (Kenya) v Attorney General*, Petition No.164B of 2016, High Court, Constitutional and Human Rights Division, eKLR 2018.

15 See Ochieng, JD "*The Legal Framework Governing Division of Matrimonial Property in Kenya"*; cited in Kenya Land Alliance & FIDA Kenya, Policy Brief: Women, Land and Property Rights and the Land Reforms in Kenya 1 (2006). This report found that less than 5% of land is registered jointly by men and women; See also Patricia Kameri-Mbote, 'The Land Has its Owners! Gender Issues in Land Tenure Under Customary Law in Kenya' *IELRC Working Paper,* International Environmental Law Research Centre (2005).

16 Constitution of Kenya (2010) Arts 27(1), (2).

basis has been expressed in some High Court judgments and scholarly sources.[17] In the 2016 petition, the Constitutional and Human Rights Division of the High Court disagreed.

The Supreme Court of Kenya in 2023 upheld the constitutionality of the contribution approach in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)*.[18] The Supreme Court was emphatic that the principle of equality espoused in Article 45(3) does not mean that a spouse is automatically entitled to 50% of the matrimonial property upon dissolution of marriage by the fact of marriage alone. The Court reiterated that for a party to obtain a beneficial interest in property held by their spouse, specific contribution, whether direct or indirect, monetary or non-monetary, had to be proved. The Supreme Court affirmed and adopted the concurring opinion of Kiage JA, in *PNN v ZWN*[19] which interrogated what the concept of marital equality should mean in matters of matrimonial property:

> *"Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement…"*[20]

Strict proof of contribution- monetary or non-monetary- is therefore established as a central feature of Kenya's separate property marital regime. The MPA's formula for division of matrimonial property in polygamous marriage gives vivid illustration of the centrality of contribution in Kenya's separate property marital regime.

B. Spousal Contribution in Polygamous Marriages

The treatment of property in polygamous marriages under the MPA contrasts sharply with the approach that the LSA takes to the intestate succession of a polygamous man. This contrast lays bare the logical inconsistency of the law.

Section 8 of the MPA takes great care to set out a formula for division of matrimonial property in polygamous marriages. Polygamous marriages are accorded legal validity in Kenya if they are conducted under either customary law or Islamic law,

17 See, for example, Patricia Kameri-Mbote and Muriuki Muriungi, "Much Ado About Nothing: A Critical Analysis of the Matrimonial Property in Kenya" (2016) 6 *Zanzibar Yearbook of Law*, 71; some High Court judgments, *JAO -v- NN* (2013) eKLR; *CMN -v- AWM* (2013) eKLR; *EGM -v-BMM* [reversed on appeal] Civil Appeal No.231 of 2018 [2020] eKLR; *PNN-v-ZWN* [also reversed on appeal] Civil Appeal No.128 of 2014 (decided March 2017).

18 (Petition 11 of 2020) [2023] KESC 4 (KLR).

19 Civil Appeal No.128 of 2014 [2017] KECA 753 (KLR).

20 [2017] KECA 753 (KLR); See also *ENK v MNNN*, Mombasa Civil Appeal No 559 of 2019 [2021] KECA 219 (KLR); and the High Court case of *UMM v IMM* [2014] KEHC 7534 (KLR), (Tuiyott J).

whose norms recognize polygamy.[21] The formula that is set out in section 8 takes into consideration each wife's contribution. Matrimonial property acquired before the man married a subsequent wife is divided equally between the man and the first wife.[22]As pointed out above, this is one of the instances when the law does not base entitlement on contribution, but rather, on the fact of marriage, and in fact goes ahead to stipulate equal shares.

Entitlement to property acquired after the marriage becomes polygamous, however, is based strictly on contribution. Subsequent wives do not gain an interest in property acquired before they came into the marriage as they did not contribute to it. Matrimonial property acquired after the man has married a subsequent wife or wives is treated as being owned by the man, the first wife and the additional wives considering contributions made by the man and each of the wives.[23] However, the law adds a rider: where there is clear agreement of the parties that a wife shall have her matrimonial property with her husband separate from her co-wives, she shall own that property equally with the husband without the participation of her co-wives.[24]

This formula will be revisited in discussing intestate succession in polygamous families in Section 3.4 below.

C. Taking Customary Law into Account in Dealing with Matrimonial Property

Another point of difference between the MPA and the LSA is with regard to the treatment of African customary law. Section 11 of the MPA stipulates that during the division of matrimonial property, the customary law of the communities in question shall be taken into account 'subject to the values and principles of the Constitution'.[25] The aspects of customary law that are to be taken account of include customary law dealing with divorce or dissolution of marriage, 'the principle of protection of rights of future generations to community and ancestral land' and 'principles relating to access and utilization of ancestral land and the cultural home by a wife, wives or former wife or wives.'[26]

Key terms such as 'future generations', 'ancestral land' and 'cultural home' are not defined, neither in the MPA nor in Article 63 of the constitution which is referenced in section 11 of the MPA. However, that is not the focus of this discussion. The point of focus is that while in the context of matrimonial property courts are enjoined to take customary law into account, in the context of intestate succession, customary law is ousted, except in designated areas of the country. Customary law principles

21 Marriage Act 2014 s 6(3).
22 MPA s8(1)(a).
23 MPA s8(1)(b).
24 MPA S8(2). It is rather ironic, considering the negative perception of polygamy, that a polygamous marriage is the only one in which a wife can expect matrimonial property rights on an equal basis with her husband without proof of contribution (if she falls within either section 8(1)(a) or 8(2).
25 MPA s11.
26 Ibid s11(a) (b) (c).

of succession apply only to agricultural land, crops and livestock in designated counties. These counties are exempt from the LSA's provisions on intestacy. In their place, customary law of succession in that locality applies automatically.[27] Outside of these designated counties, customary law is not to be taken into account in determining intestate succession disputes.[28]

In addition, in defining matrimonial property, section 6(2) excludes property held in trust, including a customary trust. The MPA does not define 'customary trust', and neither does the Land Registration Act.[29] The Supreme Court offered a definition in a 2015 petition.[30] In brief, it relates to land that is held for the benefit of a group of beneficiaries (most commonly a family, lineage or clan) whose claims rest on customary law, regardless of its registration in the name of one person or a few of the group's members.[31] Such property (mostly land) cannot fall into the category of matrimonial property. The LSA, by contrast, contains no reference to customary trusts, and does not excise them from the property that would fall into an intestate's estate.

The treatment of customary law and claims founded on it is yet another illustration of the contrasting approaches taken in the two areas of law, which does little to clarify property rights in the context of family.

D. Effect of a Declaration of Matrimonial Property Rights in a Subsisting Marriage

Court proceedings for division of matrimonial property between spouses can only be undertaken after dissolution of the marriage. However, the MPA also gives parties the power to take certain measures to protect their undivided proprietary interests during the subsistence of marriage. First, a spouse's consent is needed in transactions over matrimonial property, such as sale or mortgage, and a spouse may lodge a caution/caveat to protect his/her interests.[32] Second, a spouse may apply to court for a declaration under section 17 of the extent of his/her rights to any property that is disputed, even in the context of a subsisting marriage.[33] This remedy raises a logical question: supposing that a party had secured such a declaration prior to the death of his/her spouse, would his/her declared share of such property be excised from the spouse's intestate estate?

27 Law of Succession Act [hereinafter LSA] ss 32, 33. The exempt counties are located in areas in which pastoralism is the dominant way of life. These are West Pokot, Wajir, Turkana, Tana River, Samburu, Narok, Marsabit, Mandera, Lamu, Kajiado, Isiolo and Garissa.

28 See *In the Matter of the Estate of Kihara Githambaa (Deceased)* High Court Probate and Administration Cause No.364 of 1989; *In the Matter of the Estate of Benson Kagunda Ngururi (Deceased)* Nakuru High Court Succession Cause No. 341 of 1993; See generally, William Musyoka, *Law of Succession* (Law Africa Publishing, 2006), 106-110.

29 Land Registration Act s 28lists 'customary trusts' as overriding interests but does not define them.

30 *Isack M'Inanga Kiebia -v- Isaaya Theuri M'Lintari, Isack Ntongai M'Lintari*, Supreme Court Petition No.10 of 2015 [2018] KESC 22 (KLR).

31 Ibid [52].

32 MPA s12.

33 Ibid s17.

Death automatically dissolves a marriage under Kenyan law.[34] This means that a widow or widower cannot institute civil proceedings in court claiming any right or relief in respect of matrimonial property. This is because under Rule 5 of the Matrimonial Property Rules, a party can only make the application for declaration of his/her rights under section 17 during the subsistence of a marriage.[35] By the same rule, an application for division of matrimonial property can only be made after dissolution of the marriage 'by a decree of a court' (not by death).[36]

The effect of the law, therefore, is that any matrimonial property rights that may have vested in the parties are extinguished by the death of one spouse. Upon the death of a polygamous man, a widow in a polygamous marriage, for instance, would have no way of asserting against her co-wife her claim to property that the MPA would have recognized as being held exclusively between her and her husband during his lifetime.[37] Even the posthumous status of prenuptial agreements is not clear.[38] Any assertion of property rights and interests at that point can only be sought through the law of succession, yet the text of the law of succession does not leave room for recognition of spousal contribution. Whether such spousal contribution was acknowledged in the spouse's lifetime becomes irrelevant, at least as far as the text of the LSA is concerned.

The next section discusses the legal framework governing intestate succession, highlighting further disharmonies that undermine a spouse's property rights

III. Legal Framework Governing Intestate Succession

This part of the article analyses the provisions of the LSA side by side with the MPA, highlighting disharmonies between the two regimes. Some of these disharmonies have already been introduced in the previous section. Five features of the LSA that undermine a spouse's property rights will be discussed in detail here.

A. Defining 'Free Property': Should a Surviving Spouse's Matrimonial Property be Ring-fenced?

Intestate succession is dealt with under Part V of the LSA. Intestacy applies to any part of a deceased person's 'free property' that is not the subject of a valid will.[39] Free property is defined as all the property that the deceased had the legal power to freely dispose of during his (or her) lifetime, and in respect of which the deceased's

34 Marriage Act 2014, s6.
35 Matrimonial Property Rules (Legal Notice 137 of 2022), Rule 5(1)(c).
36 Ibid.
37 Ibid Rules 5(1)(a) and (c) as read together with Rule 4(b).
38 Marriage Act 2014, s6(3).
39 LSA s34.

interest had not been terminated by death.[40] This 'unwilled' free property forms the estate of the deceased and is subject to distribution in line with the intestacy provisions of the law of succession.

A logical question arises: Should (or does) matrimonial property, which the deceased could not freely dispose of without his/her spouse's written consent[41] during his/her lifetime fall within the LSA's definition of 'free property'?

The text of the LSA does not countenance a procedure for the prior ascertainment of matrimonial property rights and interests and their excision from the deceased's estate.[42] Whatever was registered solely in the name of the deceased automatically falls into the intestate estate of the deceased, a spouse's beneficial interest on account of contribution under the MPA notwithstanding. As was pointed out in the previous section, the posthumous status of a prenuptial agreement as well as that of a judicial declaration of the extent of a spouse's matrimonial property rights is unclear as the law is silent on that.

Some judges have attempted to do justice for spouses caught up in this silence in the law. Kimondo J in *Re Estate of Ephantus Githatu Waithaka*[43] invoked the general discretion conferred on a court under sections 27, 28 and 35 of the LSA to uphold a first widow's claim to half of the estate acquired before her co-widow came into the picture, excluding it from the free property of the deceased. He cited the case of *Dorcas Wangari Macharia-v- KCB & 2 Others*[44] in which Rawal J relied on the principles of equity to uphold the rights of a widow as against a financial institution, holding that her rights survive the demise of her husband. Rawal J's resort to equity, and Kimondo J's resort to the general discretionary power conferred on the court by sections 27, 28 and 35 of the LSA speak to the absence of a specific statutory basis for upholding a widow's proprietary rights as separate and distinct from her deceased husband's intestate estate.

B. A Spouse's Interest in Intestate Succession

The LSA's provisions concerning a spouse's entitlement in intestacy are found in sections 35 and 36. Under these provisions, a surviving spouse is entitled to the personal and household effects of the deceased absolutely.[45] For Polygamous unions, each of the surviving widows is only entitled to a share of the personal and household effects proportionate to the size of her household (the sum of her children

40 LSA s3. An example of a property interest that terminates upon one's death is their undivided share in a joint tenancy. Property registered under joint tenancy automatically vests in the surviving joint tenant absolutely, according to section 60 of the Land Registration Act. This makes it ideal for married parties wishing to avoid the succession process until the last of them dies.

41 Matrimonial Property Act 2013, s 12(1).

42 Rule 49 of the Probate and Administration Rules, however, states that 'applications not otherwise provided for' may be made via a summons, supported by an affidavit if necessary.

43 Probate and Administration Cause No 244 of 2002 [hereinafter *Waithaka* case].

44 Nairobi, High Court, Civil Case 18 of 2003.

45 LSA ss 35(1)(a) and 36(1)(a).

plus herself).[46] The LSA defines personal and household effects to include the deceased's articles of personal use, furniture, appliances, and ornaments normally associated with a matrimonial home, but exclusive of motor vehicles and items of business or professional use.[47]Under the MPA the household goods and effects in the matrimonial home or homes are included in the definition of matrimonial property.[48] Entitlement to them is therefore based on proof of contribution, if they are held in the sole name of one of the parties to the marriage.[49] Unlike at divorce, when a marriage is dissolved by death the law now automatically grants the surviving spouse(s) absolute rights over personal and household effects, without regard to contribution.

This divergence between the MPA and LSA is amplified in polygamous situations. Personal and household effects that might have been purchased or set apart for exclusive use or ownership by a specific wife and her household fall into the common pool as soon as the husband dies. The extent of her entitlement to them now depends on the numerical strength of her household. The MPA would have applied section 8(2) to designate that property as hers jointly and equally with the husband to the exclusion of her co-wives.

After personal and household effects are dealt with, the remainder of the estate is divided up based on whether or not the marriage was monogamous or polygamous and whether or not there were any surviving children from the marriage.[50] Where there is only one surviving spouse with a child or children she is only entitled to a life interest in the remainder of the estate.[51] A surviving polygamous widow with a child or children, also only gets a life interest in the share of the property apportioned to her household in proportion to numerical strength as determined by section 40.[52]

A childless spouse, on the other hand, gets the greater of twenty per cent or the first ten thousand shillings out of the residue of the intestate estate absolutely. In addition, she gets a life interest in the whole of the remainder of the intestate estate if the marriage was monogamous, or in the share designated for her household based on numerical strength in the case of a polygamous family.[53] The childless spouse marks the only instance in which the LSA gives an absolute interest, besides a life interest, to a surviving spouse. Arguably this is the only provision under the LSA, that could be construed as recognizing a designated share for the spouse at the dissolution of the marriage by death. That absolute share is capped at 20%. The provision could be construed as being based on one of two assumptions:

46 Ibid s40.
47 LSA, s 3.
48 MPA s6(1)(b).
49 Ibid s7.
50 LSA ss 35-40.
51 Ibid s35(1)(b).
52 Ibid s40(2); See also *In the Matter Of The Estate Of Mwangi Giture (Deceased)* [2004] KEHC 548 (KLR), Succession Cause No 1044 o 1996, (Koome J) [hereinafter *Giture* case].
53 LSA s36(1)(b) and s40(2).

1. That contribution matters, and that a spouse must be presumed to have contributed to acquisition (or improvement) of the estate, at least to the value of 20%; or
2. That contribution does not feature into the logic of the LSA at all; the provision simply reflects the law's attempt to balance the needs of a surviving spouse with the interests of other beneficiaries of a childless deceased person's estate.

Whichever anchor the law is working with, this provision demonstrates that the MPA and the LSA operate on parallel logics. The MPA stipulates that a spouse's beneficial interest is to the extent of his/her strictly proven contribution.[54] It is not capped, neither is it defined by his/her needs.

C. Life Interest, Restriction on the Power to Transact, and Discrimination

A spouse's life interest in the net intestate estate is subject to limitations. A surviving spouse may sell the property only with the consent of co-trustees and any children of full age or with the approval of the court. Even then, the sale must be justified as necessary for such surviving spouse's maintenance. In a sale transaction involving immovable property, court approval is mandatory.[55] Where there are children of the deceased (under the age of 18), the surviving spouse holds the property in trust for them. In the absence of surviving children, the surviving spouse's life interest gives way to the deceased's father and, if dead, to the mother, and then siblings in that order.[56]

Until the High Court Constitutional and Human Rights Division decision in the *Ripples* petition, sections 35(1)(b) and 36(1)(b) dictated that if the surviving spouse was a widow, then her life interest would terminate upon remarriage to any person.[57] The decision declared these sub-sections unconstitutional so they are no longer in operation. However, parliament, is yet to act on the *Ripples* decision to repeal or amend the provisions.[58]

D. Wives in Polygamous Families Treated as Children

Section 40 of the LSA, which deals with the intestate estate of a polygamous man, renders the LSA's disregard of spousal interests that much more visible. The section stipulates that when a polygamous man dies intestate, his net estate, shall be divided among the houses (each wife representing a 'house') according to the number of children in each house, adding each surviving wife as an additional unit to the number of children in her household. This provision arbitrarily lumps

54 MPA ss 9, 14(a).
55 LSA s 37.
56 LSA ss 35(2), 36(3) and 40(2). Section 39 establishes the order of priority with respect to a deceased person who is survived by neither spouse nor children.
57 LSA ss 35(1)(b), 36(1)(b).
58 *Ripples* case (n 5) [38].

the interests of all widows together without regard for each widow's respective contribution to the acquisition of property, seniority or length of marriage, or any express or implied agreement or prior delineation of property among them in their husband's lifetime. Not only are the widows' interests lumped together, but also ranked equally with those of all the deceased's children. Each surviving wife counts only as an additional unit within her respective household alongside her children.

Koome J (as she then was), in *Re estsate of Mwangi Giture*[59] remarked that this state of affairs breeds inequalities and inequities in our law and ought to be addressed urgently. Her remarks in the said judgement were made twenty-one years ago, but there has been no parliamentary action to amend the law. In making the above remark, the learned judge noted that the first widow's entitlement was treated as equal to that of her co-wives and the youngest child of all the marriages. There is no sense of equity in recognition of her longer duration of marriage and arguably greater economic contribution.[60] The meticulous formula developed in section 8 of the MPA is made redundant by the blunt approach taken by section 40 of the LSA.

E. Section 3(5) and its Broad Definition of Marriage

Section 3(5) of the LSA expands the definition of marriage and has proven problematic for spousal rights to property in the context of intestacy. Section 3(5) was introduced as an amendment to the LSA in 1981[61] and it states as follows:

> *'Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.'*

The Court of Appeal in the case of *Selina Chepterer Martim v Grace Chemutai Maritim* gave the policy rationale for section 3(5) as follows:

> *"The effect of this provision, in our understanding, is to provide a post-humous equalization of a man's wives and children. They all receive recognition for purposes of succeeding into his estate. We think it would fly in the face of the statute, and amount to an untenable denial of the lessons of our times, for courts to rebuke, rebuff and dispossess those that the deceased had in his lifetime embraced and engendered. We have no difficulty holding, therefore, that Selina for purposes of the succession of Maritim's estate was not merely a dependant ... Rather, she is a wife and a mother to Maritim's children who are beneficiaries …"*[62]

59 See *Giture case* (n 52).
60 Ibid [15].
61 Statute Law Repeals and Miscellaneous Amendments, No. 10 of 1981.
62 *Selina Chepterer Maritim -v- Grace Chemutai Maritim*, Nakuru Civil Appeal No.274 of 2013 (unreported) [hereinafter *Maritim* case].

Section 3(5) has raised a lot of contestation, even leading to conflicting judicial opinions. These will be discussed in the section that follows. The focus of the present section of this article is to draw attention to the contradiction in the definition of a valid marriage between the context of marriage and matrimonial property on the one hand, and the context of intestate succession on the other.

As earlier mentioned, the systems of law that recognize polygamy in Kenya are Islamic and customary law. The typical scenario triggering section 3(5) is that a woman claims to have married the deceased under customary law, during the subsistence of his marriage to another woman, whether under customary, Islamic, civil or Christian marriage. If she succeeds in her claim, then she will be regarded as a co-wife, and section 40 kicks in. The extent of her entitlement to the intestate estate is the same as that of the wife or wives whose marriages were valid during the deceased's lifetime. Where the deceased's subsisting marriage was conducted under a monogamous system, the effect of section 3(5) is that a relationship outside of that marriage, which the law regarded as bigamous during the deceased's lifetime, becomes legal upon the man's death. Section 3(5) becomes, in effect, a means by which the law against bigamy, and the Marriage Act's prohibition of conversion of monogamous marriages into polygamous marriages are circumvented.[63]

It is important to note here, an amendment to section 3 of the LSA, which was introduced by Member of Parliament George Kaluma in 2021. This amendment has no doubt muddied the waters even further. The amendment simply provides:

"Section 3 of the Law of Succession Act is hereby amended by inserting the following definition …"spouse" means a husband or a wife or wives recognized under the Marriage Act."[64]

The Marriage Act, in turn, defines 'spouse' simply as a husband or a wife. In defining 'marriage' (as the voluntary union of a man and a woman whether polygamous or monogamous), however, section 3 adds 'and registered in accordance with this Act'. This definition would clearly not accommodate section 3(5) of the LSA, which does not envisage that the 'marriage' asserted posthumously must have been registered. The Kaluma amendment, therefore, leaves the application of section 3(5) of the LSA on shaky ground. This misalignment between the Marriage Act and the LSA adds one more layer to the inconsistency between the LSA and recent constitutional and legislative change.

The legal effect of the broad definition of marriage under section 3(5) of the LSA is that it confers property rights on the claimant without regard to contribution, by virtue of posthumous recognition of her relationship with the deceased which

63 Marriage Act 2014, ss 8(2) 9(a); see also the offence of bigamy under the Penal Code (Cap 63 Laws of Kenya), s 171.

64 The Law of Succession (Amendment) Act, No.11 of 2021.

existed, so to speak, in the shadow of a subsisting marriage. By contrast, the MPA regime, as discussed above, dictates that property rights accrue to a spouse strictly on the basis of proof of contribution. Section 3(5) is yet another example of the dissonance between these two areas of law.

IV. The Great Divide: How Courts Have Decided Cases at the Intersection of Matrimonial Property and Intestate Succession

All five features of the intestate succession provisions of the LSA highlighted in the previous section are incongruent with the safeguarding of matrimonial property. However, two provisions have invited the greatest contestation: section 3(5) and section 40. Reforming these two provisions would mark an important first step in ironing out the inconsistency in how the law treats a spouse's property rights in the context of matrimonial property and in the context of intestate succession.

Judicial opinion on interpretation of section 3(5) and section 40 of the LSA is divided. This section discusses case law to illustrate this internal conflict. It underlines the need for legislative reform to align the LSA's provisions on intestacy not only with the MPA, but also with the Marriage Act, 2014, and with the 2010 Constitution.

A. Case Law Interpreting Section 3(5)

The judicial conflict over interpretation of section 3(5) played out in the Court of Appeal case of *MWG v EWK*.[65] The dispute involved two women claiming marriage to the deceased. The lower court had made them joint administrators of the estate. The first proved marriage under customary law for 33 years. The second claimed widow status on account of section 3(5). She could not prove the elements of a customary marriage, since the necessary ceremonies and marriage payments had not been made. However, she was able to prove cohabitation with the deceased for 15 years, with three children between them. She was actually living with him at the time of his death, in a house for which he was paying rent.

The deceased had acknowledged the children as his, both on their birth certificates and in instructions given to his customary law wife concerning provision for them. The customary law wife did not dispute the children's claim to the estate, but she was opposed to the second woman's claim to the status of widow, asserting that her husband had referred to her as a woman he took 'for leisure'.

The majority opinion acknowledged the lack of evidence of a customary marriage with the second woman. In the absence of such evidence, they proceeded to invoke the English common law presumption of marriage in her favour, taking the

65 [2010] KECA 322 (KLR) [hereinafter *MWG-v-EWK* case]. For discussion of older High Court cases interpreting and apply section 3(5) see Patricia Kameri-Mbote, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control* (Nairobi, Women and Law in East Africa monograph, 1995) 14-17.

position that the presumption of marriage can be adduced under customary law.[66] They justified this approach as follows:

> *"It is noteworthy that Parliament realized that some women who genuinely had been taken as wives were discriminated against merely because, as in this case, dowry had not been paid, or that there had not been any ceremony to solemnize the union. By Act No.10 of 1981, Parliament added section 3(5) to the Law of Succession Act, Cap 160 Laws of Kenya."*[67]

The majority, therefore, took the view that section 3(5) was intended to cure discrimination against women who were in relationships that could be shown to be more than mere cohabitation or 'concubinage'. This same justification for section 3(5) has been given in other cases.[68]

Nyamu J penned a dissenting opinion that is thrice as long as the majority opinion, dwelling on interpretation of the scope of section 3(5). The text of the provision, he emphasized, refers to a woman 'married' under a system of law that permits polygamy. Nyamu J faults his brother judges for going outside of the scope of section 3(5) to apply the English common law presumption of marriage which, by definition, is not a system of law that recognises polygamy:

> *"With respect the respondent was not married under a system of law as contemplated by the section and the section did not apply to her and therefore the judgment is with respect, a clear misapplication of this provision."*

Relying on the decision of the majority in *Mary Njoki v John Kinyanjui Mutheru*[69], the dissenting judgment casts doubt on the applicability of the common law presumption of marriage to somehow infer a customary marriage. This, Nyamu J maintained, was a logical leap from a mere evidentiary presumption to a specific form of marriage (customary). The approach taken by the majority amounted to allowing the respondent "*to enjoy the status of a Kikuyu customary marriage under the banner of a presumption of marriage which literally hangs in the air*."

Having section 3(5) on the statute books already generates its fair share of controversy. Divided judicial opinion on its scope sends a clear signal on the lack of clarity, and therefore the importance and urgency of reform.

66 Kenyan law recognises the common law presumption of marriage through section 119 of the Evidence Act. The common law presumption of marriage was employed to similar effect in *Esther Wanjiku Njau & Another -v- Mary Wahito* [2006] KEHC 1325 (KLR).

67 Per Bosire, J, in *MWG -v- EWK* case (n 65). The majority supported its approach by citing *Yawe-v-Public Trustee* [1976] KECA 1 (KLR), which applied the common law presumption of marriage to infer the parties' intention to contract a customary marriage. They also relied on the dissenting opinion of Madan JA in *Mary Njoki v John Kinyanjui Mutheru*, [1985] KECA 32 (KLR).

68 *Maritim* case (n 62); *Macharia -v-Njomo & Another*, (2008) 1KLR (Gender & Family Digest), 759.

69 Ibid.

B. Case Law Interpretin and Applying Section 40 LSA

As was established in Section 3 above, section 40 of the LSA, which deals with intestate succession in polygamous contexts, lumps widows and children together, treating them as equal numerical units. No regard is paid to differentiated spousal contribution.

Is there room for courts to exercise discretion and bypass section 40 so as to take into consideration a widow's contribution to the estate, formerly her matrimonial property rights? The High Court in the cases of *Re Estate of Mwangi Giture*[70] (discussed under Section 3.4 above) and *Re estate of Samuel Miriti*[71] responded in the negative. The court saw itself as barred by section 40 from achieving a just outcome for such widows and called for legislative reform.

However, some judges have taken the view that there is room for judicial discretion in applying section 40. In *Kilonzo v Kilonzo & Another*[72] the Court of Appeal stated:

> *"In our view, parties need to understand that the distribution of an estate is not a mathematical exercise. A court of law dealing with the distribution of an estate has the discretion to ensure fair distribution is done, but the discretion has to be exercised judiciously based on a sound legal and factual basis. In addition, the circumstances of each case have to be considered taking into account inter alia, the number of houses; the number of children in each house; the circumstances of each beneficiary; and any gift that may have been given to a beneficiary during the lifetime of the deceased, but always bearing in mind that the factors to be considered cannot be exhaustive. Of paramount consideration in the exercise of discretion in distribution is to ensure justice is done so that there is no blind application of section 40 of the Law of Succession Act."*

In *Re Estate of Ephantus Githatu Waithaka*[73] referred to earlier under Section 2.1 the High Court (Kimondo J) went even further in making the point that section 40 does not take away the discretion conferred on the court by sections 27, 28 and 35 of the LSA to distribute the estate fairly.[74] The first widow, who had established a 33-year customary marriage to the deceased asserted her right to half of the estate acquired between the date of her marriage in 1968 and the co-widow's entry into the picture in 1984. She applied to have the court exclude this property from the estate, and to determine what portion of it constituted a resulting trust in her favour, on the basis of her contribution to its acquisition through running the family business. The remainder of the estate could be distributed equally to all the beneficiaries according to section 40.

70 *Giture case*, (n 52).
71 *MMM'm v AIM* [2014] eKLR.
72 (Civil Appeal E351 of 2021) [2024] KECA 354 (KLR).
73 Probate and Administration Cause No 244 of 2002.
74 *Waithaka* case (n 43), para.24. This is the case that is presented in the Court of Appeal as *MWG-v-EWK*. See (n 65).

Kimondo J upheld her claim, stating:

> *"I thus find that the objector made non-financial contribution to the acquisition of those properties. They were matrimonial properties."*[75]

On account of this finding, the judge continued, "*it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court.*[76]

Although her counsel invited the court to apply section 8 of the MPA (on division of matrimonial property in polygamous marriages), the court declined, as statutes cannot be applied retrospectively.[77] Instead, the court based its decision on the principle of equality in marriage under Article 45(3), since the Constitution does apply retrospectively and all laws are required to be in alignment with it.[78]

The dispute found its way to the Court of Appeal.[79] The issues for determination relevant for this article were: first, whether the first widow had sufficiently proved her contribution in order to justify exclusion of that portion of the estate from the free property available for distribution under section 40. Secondly, whether the resulting trust she claimed could be enforced against the estate after the death of her husband.[80] On both issues the Court of Appeal agreed with Judge Kimondo's findings. Most importantly, the Court of Appeal also agreed with the judge's conclusion that section 40 does not tie the hands of the court, resulting in a line of Court of Appeal cases that take this approach.[81]

One High Court case that was decided before the *Githatu Waithaka* appeal (but after the High Court decision of Kimondo J) is worth noting: *the Estate of the late George Cheriro Chepkosiom*.[82] The case involved 56 acres of land. The land was allocated to the deceased on settlement scheme terms in 1964 and it took 12 years to pay off the scheme loan and get the land registered in the name of the deceased. It was at that point that the second wife came into the picture. The first widow's prayer was that 10 acres be awarded to her prior to distribution of the estate, in recognition of her contribution to acquisition of the land in that 12-year period. The rest could then be distributed according to section 40. Citing Kimondo J's judgment in *the Estate of Githatu Waithaka,* Mumbi Ngugi J not only upheld her claim, but also sought to lighten the evidentiary burden placed on such widows to prove contribution in the context of succession disputes:

75 Ibid [26].
76 *Waithaka* case (n 43**),** [27].
77 Ibid. [29].
78 Ibid [30].
79 *Esther Wanjiru Githatu-v-Mary Wanjiru Githatu*, 2019 KECA 811 (KLR) [Civil Appeal No.30 of 2016].
80 Ibid [23].
81 *Gesora v Gesora* [2022] KECA 109 (KLR); *Grace Wanjiru Njuru v Loice Njeri Njuru* [2020] KECA 605 (KLR); *Muriungi v Mwongera & another* [2024] KECA 1709 (KLR); *Kamau v Njogu* [2023] KECA 432 (KLR; *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] KECA 1053 (KLR).
82 *In re the Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR [hereinafter *Chepkosiom* case].

> *"Where the dispute is between the husband and wife over distribution of matrimonial property at the dissolution of marriage, it is fair and reasonable to demand that a wife discharges the burden imposed by section 107 of the Evidence Act …"*[83]
>
> *"In a succession matter, it is an unfair imposition to demand it of a widow as against a person who is a stranger to the events and circumstances relating to the acquisition of the property, that person not having been there at the time of its purchase."*[84]

The judge concluded by pointing out that in as much as the MPA was not applicable to the succession dispute, the approach taken was in harmony with section 8 of the Matrimonial Property Act. This statement by the judge signals the need for synergy between matrimonial property law and the law of intestate succession.

C. Dilemmas of Taking Spousal Contribution into Account in Intestate Succession

The courts have employed various innovations to uphold the claims of widows asserting spousal contribution. Some cases have appealed to the wide discretionary powers given to courts under sections 27, 28 and 35 of the LSA to avoid the rigid formula of section 40. Others have appealed to article 45(3) of the Constitution concerning equality during marriage and at its dissolution. In other cases, judges have incorporated the spirit of the MPA. While these innovations are commendable, they do raise some fundamental questions. First, should other wives in polygamous marriages be accorded similar opportunity to assert and prove their contribution, or is that a privilege that is reserved for the first wife? At a formal level, the apparent privileging of the first widow is easy to justify: the MPA already takes this approach, since the matrimonial property rights of subsequent wives only kick in from the date of their entry into the marital unit. Should the incorporation of the principles of the MPA go all the way, then, and allow each wife to prove her contribution from the date of her marriage, and have her portion also excised from the estate? What then becomes of the interests of the children? It would mean that a child's interest in the estate is hinged, in the first instance, on what his/her mother is able to prove as her separate property earned through spousal contribution, and then on what remains for common distribution under section 40. The point being made here is that if this judicial innovation is to be further developed into a statutory procedure that is generally applicable, it must be able to stand on principle as an approach that is open to all potential claimants. It must have seamless application to ensure consistent treatment of property rights in matrimonial as well as intestate succession contexts.

83 Ibid [44]. Section 107 of the Evidence Act requires proof of facts that are relied upon to establish a legal right or liability.

84 *Chepkosiom* case, (n 82) [45].

Secondly, the issue of standard of proof with respect to matrimonial property claims made in the context of intestate succession continues to nag. Justice Mumbi Ngugi urged that a widow's contribution can be presumed in accordance with section 119 of the Evidence Act[85], especially in marriages of long duration. On what basis may contribution be presumed in the context of intestate succession, if such presumption is not contemplated in the context of matrimonial property disputes under the MPA? Is it not logical to expect that the standard of proof should be higher, not lower, if one of the parties is not present to refute the claim and interrogate the evidence that the surviving spouse may present?

The situation certainly calls for a measure of proof, not the seemingly open-door approach suggested by Justice Mumbi Ngugi. What measure suffices would have to be determined on a case-by-case basis, as in *Nyambane v Nyambane* where a court rejected for lack of evidence a claim that the deceased had settled certain property in favour of the applicant.[86] The duty of the court to weigh the evidence in each case, therefore, serves as a safeguard, preempting counter arguments for disregard of such claims altogether.

V. Conclusion and Recommendations: Charting a Path Toward Synergy

This article has argued that there is a logical inconsistency between the law of matrimonial property and the law of intestate succession, and that this inconsistency results in weaker protection for the rights of spouses, especially, widows. The Law of Succession Act (LSA), in force since 1981, needs to be aligned with the 2010 Constitution and with the reforms of the last decade to the law of marriage and matrimonial property. This article has illustrated the disconnect between the two areas of law and argued for specific legislative reform.

This concluding section proposes five specific reforms as priorities. First, the law of intestate succession needs to allow for a procedure for determining the extent of the 'free property' making up an estate. In this determination, the court should hear applications asserting any claim for exclusion of specified property from the estate, on the basis that such property represents a surviving spouse's beneficial interest in matrimonial property. Courts would then issue a declaration such as the one provided for under section 17 of the Matrimonial Property Act, in respect of matrimonial property forming part of the estate. In line with section 7 of the MPA, an applicant would need to prove contribution to a standard of proof that persuades the court, in the context of a succession dispute. In addition, the scope of section 17 of the MPA could be expanded to allow for applications for declaration of matrimonial

85 Section 119 of the Evidence Act states: 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.' See Evidence Act, Cap 80, Laws of Kenya.

86 (Civil Appeal 22 of 2019) [2023] KECA 788 (KLR); See also *Nchue v Nchue* (Civil Appeal 9 of 2018) [2022] KECA 729 (KLR).

property rights against a spouse's estate in intestate succession disputes.[87] These amendments would apply to both monogamous and polygamous contexts.

This proposed legislative reform would simply institutionalise and standardize what has already emerged from judicial innovation in the cases discussed in the previous section. The details of the procedure for filing and proving such claims would need to be expressly provided in the Probate and Administration Rules. In the meantime, innovative litigants can utilize Rule 49 of the Probate and Administration Rules. Rule 49 allows a person wishing to make an application relating to the estate of a deceased person, but for which no specific procedure is stipulated in the rules, to institute it by a summons, supported by an affidavit if necessary.[88]

Second, and related to the above, it is commendable that the Matrimonial Property Act introduced prenuptial agreements into Kenyan law for the first time.[89] Such agreements are clearly not intended to have posthumous application. Nonetheless, the law of intestate succession could make it clear that where a surviving spouse makes a claim for exclusion of their beneficial interest from the free property of the deceased, if the parties had a prenuptial agreement, such agreement will be taken into account along with other evidence, to gauge the intention of the parties.

Third, with respect to polygamous intestate succession, it is necessary to amend section 40 of the LSA to bring an end to the blunt numerical formula it stipulates. Rather than the current approach that lumps wives along with children and accords them equal weight as units, the amendment should incorporate the distribution formula for matrimonial property in polygamous marriages laid out in section 8 of the MPA. This would mean that property acquired prior to the entry of subsequent wives into the marital unit would be treated as having been held in equal shares exclusively between the first wife and the deceased. Her interest would therefore be excluded prior to distribution of the estate. In fairness, a similar opportunity should be afforded to any of the other wives able to prove her beneficial interest based on specific contribution.

By that same logic, and in line with s8(2) of the MPA, where it can be shown that there was a clear agreement between the husband and his wives that specific property was intended to be held by a specific wife to the exclusion of others, it should be allocated to that specific wife. To a limited extent, the wording of section 42 of the LSA allows room for this course of action, for instance, where it is clear that separate homesteads and farms or enterprises had been established for each house. The section states that where the deceased had, during his lifetime, 'given or settled any property to or for the benefit of a child, grandchild or house' such property will be taken into account in determining their share of the net intestate estate.

87 Amendment to s17 of the MPA would be complemented by amendment of Rules 4 and 5 of the Matrimonial Property Rules.
88 See Probate and Administration Rules, No.104 of 1980 (revised 2022), Rule 49.
89 MPA s 6(3).

Fourth, there needs to be a clear decision on whether to retain, amend or repeal section 3(5) of the LSA. This is because its broad definition of a valid marriage for the purpose of intestate succession sits at odds with the criteria for validity of marriage under the Marriage Act 2014.[90] The one-sentence 'Kaluma amendment' has done little to reconcile the divergent approaches in the two statutes. The LSA's broad criterion under section 3(5) to validity of marriage (made even broader under the position taken by the majority of the Court of Appeal in *MWG v EWK*[91]) renders uncertain the extent of a surviving spouse's property rights. A widow's property rights are contingent on the number of rival contenders to the status of 'widow', and the relative numerical strength of their households, thanks to section 40. This uncertainty is present whether viewed from the perspective of the woman whose marriage was openly acknowledged during the deceased's lifetime, or from that of the woman who makes a posthumous appearance. The split in judicial opinion in the Court of Appeal on the scope of section 3(5) needs to be resolved by an authoritative statement, either by the legislature or by the Supreme Court- but preferably by clear legislative enactment.

Fifth, parliament needs to act to repeal or amend the provisions of the LSA that were declared unconstitutional on grounds of gender discrimination in *Ripples International -v-AG & Another*.[92] The LSA provisions need to be aligned with the 2010 Constitution.

Finally, even as these changes are advocated, there is immediate need for extensive, informative and rigorous civic education to the general public on the changes that have come about on account of the marriage and matrimonial property legislation of the last decade.

Without this alignment between the law on marriage and matrimonial property on the one hand, and the law on intestate succession on the other, a crucial dimension of the spousal equality promised in Article 45(3) of the Constitution remains a mirage.

90 Section 3(1) of the Marriage Act, 2014, in defining marriage, includes the requirement of registration, even for customary marriages (s43-45; s55). That would rule out a claimant under s3(5) of the LSA, unless the marriage on which the claim is founded was registered.

91 See *MWG v EWK* case, (n 65).

92 *Ripples* case, (n 5). The provisions are: section 35(1)(b) and section 36(1)(b) which stipulate that a widow loses her life interest in the estate upon remarriage, but a widower does not; section 39(1)(a) and (b) which considers a mother's right to inherit her child's property (where such child dies without spouse or offspring) only if the father is dead, rather than rank both parents equally. It is worth noting that a bill to amend the LSA was tabled before the Senate in 2020 and reintroduced in 2023. However, its proposal to address the discriminatory impact by 'equalising down' by proposing that both widows and widowers should lose the life interest upon remarriage makes it incompatible with the trajectory of strengthening of spousal property rights that this article is advocating; See Law of Succession (Amendment) Bill, 2023, Kenya Gazette Supplement No.70 (Senate Bills No.20), 19th May 2023.

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