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CASE REVIEW: KEY JUDICIAL PRONOUNCEMENTS ON CONSTITUTIONALITY OF ASPECTS OF FAMILY LAW IN POST-2014 KENYA

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Abstract

This Case Review critically examines six decisions made by the Supreme Court of Kenya and the High Court Constitutional and Human Rights Division since 2014. These cases are pivotal in shaping the evolving landscape of family law. The Case Review highlights constitutional challenges to provisions of the Marriage Act and Matrimonial Property Act, including the one-year statutory limitation for instituting annulment proceedings, the three-year waiting period for divorce in civil marriages, and the constitutionality of contribution as the basis for entitlement to matrimonial property. The analysis explores the role of the judiciary in balancing individual rights with public interest imperatives such as protecting the family unit and ensuring child welfare. It discusses the one case that challenged the constitutionality of the application of the ban on child marriages to Islamic marriages on grounds of religious freedom. Recent Supreme Court decisions concerning the uncertain status of cohabitation unions in the wake of the Marriage Act of 2014, and the diminishing relevance of the common law presumption of marriage are also discussed. The review underscores urgent legislative gaps requiring reform to harmonize constitutional rights with family law.

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I. Introduction

The decade that followed the enactment of the Marriage Act (2014)[1] the Matrimonial Property Act (MPA) (2013),[2] the Victim Protection Act (2014),[3] and the Protection Against Domestic Violence Act (2015)[4] has seen Kenyan courts make pronouncements that have implications for marriage, property and equality. This case review analyses six such judicial decisions, highlighting where there are reform gaps that still need to be addressed. The six judicial decisions consist of four by the High Court's Constitutional and Human Rights Division and two by the Supreme Court.

Among the High Court decisions, the first challenges the constitutionality of section 73(2) of the Marriage Act whose effect is to compel parties who fail to file applications for annulment before the expiration of the first year of marriage to remain in those faulty marriages. The second challenges the constitutionality of section 66(1) of the Marriage Act, which bars parties in civil marriages from filing for divorce unless the marriage has lasted for three years. In the third petition, a council of Muslim clerics challenge the prosecution of persons involved in arranging the marriage of a 16-year-old girl, arguing that Islamic marriages are exempt from prohibition of child marriage on account of the constitutional freedom of religion. The fourth case before the High Court's Constitutional and Human Rights Division was a petition brought by the International Federation of Women Lawyers (FIDA-Kenya) to challenge the constitutionality of section 7 of the Matrimonial Property Act which makes proof of contribution the basis for entitlement to matrimonial property.

The two Supreme Court decisions concern matrimonial property. In the first, the court settles the matter of the property implications of Article 45(3) which guarantees equality of parties in a marriage. It also decides on the issue of whether the MPA applies to suits initiated before its enactment. In the second Supreme Court decision, the court tackles the question of whether the MPA is applicable to cohabitation unions, and also addresses (but does not resolve) the legal uncertainty of the presumption of marriage in the post-2014 context.

1 The Marriage Act, 2014 (Cap. 150, Laws of Kenya).
2 The Matrimonial Property Act, 2013 (Cap.152, Laws of Kenya).
3 The Victim Protection Act, 2014 (Cap.79A, Laws of Kenya).
4 The Protection Against Domestic Violence Act, 2015 (Cap.151, Law of Kenya).

II. Constitutional Challenges Before the High Court's Constitutional and Human Rights Division

A. *S B M & Another -v- Attorney General*:[5] The Constitutionality of Section 73(2) of the Marriage Act

The Petitioners in this case challenged the Constitutionality of section 73(2) of the Marriage Act which states as follows:

"(2) The court shall only grant a decree of annulment if –

(a) the petition is made within one year of the celebration of the marriage;

(b) at the date of the marriage and regarding subsections (1)(b) and (c), the petitioner was ignorant of the facts alleged in the petition; and

(c) the marriage has not been consummated since the petition was made to the court."

For clarity and context section 73(1) states as follows:

"73.Grounds for annulment of marriage

(1) A party to a marriage may petition the court to annul the marriage on the ground that –

(a) the marriage has not been consummated since its celebration;

(b) at the time of the marriage and without the knowledge of either party, the parties were in a prohibited relationship;

(c) in the case of a monogamous marriage, at the time of the marriage one of the parties was married to another person;

(d) the petitioner's consent was not freely given;

(e) a party to the marriage was absent at the time of the celebration of the marriage;

(f) at the time of the marriage and without the knowledge of the husband, the wife is pregnant and that the husband is not responsible for the pregnancy; or

(g) at the time of the marriage and without the knowledge of the petitioner, the other party suffers recurrent bouts of insanity."

5 *SBM & another v Attorney General* [2022] KEHC 13920 (KLR) (hereinafter SBM & another).

The contention of the petitioners in this matter was rather straightforward: applying the one-year limitation of time would, in effect, compel parties to remain in faulty marriages. They alleged that this would violate Article 45(2) of the Constitution which requires that marriage should be on the basis of free consent. They further alleged that it violates the right to equality and non-discrimination under Article 27.

It is worth mentioning that the predecessor to the Marriage Act, 2014 - the Matrimonial Causes Act- avoided this absurd outcome by distinguishing between void and voidable marriages. Void marriages are invalid by operation of the law, with or without any action by a party to have them annulled. This is on account of their non-compliance with an essential requirement (for example, that one of the parties is in a subsisting marriage or is under-age, or that the parties are withing the prohibited degrees of relationship). Voidable marriages remain valid unless a party moves to have them declared invalid by a court. The Matrimonial Causes Act rightly applied the one-year limitation of time to voidable marriages only. The current wording of Section 73(2) would see one compelled to persist in marriage to someone they later discover is a close relative within the prohibited degrees of relationship for example.

1. Determination

The Court handled the matter as it was presented, namely, as a constitutionality issue, rather than as a simple matter of faulty drafting that failed to restrict the one-year limitation to voidable marriages only. In essence, Nyakundi J took on not just the narrow question of the lack of differentiation between void and voidable marriages under s73(2), but the broader constitutional implications of imposing a time bar in any circumstance. He ruled that the said provision was indeed unconstitutional as it limited access to justice:

> *"The very purpose of the provision is to withhold that right rooted in the fundamental justice for a court to render a decision on the issue of annulment expeditiously. The court as an impartial forum in article 50(1) of the Constitution should be allowed to adjudicate any petition/claim arising out of void or voidable marriage unions."*[6]

Nyakundi, J likened the provision to 'detention':

> *"I think the message our parliament wanted to impart to the courts under section 73(2) of the Marriage Act is loud and clear: that one finding herself or himself in a voidable marriage ought to live in "detention" inconsistent with the rights to equality, dignity, conscience, liberty, freedom of choice as prescribed in the bill of rights."*[7]

6 Ibid [58].
7 *SBM & another* (n 5) [45].

2. *Examining the Impact of the Decision*

One possible reading of the judgement is that the learned Judge needed to do no more than simply point out the drafters' error in failing to distinguish between marriages that are void and those that are voidable, and impose the one-year limitation on the latter only. This reading suggests that there was really no constitutional issue to resolve.

Another possible reading of the judgement is that the learned judge opted to take on the broader question of principle—that is, should there be a one-year limitation at all even with respect to voidable marriages? The concern of the judge seems to be that it is unconstitutional for the law to compel parties to remain in voidable marriages simply on account of having missed the one-year deadline for seeking annulment.

So, what is the status of s73(2) of the Marriage Act following the judgement in the *SBM* case? The declaration of unconstitutionality renders the provision inoperable, but parliament has not moved to amend or repeal it. If and when parliament does act, should it simply restore the position of the law to what it was under the previous statute, and apply the one-year limitation to voidable marriages only, excluding void ones? Or should parliament endorse the judge's broader view that even restricting the one-year limitation to voidable marriages amounts to 'detention' and offends the Constitution's guarantee of access to justice? If parliament endorsed this broader view, would it be restricted to time limitations in the area of marriage only, or would that call for repeal of all laws that impose a time limitation for bringing legal action? Is the right of access to justice under Article 48 of the Constitution not subject to limitations? Is it not to be balanced against other public interest imperatives?

In the case of voidable marriages, such public interest imperatives include sparing parties who have invested in a relationship- including children born of such unions- uncertainty and abrupt disruptions after a period of time has elapsed. It is therefore more likely that parliament will take the narrower approach and simply reset the clock to pre-2014 by reintroducing the demarcation that existed in the Matrimonial Causes Act between void and voidable marriages, than repeal s73(2). Either way, legislative action is called for, as this judgment raises fundamental questions.

B. ***National Assembly of Kenya -v- Tukero Ole Kina & Another***[8]

Lawyer Ole Kina filed a petition challenging Section 66(1) of the Marriage Act for being discriminatory as it treated persons married under the civil marriage system differently from persons married under other systems. The said section states:

> "*(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage*."

8 *National Assembly of Kenya v Tukero Ole Kina & another* [2022] KECA 548 (KLR) (hereinafter Ole Kina case).

The court of first instance – the High Court- agreed with the petitioner's charge of discrimination, since other marriage regimes are not subjected to a similar waiting period. The National Assembly appealed to the Court of Appeal, whose judgment is discussed here.

1. Determination

The Court of Appeal found s66(1) of the Marriage Act unconstitutional, but not on the ground of discrimination. The court ruled that by virtue of Article 45(1) and 45(4), parliament was constitutionally permitted to give effect to the positive constitutional obligation to protect the family unit by recognizing the various forms of marriages and divorces, including under different traditions, religious norms and personal laws. There was, therefore, a legitimate reason and purpose for the Marriage Act provisions' different treatment of the various marriages, and section 66(1) was just one example:

> *"...Firstly, it is notable that the parties to the different marriage systems are not similarly situated to require uniformity in treatment, as urged by Mr. Ole Kina. They have dissimilar situations in terms of religion, belief and conscience which leads them to contract different types of marriage. In the circumstances, we cannot adopt an interpretation of equality that requires all the parties to the different marriage systems to be simply treated alike, and must of necessity interpret equality in the context of the constitutionally permitted social, religious and personal differences that influence the choice of the different marriage systems."*[9]

The Court took the view that the restriction in s66(1) was legitimate in pursuit of the state's positive obligation to protect the family, in line with Article 45(1). However, the Court of Appeal found that the provision failed the proportionality test in Article 24 of the Constitution. In essence, parliament goes too far in the direction of preserving marriage, at the expense of personal freedoms, and should have set out exceptional circumstances under which a divorce petition in a civil marriage might be brought before the expiration of three years.[10]

As with the *SBM* case discussed above, it bears mention that the predecessor statute, the Matrimonial Causes Act, did provide for just the proportionality that the Court of Appeal called for. A proviso to the three-year restriction stated: 'Provided that a judge of the court may, upon application being made to him in accordance with rules made under this Act, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent…'[11]

9 Ibid [48].
10 Ole Kina case [71].
11 The Matrimonial Causes Act, 2010 (Repealed), s 6(1).

Indeed, parliament appears to have tried to incorporate this exception through subsequent subsidiary legislation. Rule 4(1) of the Marriage (Matrimonial Proceedings Rules) 2020 stipulates a procedure to be followed in petitioning for dissolution of a civil marriage before the expiration of three years. But this quick fix is anomalous as there is no anchoring of this subsidiary rule in the parent statute.

2. The Impact of the Decision

This quick fix approach has resulted in an awkward position where we have Rule 4(1) of the Matrimonial Proceedings Rules (2020) attempting to remedy section 66(1) which has been declared unconstitutional for lack of proportionality. However, in so far as the parent statute does not grant that option or indicate the grounds on which the three-year waiting period may be waived, the rule hangs in the air. It is not clear why parliament has not acted swiftly to put an end to this anomaly.

C. *Council of Imams and Preachers of Kenya, Malindi & 4 Others -v- Attorney General & 5 Others*[12]

The facts of this case are that the father of a 16-year-old girl was charged, along with two other adults, with the crime of arranging for the marriage of a minor. This was contrary to section 20 of the then Children Act of 2001 (repealed by Children Act 2022), which prohibited exposing a child to harmful cultural practices such as child marriage. The Malindi chapter of the Council of Imams and Preachers challenged their arrest and arraignment as unconstitutional, arguing that the offence did not apply to Islamic marriages on account of the freedom of religion recognized under Article 32 of the Constitution.

1. Determination

The Constitutional and Human Rights Division of the High Court made a finding that the right to practice the religion of one's choice under Article 32 of the Constitution can only be read harmoniously with other constitutional provisions. These other constitutional provisions include: Article 45(2) which accords the right to marry to adults only; Article 45(4) which gives parliament the power to enact laws recognizing a variety of marriage and personal law systems based on tradition or religion, but with a proviso: 'to the extent that any such marriages or systems of law are consistent with this Constitution'; and Article 53 which embodies the principle of the best interests of the child. Only marriages entered into in compliance with all constitutional dictates can withstand scrutiny, freedom of religion notwithstanding.

The Court restated the definition of a child as per both the Constitution and the Children Act as a person below the age of 18 Years. The court found that only

12 *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* (Constitutional Petition 40 of 2011) [2015] KEHC 1762 (KLR).

Islamic marriages entered into by persons of majority age can be sanctioned by the law and hence the petition was dismissed. In doing so the court made the following pertinent observation:

> *"If each religion is given a free hand to exercise its belief without a common ground, then the end result will be disharmony in Kenyan society. Some religious beliefs do not entertain medical treatment. The belief is that prayers can heal the sick. The government in its effort to eliminate diseases such as polio or bilharzia, is empowered to forcefully vaccinate or administer medicine on those whose religious beliefs are against medication. In the same line, the Constitution outlaws marriages of people below 18 years. This is irrespective of one's religious belief."*[13]

2. Potential Impact in Relation to the Marriage Act 2014

This case was filed prior to the Marriage Act, 2014. However, it highlights a lack of coherence within the Marriage Act. In focus is Section 49(3) as read with section 4 of the Act. The two provisions state as follows:

> *"49(3) Any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith."*

On the other hand, section 4 provides that:

> *"A person shall not marry unless that person has attained the age of eighteen years"*

As currently worded, section 4 would have to defer to the unqualified language of section 49(3) and exempt persons who profess the Islamic faith from the Marriage Act's provisions that are inconsistent with Islamic law. This potential gap could be remedied by prefacing section 49(3) with 'subject to section 4'. Arguably, the potential danger is averted by two safeguards. First, by the general assurance that statutes are only to be interpreted in a manner consistent with the Constitution. Second, by the conflict of laws provision contained in section 4 of the Children Act 2022. This provision states that in the event of any inconsistency between the Children Act 2022 and any other legislation, the former shall prevail in matters dealing with children. This is positive, since section 2 of the Children Act is unequivocal about 18 years as the minimum age of marriage.

However, section 4(2) goes on to provide that such other legislation will prevail if it is proved that it offers a greater benefit in law to children, having regard to the best interest of the child. This leaves room for argument that it is in the child's best interest to adhere to the expectations of his/her faith, for instance. The comfort offered by section 4 is thus diminished by the possibility of ouster of the Children Act in favour of the internally incoherent provisions of the Marriage Act, leaving

13 Ibid [9].

room for the possibility that the provisions could be used to rationalize child marriage in the name of religious freedom, as was attempted in the *Council of Imams* case. As the comprehensive law regulating marriage, the Marriage Act needs to be internally coherent, as well as unequivocal about prohibiting child marriage across all recognised systems of marriage, thereby giving full effect to Article 45(2) and (4) of the Constitution.

D. *FIDA-Kenya -v- Attorney General*[14]

This case, instituted in 2016 and decided in 2018, challenged the constitutionality of section 7 of the Matrimonial Property Act (MPA). The section provides that in the absence of an agreement to the contrary, division of matrimonial property upon divorce should be based on each party's contribution to the acquisition of the property. By contrast, section 10 on liabilities does not apply the contribution approach. Rather, liabilities incurred during marriage are to be borne equally. The Petitioner challenged contribution as the basis for division, arguing as follows: analysis of precedents showed that courts tend to place greater weight on monetary contribution rather than contribution in kind; given the reality of skewed asset ownership by gender, wives were more likely than husbands to rely on non-monetary contribution.[15] The petitioner argued that a matrimonial property regime that focused on contribution was likely to have discriminatory impact against married women, contrary to the marital equality espoused in Article 45(3) of the Constitution. Consequently, FIDA argued, parliament will have failed to fulfil the constitutional obligation under Article 60(1)(f) to eliminate 'gender discrimination in law, customs and practices related to land and property in land', which in turn would mark Kenyan law as non-compliant with international and regional human rights standards.[16]

In addition, the petitioners argued, the lack of clarity on what monetary value should be attached to the various forms of non-monetary contribution worsens the situation for women and this goes against Article 45 of the Constitution.

A proper interpretation of Article 45(3), FIDA argued, demands that the starting point should be a rebuttable presumption of 50:50 ownership.

14 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] KEHC 7130 (KLR) (hereinafter *FIDA-v-A.G.*).

15 FIDA's pleadings did not provide evidence of the gender gap in asset ownership, opting to invite the court to take judicial notice of the fact. Empirical analysis of 94 cases on matrimonial property decided between 2014 and 2024 has established that women are five times more likely than men to seek recognition of non-monetary contribution to matrimonial property. 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 (hereinafter, Mutahi this volume).

16 The petition specified Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and Articles 15 and 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 22 of the International Covenant on Civil and Political Rights and Article 3 of the African Charter on Human and Peoples' Rights.

1. Determination

The High Court's Constitutional and Human Rights Division disagreed. It ruled that section 7 of the MPA is constitutional and that the equality standard in Article 45(3) does not call for automatic division of matrimonial property into equal shares: "*By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.*"[17]

The court further held that since non-monetary contribution is defined in the Act and its components listed, it cannot be said to be vague or undefined.

FIDA got the opportunity to argue their position once again, this time before the Supreme Court as *amicus curiae* five years later in *JOO v MBO*[18] discussed below.

III. Division of Matrimonial Property: The Supreme Court Speaks

A. *JOO -v- MBO & 2 Others (amicii)*[19]

In this case decided in 2023, the Supreme Court dealt with the mode of distribution of matrimonial property in light of Article 45(3) on equality in marriage. The respondent (wife) applied for division of matrimonial property following divorce. She argued that the properties in question were a joint venture even though they were registered in the husband's name. The High Court had awarded her a 30% share in the matrimonial home, and a 20% share in rental units built on the same plot.[20] Dissatisfied, she appealed before the Court of Appeal, and the ex-husband cross-appealed, challenging the shares awarded to her in the absence of any direct (financial) contribution.

The Court of Appeal, relying on evidence that showed that she was in salaried employment for 15 of the 18 years of marriage, and constantly took loans that contributed indirectly to acquisition of the property (by paying school fees for the children, for instance), set aside the award of the High Court and awarded her a 50% share in both the matrimonial home and the rental units. Aggrieved, the ex-husband appealed to the Supreme Court, which upheld the award of the Court of Appeal.

1. Determination

Beyond the matters in dispute in the immediate case, the Supreme Court dealt with the broader issues of law raised by the case.[21] The Supreme Court first dispensed

17 *FIDA-v-A.G.* (n 14) [64].

18 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (hereinafter *JOO v MBO*). The case is also popularly referred to as the *Ogentoto* case.

19 Ibid.

20 There were three other houses, but the court did not consider those to be part of matrimonial property. *JOO v MBO* [7, 10].

21 The Supreme Court of Kenya only hears appeals from the Court of Appeal if they involve interpretation or application of the Constitution or are certified by the Court of Appeal as being of general public importance, transcending the specific dispute between the parties. See Article 163(4) of the Constitution.

with the question of the applicable law: whether the MPA 2013 could be applied to disputes filed before its enactment, as was the case in the instant dispute. The court answered in the negative, since statutes generally do not have retroactive application, but affirmed that the Constitution has retroactive application since all laws must, from the moment of promulgation of the Constitution, be interpreted in line with the Constitution.[22] Article 45(3) is therefore applicable to disputes filed prior to the promulgation of the Constitution.[23]

The court then considered the proper interpretation of Article 45(3) and concluded that the equality of parties to a marriage guaranteed under Article 45(3) does not give the court power to 'take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other.' Rejecting FIDA's (as *amicus*) argument that Article 45(3) establishes a rebuttable presumption of 50:50 sharing of matrimonial property, the court underlined that such an interpretation would fall foul of the protection of the right to property under Article 40(1) and (2).

Through its interpretation of Article 45(3), the Supreme Court affirmed the decision in *Echaria -v- Echaria*[24] (decided in 2007), namely, that a spouse does not acquire a beneficial interest in property registered in the other spouse's name on account of marriage only, but by proving specific contribution. The Supreme Court categorically stated that *Echaria* is still good law. Thus, the position of the law concerning the basis for entitlement to matrimonial property has not been altered by the enactment of the Matrimonial Property Act, 2013.[25]

2. The Impact of the Decision

The *JOO-v-MBO* judgment means that the MPA has no application to any pending disputes filed prior to the operationalisation of the 2013 statute. The repealed 1882 English Married Women's Property Act will, therefore, continue to operate with respect to those cases.

The Supreme Court affirmed the applicability of Article 45 of the Constitution to disputes filed before the promulgation of the Constitution. This means that whatever the applicable laws, they must be interpreted in light of the Constitution. This offers a measure of protection.

Finally, the court acknowledged the relative difficulty of proving non-monetary contribution but offered no guidelines other than that it has to be evaluated on a case-by-case basis. The quantification of childcare, domestic work or companionship into a percentage of the value of property is not any clearer following the Supreme Court's judgment in *JOO -v-MBO*. Given empirical evidence that women in

22 Ibid [60].
23 *JOO v MBO* [65].
24 *Priscilla Njeri Echaria V Peter Mburu Echaria* [2007] KEHC 1294 (KLR).
25 Ibid [66].

matrimonial property disputes are five times more likely than men to claim non-monetary contribution[26], the gendered impact is obvious. And yet if indeed there were to be guidelines concerning quantification of non-monetary contribution, what would they look like given that these matters are inherently contextual and subjective?

B. *MNK v POM & Another*[27]

This case was decided on the same day as the *JOO-v-MBO* case, and it also concerned matrimonial property. The respondent filed a suit in the High Court claiming a share of matrimonial property from the appellant whom he alleged was his wife by virtue of long cohabitation. The claim was filed in November 2013, predating the enactment of the MPA, and so it relied on the 1882 Married Women's Property Act. The claim failed. The High Court relied on her testimony that she had a subsisting customary marriage with someone else to rule that she did not have capacity to marry, and therefore the presumption of marriage did not apply, and therefore no claim of matrimonial property could arise. On appeal, the Court of Appeal reversed the finding of the High Court, applied the common law presumption of marriage, and awarded him 50% of the property. She appealed to the Supreme Court which revised the award downwards to 30%, recognizing the respondent's claim to the property but not on the basis of a presumption of marriage. The Supreme Court reverted to the finding of the High Court on the inapplicability of the presumption of marriage on account of the appellant's subsisting customary marriage to someone else. It based the award of 30% of the property on the equitable doctrine of constructive trust based on the respondent's proven contribution to the acquisition of the property.[28]

1. Determination

The Supreme Court had to decide two issues of general public interest. The first was whether parties in a cohabitation union or in a relationship not recognized by law as a marriage can file proceedings under the Married Women's Property Act. This raised a second issue, a corollary of the first, namely, whether the common law presumption of marriage has a place in Kenyan law post-2014, since the Marriage Act makes no mention of it.

The Supreme Court dispensed with the main issue surprisingly fast, relying solely on a plain textual reading of section 17 of the Married Women's Property Act to conclude that it refers simply to *'parties to a marriage; husband and wife.'* Since the statute does not go into the detail of how the marriage in question came about, the statute must apply to all marriages, 'recognized or unrecognized in law.' [29] This

26 Mutahi this volume (n 15).
27 *MNK v POM*; *Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* [2023] KESC 2 (KLR) (hereinafter *MNK v POM*).
28 Ibid [78].
29 *MNK v POM* [35].

conclusion begs the question: if is not recognized in law, by what means does it become a 'marriage'? But the court did not pause to consider this. Instead, it moved on to the factual question of whether the parties in this case were married.

The Supreme Court took a long excursion through various precedents on the presumption of marriage, restating the parameters within which the presumption applies.[30] Then, without giving a definitive ruling on whether the Marriage Act 2014 leaves any room for the application of the presumption, the court simply declared that the presumption of marriage is on its deathbed due to 'changes to the matrimonial laws in Kenya' and 'should only be used sparingly where there is cogent evidence to buttress it.'[31]

2. The Impact of the Decision

The Marriage Act defines 'cohabit' under section 2 but does not address the issue of the applicability of the presumption of marriage anywhere else in the statute. The Supreme Court's 'on its deathbed but still applicable' stance does little to clarify the applicability of the common law presumption of marriage or the legal status of cohabitation unions in post-2014 Kenya. This even as the court called for parliament to enact a law to regulate 'adult interdependent relationships' which, the court observed, many people were opting for without any intention of getting married. The Court's resort to the equitable doctrine of constructive trust is innovative in its simplicity. The doctrine is not new, but it is the first time that a court has used it to resolve a dispute among cohabitees who fail to meet the threshold for the presumption of marriage. In prior cases, the failure to establish a basis for presumption of marriage has usually marked the death of a claim. With this case, the Supreme Court established that it is enough that a common intention to contribute to and benefit from a particular property is proved. It is not necessary to presume marriage in order for the presumption of a resulting trust or constructive trust to kick in. The impact of this decision, therefore, goes beyond the marital and cohabitation context, to a wide variety of co-ownership arrangements. In view of the legal uncertainty surrounding cohabitation unions, this decision offers some assurance to cohabitees and people in other relationships with property implications that at least there is a legal procedure for safeguarding their property interests regardless of the status of their unions.

IV. Conclusion

This article has reviewed six cases that have significant implications for further development of the law relating to marriage, property and equality in Kenya. This brief concluding section highlights the gaps exposed by these cases, which call for action either by the judiciary or the legislature. First, despite clear direction from the Constitutional and Human Rights Division, no action has been taken to repeal or

30 Ibid [64].
31 *MNK v POM* [65].

amend section 73(2) of the Marriage Act. The same is true of section 66(1) which has resulted in an anomaly: Rule 4 in the subsidiary legislation outlines the procedure for applying for separation or divorce before the expiry of three years in a civil marriage, but it hangs in the air without anchorage in a parent statute. Thirdly, the stipulation of a minimum age for marriage across all systems of marriage would be made more secure by harmonizing s4 and s49(3) of the Marriage Act, the Children Act 2022 (, and the Constitution. Fourthly, the legal uncertainty over cohabitation unions and the applicability of the common law presumption of marriage needs to be brought to a neat end. This could be achieved through an amendment reconciling the Marriage Act with section 119 of the Evidence Act. The Supreme Court's characterization of the presumption as being 'on its deathbed but still applicable' does little to offer direction. The court's invitation to parliament to enact a law on 'interdependent adult relationships' opens up the scope of action beyond relationships that approximate to marriage and is worth looking into.

These four gaps require legislative action. The Attorney General and the Kenya Law Reform Commission ought to move the National Assembly and the relevant committees of the house to make the necessary amendments.

Finally, while the process of attributing monetary value to non-monetary contribution to matrimonial property is inherently subjective and must be addressed on a case-by-case basis, the judiciary could develop a set of broad guidelines on quantification.

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