Chapter 10
Matrimonial Property

Case 10.1 Kivuitu v Kivuitu

(Civil Appeal No. 26 of 1991)[1]

Kenya Court of Appeal

Aspects relevant to VAWG: Inequality in rights of ownership of matrimonial property, role of the judiciary in ensuring equality of rights at the end of marriage

Summary of facts

The parties in this case (husband and wife) married in 1966 and cohabited as such. The husband was a Member of Parliament. In 1970, the husband entered into an agreement with M to purchase a house for KSh160,000 and paid the deposit of KSh20,000. He was however dissatisfied with the location and security and he agreed with his wife to purchase another house at a different location for their occupation as the matrimonial home. He travelled to New York to attend sessions of the UN Assembly and left his wife in charge of finding the alternative property. While he was away, the wife searched and found a suitable house at Garden Estate in Nairobi, negotiated the purchase price at KSh170,000, signed the sale agreement and paid a deposit of KSh17,000. The deposit was paid out of moneys obtained from a business owned by the husband and a third party. All this was done with the concurrence of the husband. The husband paid the mortgage instalments from his salary. Upon the husband's return from New York, he attempted to register the house in his sole name but this was promptly rejected by the wife. Eventually, the house was registered in the joint names of the spouses without specifying the shareholding of each party.

In 1972, the marriage broke down and a decree for divorce was granted and the wife moved out of the matrimonial house, leaving behind the husband and children. Nine years later, the wife filed an application in High Court seeking, among others, an order that the house, the subject matter of the application, was the matrimonial house of the parties and that it should be sold and the proceeds shared between her and the husband in equal shares. The trial judge ruled that she was entitled to a 20 per cent share in the house, because she did not make any financial contribution to the acquisition of the disputed property.

The wife appealed on grounds she had contributed to the property and that, in any case, her title as joint tenant was absolute and entitled her to a half share in the property.

The husband cross appealed, arguing that the trial court erred in awarding the wife a 20 per cent share after finding that she had made no financial contribution. The court, Omolo Ag. JA (as he then was), in the lead judgement, made the following observations which the rest of the court agreed with and which formed the judgement:

- *If a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being a family asset is owned in equal shares.*
- *The wife contributed indirectly, both non-monetarily as a wife and financially through her alternative employment and businesses.*

The court awarded the wife a 50 per cent share in the property and ordered a valuation to be carried out so that the husband could pay to the wife half the value of the house.

Most importantly, though orbiter, the learned judge recognised that a wife's contribution to the acquisition of family property can be direct (financial) or indirect by way of her services towards the welfare of the family. Such services can be quantified to entitle a wife to a share in matrimonial property.

Ratio Decidendi

(a) A wife's contribution to the acquisition of family property can be direct (financial) or indirect by way of her services towards the welfare of the family. Such services can be quantified to entitle a wife to an equal share in matrimonial property.

Contribution to jurisprudence:

The decision is an invaluable contribution towards gender justice and indeed the rights of women. It destroyed society's gender stereotype of devaluing a wife's housekeeping role and emphasised that the contribution of a 'house wife' to the family's growth and wellbeing can be quantified and remunerated like that of a man who earns a living through work outside the home.

Case 10.2 Nderitu v Nderitu

(Civil Appeal No. 203 of 1997)[2]

Kenya Court of Appeal

Aspects relevant to VAWG: Inequality in rights of ownership of matrimonial property, role of the judiciary in ensuring equality of rights at the end of a marriage, discrimination on medical grounds

Summary of facts

The parties in this case got married under Kikuyu customary law in 1968 and were blessed with five children, three of whom were born through caesarean section. The husband was in a charcoal-selling business, while the wife was a housewife. The business was not doing well and the wife went back to her parents' home until 1972, when she returned to Nairobi and joined her husband in his business of selling second hand clothes. This was closed in 1985 and a wholesale business opened.

She continued helping to run the wholesale business. It was not in dispute that with regard to the businesses, the wife always gave the proceeds of sale to the husband who deposited it in his account at the Kenya Commercial Bank. As a result of these businesses, the husband was able to buy nine land properties, five motor vehicles and various household goods. All these properties were registered in the sole name of the husband. The marriage got into trouble in 1992 and a suit for divorce was filed. The wife applied to the court under the Married Women's Property Act (MWPA) for orders regarding ownership of the properties acquired during the subsistence of the marriage.

Issues and resolution

The wife applied to the court under the Married Women's Property Act (MWPA), seeking orders that all the property acquired during the subsistence of the marriage was jointly owned by her and her husband. She sought a further order that these properties should be sold and the net proceeds shared equally between the parties. She contended that she had contributed financially to the acquisition of the properties. The husband objected and downplayed her contribution and argued that she made no financial contribution. The trial judge held that the MWPA, being a statute of general application, applied to customary law marriages in Kenya. He considered the wife's non-monetary contribution in taking care of the children and awarded her a 50 per cent share of the matrimonial home in Tigoni and 30 per cent share in the remaining properties, apparently because the caesarean operations that she underwent reduced her productivity. She appealed on the basis that the trial judge erred in failing to award her a 50 per cent share in all the properties.

The Court of Appeal found that there was evidence before the trial court to the effect that the appellant was engaged full time in helping to run and expand the business, and that there was no evidence on record to show that the caesarean operations that she went through were adequate justification to reduce her share to 30 per cent and further held that the pregnancies were for the welfare of the family, as they increased the numerical strength of the family. Finally, the court held that the wife had proved that she made an equal

indirect contribution and she was entitled to, across the board, an equal share in all the properties registered in the husband's name. The court allowed the wife's appeal, set aside that part of the order giving her a 30 per cent interest over designated properties and assets and replaced it with an order giving her a 50 per cent share across the board. This was except one property, LR No. 209/1233 Murang'a Road, Nairobi, which was at the time of the trial in the High Court registered in the name of one Benedict Kariuki, a son of the couple.

It is important to note that both this case, as well as the Kivuitu case, was decided before Kenya enacted the Matrimonial Property Act.

Ratio Decidendi

(a) A wife's contribution to a family's welfare can be both direct (financial) or indirect through housekeeping and such must be quantified as work worth remuneration.

(b) Property whether immovable or movable acquired jointly by a husband and wife during a subsisting marriage is to be shared in equal proportions upon dissolution of the marriage.

Contribution to jurisprudence

- Court recognised the value of a woman's (wife) natural maternal functions as quantifiable contribution in a marriage relationship.
- The decision is also an invaluable contribution towards gender justice and indeed the rights of women. It destroyed society's gender stereotype of devaluing a wife's housekeeping role and emphasised that the contribution of a 'housewife' to the family's growth and wellbeing can be quantified and remunerated like that of a man who earns a living through work outside the home. (See *Kivuitu v Kivuitu*)

Case 10.3 Bi Hawa Mohammed v Ally Sefu

(Civil Appeal No. 9 of 1983)

Court of Appeal at Dar Es Salaam

Aspects relevant to VAWG: Discrimination, equality of parties at dissolution of marriage, matrimonial property, wife's contribution to acquisition of matrimonial property, direct (financial) contribution, wife's indirect contribution by providing services on the domestic front, role of the judiciary in upholding property rights.

Summary of the facts

The appellant (Bi Hawa Mohamed) and the respondent (Ally Sefu) were wife and husband respectively until the dissolution of their marriage by a decree of the Court of Ilala District, at Kariakoo, Dar es Salaam in 1980. In subsequent proceedings, seeking the division of matrimonial assets, the trial court held in effect that the appellant was not entitled to any share in the matrimonial assets because, to use the words of one of the assessors, 'She was only a mere wife, and the house was bought by the husband with his own money'. The trial court accepted the offer made by the respondent to pay a sum of TSh2,000/= as a parting gift to the appellant in accordance with the religious tenets of the respondent. On appeal, the High Court substantially agreed with the views of the trial court, but increased the amount of the parting gift to TSh3,000/=. Bi Hawa Mohamed (appellant) was further aggrieved by the decision of the High Court and she filed an appeal to the Court of Appeal.

The appellant and respondent were married according to Islamic rites in Mombasa, Kenya, sometime in 1971. The respondent had a house in Mombasa and they used it as the matrimonial home. The respondent was a seaman and his work involved travelling abroad and being away for many months. While so travelling, he would provide adequate maintenance for the appellant, who remained at Mombasa, to look after the matrimonial home. On one occasion, he gave her an additional sum of KSh18,000/= to set up business activities. She failed to set up any business and the money could not be accounted for. In 1974, the respondent purchased house No. 40 along Swahili/Mhoro Street in Dar es Salaam. This house was bought with his own money and was the subject matter of this case. In 1975, the couple moved from Mombasa to this house in Dar es Salaam and they were using this house as the matrimonial home at the time of their divorce. It was the appellant's contention that this house was matrimonial property and that she was entitled to a share in the property.

Issues and resolution

The High Court certified that the appeal raised a point of law which should be determined by the Court of Appeal. The point of law was framed thus: 'Did the High Court and Primary Court act in error in holding the view that domestic services of a housewife do not amount to contributions made by her in the acquisition of matrimonial assets'.

The Court of Appeal noted that the power of the court to divide matrimonial assets is derived from section 114(1) of the Law of Marriage Act, 1971, which gives the court the power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale

of any such asset and the division between the parties of the proceeds of sale. The court noted that from the wording of this section, the assets envisaged must firstly be matrimonial assets; and secondly, they must have been acquired by them during the marriage by their joint efforts. The second issue for determination was whether the disputed house was matrimonial property and whether it was acquired through the joint effort of the parties.

In defining what constitutes matrimonial property, which the court found to mean the same thing as 'family assets', the court relied on paragraph 1064 of *Lord Halsbury's Laws of England*, 4th Edition, p491, which defines the phrase 'family assets' to mean: those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.

Consequently, the court held that on the facts established in the two courts below, the house in dispute was used by the parties as their matrimonial home after they moved from Mombasa to Dar es Salaam and was therefore a matrimonial or family asset. The next point of law for consideration and decision was whether this matrimonial or family asset was subject to division between the parties under the provisions of section 114(1) of the Law of Marriage Act.

The next issue for determination was whether the acquisition of the disputed house was brought about by the joint effort of the parties. It was the appellant wife's contention that her efforts in performing her domestic duties had the effect of placing the respondent husband in a financial position to buy the house in question. The two courts below rejected this contention on the ground that performance of domestic duties by a housewife does not count in the acquisition of matrimonial or family assets. The question for determination by the Court of Appeal was whether the above view of the two courts below was erroneous. The court considered two schools of thought on whether a wife's domestic services amounted to a contribution in the acquisition of matrimonial property.

The first school of thought consisted of those who maintain that under section 114, the term 'joint effort' is limited to a direct contribution by a spouse by way of money, property and work, to the acquisition of the asset in question and that housekeeping and raising the children count for nothing. On the other hand, the second school of thought consists of those who take the view that household work must be regarded as part of the joint effort or indirect contribution towards the acquisition of any asset by the husband. Such indirect contribution entitles her to a share in the matrimonial assets.

The learned trial magistrate had argued that since traditionally looking after the household and caring for the children is the occupation and

responsibility of a wife, just as the feeding and clothing the family is the occupation and responsibility of the husband, the appellant's (wife's) said duties assigned by tradition and custom, should not be considered as a contribution or joint effort towards acquisition of the house in dispute. The next issue for determination was whether the trial magistrate was wrong in the above view on the issue of contribution.

The court noted that parliament had not legislated on this issue and considered whether a judge can assume the role of parliament and legislate through its judgements. It was of the view that if there was any grey area in respect of the matter, the appropriate solution to the problem lay in the intervention of the legislature and not in judicial legislation. The court considered the overall purpose of the Law of Marriage Act as an instrument of liberation and equality between the sexes and, guided by this objective of the act, the court was satisfied that the words 'their joint efforts' and 'work towards the acquiring of the assets' have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife.

On whether the appellant was entitled to any share in the house in question, the court was of the view that on the facts established by the two courts below, the appellant's domestic 'efforts' or 'work' consisted mainly in looking after the matrimonial home. She neither cooked food nor washed clothes for her husband, nor did she make his bed except on the few occasions when he was not travelling in ships abroad. Moreover, the couple had no children for her to take care of. As the respondent (former husband) was frequently away from home while working as a seaman, the court observed that the main beneficiary of such 'effort' or 'work' was not the respondent but the appellant herself, who lived in that house. This did not imply that her domestic 'effort' or 'work' was worthless, because lack of care of a house results in deterioration of such house.

In determining the shares of husband and wife in the matrimonial or family assets, section 114(2) required the court to apply the custom of the community to which the parties belonged and take into account their respective contribution to acquisition.

The parties were Muslims and the court found that, according to Islam, the respondent was expected to give a parting gift to his former wife according to his abilities.

The court was satisfied that such religious practice, which was undisputed, could properly be construed as a 'custom of the community to which the parties belong'. The High Court had found that the appellant was entitled to TSh3,000/= under this head and the record showed that she received the money in court. The court found no reason to interfere with this payment.

On whether she was entitled to a share of the house, the court held that she squandered KSh18,000 given to her to start a family business when the couple lived in Mombasa and she could not account for it, as she did not start any business.

The court regarded this money as an advance made by the respondent towards the future needs of the appellant. Taking into account the nature of the appellant's contribution discussed above, the court was of the view that the advance of KSh18,000/= at the time was sufficient provision for the future needs of the appellant, and held that she was not entitled to claim a further share in the matrimonial or family assets. Secondly, the court held that the squandering of that money by the appellant when weighed against her contribution was a matrimonial misconduct, which reduced to nothing her contribution towards the welfare of the family and the consequential acquisition of the matrimonial or family assets.

The court dismissed the appeal with an order that each party bear its own costs of the appeal, because it was a legal aid case.

Ratio Decidendi

(a) Domestic work of a wife is an indirect contribution towards the acquisition of matrimonial property and entitles her to a share in the matrimonial assets. However, the percentage which accrues to a wife who is not employed outside the home and who therefore does not make direct financial contribution to the matrimonial property depends on the nature and amount of household chores she engaged in. The Court took into consideration the nature of the man's employment which took him away from the matrimonial home for long periods and the fact that the couple did not have children to arrive at the conclusion that the chores were minimal.

In addition to the above, the Court also took note of the fact that the woman had earlier on squandered money given to her by her husband to set up business activities. Court consequently arrived at the decision that She would not be entitled on the share of the property on divorce.

Case 10.4 Lawrence Mtefu v Germana Mtefu

(Civil Appeal No. 214 of 2000)[3]

High Court of Tanzania at Dar es Salaam

Aspects relevant to VAWG: Cruelty, adultery with niece of the victim, psychological/ emotional violence, equality of parties at dissolution of

marriage, division of matrimonial property, contribution to acquisition of property during marriage, role of the court in ensuring equality of property rights at the end of a marriage

Summary of facts

The parties in this case were united by a Christian marriage contracted in 1975, which was later dissolved on the grounds of cruelty and adultery – allegedly committed by the appellant (husband). The divorce proceedings in the Magistrates Court were initiated by the respondent (wife). Following the grant of divorce, the trial magistrate ordered division of the three houses and sixteen (16) sewing machines equally between the parties. An order for maintenance at TSh10,000 per month, effective from the date when the case was filed, was also made. The husband was aggrieved by the entire decision of the court and filed an appeal before the High Court of Tanzania.

Issues and resolution

The appeal raised four grounds, namely that: the trial magistrate acted in error of law by holding that the marriage had broken down irreparably on account of cruelty and adultery on the part of the husband, which adultery she had condoned. He argued that the wife was well aware of the adulterous affair between him and one Domina Lawrence Msoka, a niece of the respondent, and that the respondent did not complain about it and that, in any case, she even facilitated the adulterous affair by taking care of the said Domina and her children.

Regarding the third and fourth grounds, the trial magistrate was faulted for having erred in law in ordering the husband to pay the wife TSh10,000 per month without first ascertaining his income, and for ordering equal distribution of all the houses and the 16 sewing machines. Concerning the three houses, his case was that the respondent was a mere housewife and had made no financial contribution to their acquisition.

The court dismissed the first ground concerning the respondent's alleged condoning of the appellant's adultery, and found that she had opposed it. The fact that she had complained to the elders was proof that she was opposed to it. The court noted that as a result of her complaint to the elders, the appellant caused her to be arrested and detained at the police station for three days, until she was bailed out by one Siril Martin. The court further noted that during her stay in police custody, the appellant was not bothered. The court found that the appellant's adultery with the respondent's niece and the arrest and detention of the respondent for three days after she complained to the leaders, were acts of cruelty that subjected the respondent to mental torture. Consequently, the first ground of appeal was dismissed.

The court also dismissed the second ground concerning the order of TSh10,000 for maintenance in view of the fact that the appellant had a coffee farm and 16 sewing machines, all of which generated income.

Concerning the order of equal distribution of the three houses and sewing machines, the court took into account the respondent's housekeeping duties, which the appellant referred to as 'conjugal obligations'. The court recognised that housekeeping, as was held in a previous case, amounted to services that required compensation because the rendering of such services makes the other spouse stable and enhances the ability to concentrate on development and acquisition of properties. The court then held that the respondent, through housekeeping services, contributed to the acquisition of the three properties and was entitled to a share at the dissolution of the marriage. Citing CEDAW, Article 15, the court held that it was the obligation of the Government of Tanzania to accord women equality with men before the law. The court was alive to the fact that the two houses at Moshi were constructed on ancestral land, and it would be extremely difficult for the respondent to access them. The court expressed itself thus on this issue:

> *The only thing which I fear may make the Respondent fail to get the remedy is the grant of the division in the two houses at Moshi. Customary rites may be an obstacle towards realization of what was granted to her….*

Bearing this in mind, the court then set aside the order of the trial court on the division of matrimonial assets and replaced it with an order awarding the Tandika house to the respondent as her share in the matrimonial assets and the rest of the assets given to the appellant. The court was of the view that in that way, the remedy to the respondent would be more effective than the remedy granted to her by the trial court.

The court in this appeal applied the law in the context of CEDAW Article 15 to which the Republic of Tanzania is a state party, to declare the rights of the parties. Article 15 requires the government to accord women equality with men before the law.

Ratio Decidendi

(a) The efforts of a wife in maintaining a home amount to work deserving compensation on divorce and cannot be conveniently cast as conjugal obligations to the benefit of a husband.

Contribution to jurisprudence/points to note:

- The Court was emphatic in its refusal to reinforce stereotypes that result in discrimination against women.
- The court applied International laws alongside domestic legislation (Constitution) to protect the woman's right to matrimonial property.

- The Court also recognized the challenges women are likely to face in utilising clan property in a patriarchal society. The court then made an order for the respondent wife to take full possession of the properties which did not have any clan links. On the other hand, the appellant husband received full possession of the two remaining properties which were situated on clan land. This action by the Court demonstrates that the Court was wary of delivering the respondent a hollow remedy and thus crafted an effective remedy.

Case 10.5 Gatera Johnson & Kabalisa Teddy v The Supreme Court

(RS/Inconst/Pén.0003/10/CS)

Supreme Court of Rwanda

Facts

The two plaintiffs, Gatera Johnson and Kabalisa Teddy, were married. However, prior to their marriage, Kiza Anita who sustained an unrecognised marriage with Gatera Johnson, filed a claim before the Second Instance Court at Gasabo requesting the distribution of common assets acquired before Gatera Johnson married Kabalisa Teddy.

The Second Instance Court at Gasabo reached a decision ordering Gatera Johnson to share the asset, a house, equally with Kiza Anita.

Gatera Johnson and Kabalisa Teddy then lodged an appeal to the Supreme Court against the judgement. On appeal, the main contention of the plaintiffs was that Article 39 of Law N°59/2008 of 10/09/2008, which prevented and punished any gender-based violence, be repealed as it contradicted the Constitution of the Republic of Rwanda.

Article 39 of Law N°59/2008 of 10/09/2008 provided as follows:

> *Those people entertaining unrecognised marriages shall be married in accordance with monogamous principle.*
>
> *If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands and wives equally.*

The specific arguments of the plaintiffs were that Article 39 contradicted Article 26 of the Constitution of the Republic of Rwanda, which stipulated for a civil monogamous heterosexual marriage as being the only recognised marital union. The plaintiffs argued that marriages or unions which are not

recognised by the constitution did not claim equal rights and obligations like those within recognised marriages.

The plaintiffs also made reference to the second paragraph of Article 39 and interpreted it as allowing those who are married under unrecognised marriages to share assets, which contradicted the constitution. The plaintiffs contended that this would entitle them to the status enjoyed by legally recognised marriages.

Counsel for Kiza Anita on the other hand maintained that the article does not contradict the constitution, but offers a way for those in unrecognised marriages to share commonly owned assets upon divorce. This position was supported by the representative of the government in the case. The representative also added that a party has a right to assets commonly owned in a marriage or out of marriage.

The Supreme Court of Rwanda held *inter alia* that:

1. The rationale guiding the distribution of assets in Article 39 was by virtue of the fact that a party to a marriage had rights to assets which were commonly acquired or owned and the rationale was not the fact of a legally recognised marriage.
2. Upon dissolution of an unrecognised marriage, the law did not require parties to it to share their assets equally, regardless of the contribution each of them had to acquiring or increasing the value of the assets. Instead, it only allowed them access to commonly owned or acquired property. This was different for legally recognised marriages, where equal distribution upon divorce was required as per the community property regime or limited community property regime and such rights originated from the marriage contract.
3. Article 39 of Law N°59/2008 of 10/09/2008 did not contradict Article 26 of the constitution, as it did not stipulate that a marriage between one man and more than one wife or one wife and more than one man was legally recognised, or that a marriage contract signed elsewhere apart from the civil service of the government was legally recognised.
4. The import of Article 39 Law N°59/2008 of 10/09/2008 was that before a man living with more than one wife or a woman living with more than one man decided to have a legally recognised marriage as per Article 26 of the constitution, they were required to share commonly owned belongings with that husband/wife equally. This was the way the legislator had provided to prevent any violence of rights to property if parties to an unrecognised marriage decided

to stop living together as husband and wife and one of them elected to marry according to law.

5. The fact that Article 39 provides a way for those in unrecognised marriages to share property was not particular to Rwanda. Jurisdictions like Canada, Australia and New Zealand all had statutory provisions for the distribution of commonly owned assets at the dissolution of an unrecognised marriage. This was affirmed by various court decisions within these same jurisdictions, which provided that parties to an unrecognised marriage were entitled to commonly owned or acquired property.

Notes

1 *Kivuitu v Kivuitu*, Civil Appeal No. 26 of 1985, reported in (1991) 2 KAR 241.
2 Civil Appeal No. 203 of 1997, eKLR, available at: http://www.kenyalaw.org.
3 *Lawrence Mtefu v Germana Mtefu*, High Court of Tanzania, Dar-Es-Salaam District Registry, Civil Appeal No. 214 of 2000.