
Chetu si change!
**A FOCUS ON LAW, ISLAM AND WOMEN'S MATRIMONIAL PROPERTY
RIGHTS IN MOMBASA, KENYA**

BY

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ABSTRACT

Many Muslim women in Mombasa contribute to matrimonial property either directly or indirectly. An investigation into the various applicable international laws, Quran and *Sunnah*, institutions, semi autonomous social fields as well as comparative jurisprudence was done.

An analysis was also conducted into the socio-cultural and economic factors that affect women in their pursuit of their share to matrimonial property. To gather data various methods and methodologies were employed which demonstrated the diverse problems as well as opportunities for Muslim women in ensuring the protection of their share to matrimonial property. The research explores the possibility of legal reform and awareness raising in guaranteeing protection of matrimonial property for women.

Declaration

I, MWANAMKUU SUDI MWAKWAMBIRWA, do hereby declare that this is an original work presented towards the award of the Masters' in Women's Law, University of Zimbabwe, not previously presented for any degree or other award in any academic institution.

I know that using another person's ideas and pretending that they are my own constitutes plagiarism and that this is subject to penalties. All quotations and significant contributions from the work of other authors are properly referenced or acknowledged in the text and in the footnotes.

Signed.....and dated this.....day of.....2014

Author: Mwanamkuu Sudi Mwakwambirwa

Signed.....and dated this.....day of.....2014

Supervisor: Professor Julie Stewart

Dedication

This dissertation is dedicated to all Muslim Ummah.

'And these examples We present to the people, but none will understand them except those of knowledge.' [Qur'an, [29:43](#)]

'If the learned ponders how the hours he spent learning saved him from the humiliation of being dominated by the ignorant and from the distress of having no access to the facts, and how those hours provided him with the joy of discovering that which is hidden from others, he would excel in praising Allah, the exalted, full of majesty, and would be more pleased with the knowledge he has and would deepen his desire to increase his knowledge.' (Abu Hazm
(r.a)

My Lord increase me in knowledge (Quran 20-114) so I can shame the ignorant (Ameen).

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Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FGD	Focus Group Discussion
FIDA	Federation of Women Lawyers
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
IFLA	Islamic Family Law (Federal Territories) Act
IUDHR	Universal Islamic Declaration of Human Rights
KCCC	Kadhis' Court Civil Case
MCA	Matrimonial Causes Act
MMDS	Mohammedan Marriage, Divorce and Succession Act
MPA	Matrimonial Property Act
NGO	Non Governmental Organisation
PBUH	Peace Be Upon Him
SEARCWL	Southern and Eastern Regional Centre for Women's Law
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
USA	United States of America
USD	United States Dollar

List of international instruments

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),
December 18, 1979, 1249 U.N.T.S 13

International Convention on Civil and Political Rights March 23, 1976, 999 U.N.T.S 171

International Convention on Economic Social and Cultural Rights 1976 993 U.N.T.S 3

Protocol to the African Charter on Human and People's Rights on the Rights of Women in
Africa, 11 July 2003

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/811(1948)

Universal Islamic Declaration of Human Rights (UIDHR) 19 September 1981

List of statutes

The Constitution of Kenya (1963)

Kenya. Civil Procedure Act Chapter 21

Kenya. Judicature Act Chapter 8

Kenya. Kadhis' Court Act Chapter 11

Kenya. Matrimonial Causes Act Chapter 152

Kenya. Matrimonial Property Act No. 49 of 2013

Kenya. The Mohammedan Marriage Divorce and Succession, Act Chapter 156

Malaysian [Act 303; Islamic Family Law \(Federal Territories\) Act, 1984](#)

Morocco. Family Law Code (*Moudawana*)

The Constitution of Kenya (2010)

United Kingdom. Married Women Property Act of 1882

List of cases

A. v N. [2006] eKLR

Afwa Ramadhan v Athuman Juma [2005] eKLR, High Court Case 174 of 2005 at Mombasa

Amina Abdulkadir v Ravindra N. Shah [2006] eKLR

Angelika Linke Alias Malika v Abdul Waheed Ali Mohamed KCCC No 136/2009 (unreported)

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109

Echaria v Echaria [2007] eKLR

Esha Maulid v Mohamed KCCC No 103/2009 (unreported)

Essa v Essa [1996] EA 53

F.A. v A. (KCCC No. 253/2012)
Haminah Bee v Shamsudin [1979] I HJ (2); 71
Hine v Hine [1962] 1 WLR 1124
M.M. v N.O.M. (KCCC No 96/2011)
Mohamed Bakhressa v Nasra Abdulwahab Ahmed (2007) eKLR
N.S. v K.A.M. (KCCC NO 73/2009)
N.O.M v M.M. Mombasa Children’s Case No 32 of 2010 (pending).
Noorbee v Ahmed Sanusi (1978) I Journal Hukum 63
Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya, Communication No. 375/09
Salma Abdul v Feisal Awadh, Kadhi Case No 73 of 2001(unreported)
Tengku Saharah v Dato Dr Hussain (1980) 3 Journal Hukum 125
Yang Chik v Abdul Jamal (1985) 6HJ 146; [1982] s MLJ xxix

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Executive summary

In marriage matrimonial property disputes usually arise at the time of divorce. Under its Constitution Kenya recognises a multi-cultural multi-religious society, and has, therefore, allowed Muslim personal laws to operate alongside mainstream law. Muslims make up 11% of the population in Kenya with Mombasa having its fair share. The legal framework governing Muslim personal laws at the Kadhis' Court however is very old and lacks any substantive provisions while the Quranic principles are scattered resulting in difficulty in fruitful engagement in the area of divorce and matrimonial property. Further this leaves a lot of space for discretionary practice by the Kadhi Courts leading to varied interpretations and unpredictability. Women are therefore confused or unaware of the Quranic provisions and are often misled as to what their rights are when it comes to their rights to matrimonial property. According to the Kadhi marriage registry, an average of 838 marriages take place each year with 31% ending up in divorce. However, of the divorce cases filed at the Kadhis' Court only an average of 2% touched on immovable property. A review of the literature of the matrimonial property in Islam reveals a non-existent contextual engagement as the majority of it focuses on inheritance rights.

This study examined the Quranic provisions and *Sunnah* as well as other jurisprudential tools under Islamic Law regarding matrimonial property that can facilitate workable solutions that work for the benefit of women. It further analysed the existing legal framework and new Matrimonial Property Act of 2013. The study exposed the challenges and lived realities of women in the quest for matrimonial property. It also provided comparative frameworks from legally pluralistic countries that have applied Islamic principles in developing their jurisprudence. With this, it hoped to influence a contextual jurisprudential development that will assist decision making organs to apply logical and independent reasoning to facilitate justice for Muslim women. Lastly the study hoped to influence legal reform of the current legislation that leaves wide discretion to the Kadhi in the hope of facilitating predictability, fairness and uniformity in decisions.

The field work entailed a Women's Law approach on the lived realities of women, a perspective from the actors and structures such as the Kadhi Court, Family Division Court, advocates and local Kadhis was obtained. The study revealed that legal pluralism exists in

Kenya with most Muslim's family issues being determined outside the purview of the existing legal and structural periphery. A sex and gender analysis exposed the relational character of women in their attitude towards their resolve to forego their shares for the sake of their children, which was in contrast to that of male sex who are inclined to convert women's shares because of cultural attitudes that property must always be vested in them. They also considered women's contribution too menial to constitute contribution worthy of a share. To gather information, a number of methods such as in-depth and unstructured interviews, Focus Group Discussions and participant observations were done.

The findings revealed that despite the absence of the matrimonial property concept in Islam, a liberal and wide interpretation of Quranic provisions can protect women's matrimonial property rights. These can be done for instance through the non-forfeiture of women's gifts and agreements. The application of *Ijma* (consensus) and *Qiyas* (independent reasoning) will facilitate taking into account contemporary issues as well as divergent culture to ensure justice and equity envisaged in Islam. The mainstream legal framework being the Matrimonial Property Act 2013 now provides a comprehensive piece of legislation which also allows Islamic principles to be applied for Muslim faithful. The duality of the legal system gives choice and the new law has dealt effectively with the jurisdictional conflicts prevalent under the previous statute of general application, the Married Women Properties Act of 1882. The new Act acknowledges both monetary and non-monetary contributions.

The study also revealed the similarities between Islamic Human Rights and International Human rights. The Islamic Human rights provide an alternative approach to ensuring justice, equity and equality of rights for the Muslim faithful who are bound by them.

A focus on the social, cultural and economic factors revealed that women contribute immensely towards household and marital property development even when unemployed, through microfinance to support husbands who abdicate their duties under religion. However, women lack knowledge and obtain it from purportedly knowledgeable sources such as the Imams who never give much weight to such family issues, leaving a great deal of gaps for women's awareness. The men selectively apply Islamic principles and take advantage of women's lack of knowledge, apathy and benevolence but fail to reciprocate when required. This does not however imply that women are always passive and lack agency as there are a

few who are able to articulate and use traditional and Western techniques to ensure they obtain their entitlements.

Empowerment of women through awareness-raising as well as legal reform of the present applicable legal frameworks will ensure that women enjoy the protection envisaged as well as make informed choice in choosing the forum for adjudication. This will also get rid of the confusion and misinterpretations as seen within comparative matrimonial property legislation from Malaysia and Morocco which are based on Islamic principles.

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CHAPTER 1

1.0 INTRODUCTION

1.1 Why the topic?

Chetu si changu are Swahili words that can connote rights of ownership or control, and is simply translated, ‘ours - is not - mine’ in that order, and means, more or less, ‘what is ours is not mine’. It explains the shock that women experience at the time of the process of the division of the matrimonial property they share with their spouses. This expression was inspired by the research itself when woman after woman expressed shocked upon discovering that they do not enjoy ownership of what that had perceived was jointly owned matrimonial property. The decision to write on this topic is threefold.

First, as a woman, I witnessed several occasions on which other women like myself were shocked to discover that despite having lived as part of and within a family during their marriage and invested in property in the hope of securing their families’ future, these women found that their ownership rights were quickly extinguished during divorce or separation.

Secondly, as lawyer, I wanted to investigate the perceived gap or deficiency that exists in Islamic matrimonial property law when one compares the lived realities of women against that law. The purpose of this is to identify the need to pursue possible reforms in the applicable law.

Thirdly, one lecture at SEARCWL touching on women’s property rights in marriage raised my curiosity, especially when a comment was made that Muslim women in Kenya are protected under Islamic law.

Lastly, I also hoped to raise awareness about matrimonial property rights with a view to reviewing available approaches based on the changing dynamics that are currently shaping the Muslim community in Mombasa. It is all these ideas which propelled me to delve deeper into the topic.

1.2 Background to the problem

'When a man and woman made the decision to get married, their hope and expectation was for them to live and age together, to have children and watch them grow up to become successful citizens in society. They therefore moulded their lives and priorities according to the needs of the family including their savings, consumptions work, investments and efforts. Alas! Such guarantee in life is not a given, their expectations did not materialise and there ended the marriage. When this happened among other things that needed to be sorted out is the division of matrimonial property.'

(Jamaluddin, 2010)

According to a report compiled by the Kadhis' Mombasa Marriage Registry, between 2010 and 2013, 600 to 1000 marriages are contracted annually, making an average of 838 marriages per year. Of these marriages an average of 257 (31%) ended in divorce. This report, however, does not capture those unregistered marriages and divorces that occur regularly outside the Kadhis' Court. The Kadhis' Court Register on divorce claims also indicated slightly higher statistics than the report. It reflected that in the years 2008, 2009, 2012 and 2013 there was an average of 300 claims filed regarding divorce. This roughly translates to close to a third of litigants who should lodge moveable and immoveable matrimonial property claims ancillary to divorce. However, that is not the reality; aside from claims of moveable items, there was an annual average of only 5 (2%) cases relating to immoveable property. This revelation indicates a disturbing gap in (or lack of information about) matrimonial property claims that needed further causal investigation in view of the exploding property expansion in Mombasa.

A literature review of this area of study reveals a total lack of contextual jurisprudential development in Muslim matrimonial property law, with the majority of literature dealing with Islamic property rights often focusing on inheritance (Karuru, 2004), the general presumption being that matrimonial property rights are non-existent in Islam and that investigating why that is the case would be anathema. On the other hand, literature frequently portrays Islamic principles relating to property as disempowering women.

The provisions in the Quran regarding such rights are scattered and there is only a little literature which is not accessible to many, let alone the ordinary Muslim woman. The

interpretation of specific Islamic principles is left to the whim of those who ‘hold’ knowledge, whether accurate or skewed. Leadership fails to recognise that a socially secure family set-up will most likely lead to confident faithful members who will have an even higher regard for the Islamic justice system. Furthermore, the lack of appreciation that the absence of matrimonial property rights will also affect the rights and wellbeing of women has been seriously overlooked. A review of local literature indicates presumptuous notions that women do know their rights and as such they strictly follow Islamic principles (Karuru, 2004).

Kenya has an 11% minority Muslim population according to the Kenya National Bureau of Statistics Census Report, 2009 (Minority Rights Group, 2012), with Mombasa County comprising a fair share. Despite a legal pluralistic system in Kenya where Islamic principles operate alongside the government system, law reform has not seen fit to ‘interfere’ with the existing Islamic practices. This leaves an archaic legal framework that fails to provide any protection for the Muslim minority, in particular, in regard to matrimonial property. The effect is that women operating within the Islamic framework are vulnerable and exposed to discrimination.

While these problems, coupled with the lack of registered titles in Mombasa since pre-independence (Jimale, 2009) have, on the one hand, made it easy for women to access property, they have also, on the other, made it hard for them to control and own property. The majority of property in Mombasa is unregistered, hence, it is easy and quick to buy and sell without government controls. The existing culture of building Swahili houses on parcels of land on a temporary basis, commonly known as ‘house without land’, makes it conducive for men to sell property without their wife’s knowledge (Architecture Kenya, 2010). They then pocket the entire proceeds and leave their wives destitute. This abuse is increasing rapidly.

This study will therefore focus on the legal, Islamic, socio-cultural and economic factors that influence the underlying causes and solutions that can enhance women’s access to and ownership of matrimonial property as well as outside court. The property covered shall be both moveable and immovable but special emphasis is placed on the latter due to the socio-cultural dynamics that surround it. The scope of the study also extends to several ethnic groupings comprising of tribes that live within the Mombasa County.

1.3 Statement of the problem

Married couples, especially women, have very little understanding of their matrimonial property rights in Islam, leaving them vulnerable to loss of investments and sometimes even homelessness. Some Islamic clerics interpret Islam conservatively and say that it does not encompass the concept of matrimonial property and, thus, they fail to acknowledge any changing dynamics. This denies women their deserved share of matrimonial property at the time of divorce. The limited or rampant lack of knowledge makes it obvious that religious principles that could have assisted women easily become substituted with traditions and customs that govern the different ethnic groups within Mombasa.

Laws that do govern Muslims with respect to marriage and ancillary relief, such as matrimonial property, are devoid of any substantive provisions, making it difficult for women to manoeuvre and obtain their deserved share of such property.

1.4 Overall aim and objectives of the study

The overall aim of the study is to highlight the need to develop a local contextual jurisprudence and law under Islamic principles with the aim of improving the lives of women, especially those in Mombasa.

With this in mind, the study aims to assist women by:

- Critically analysing the existing Islamic framework together with the possibilities of its application within the Mombasa context.
- Highlighting the need to apply contextual independent reasoning when reaching decisions concerning matrimonial property.
- Highlighting best practices from comparative jurisprudence that will assist decision making organs in applying contextual strategies that will achieve justice for women within the Islamic framework.
- Investigating the lived realities experienced by women due to divorce and highlighting their limitations in accessing justice.
- Proposing the need for reform of the law governing Muslims to include specific and substantive provisions on the rights to matrimonial property.

1.5 Research assumptions

My initial assumptions were drawn from the experiences I had as a legal practitioner and observations during my study period at SEARCWL. This prompted me to review relevant literature and draw more inferences about the issues as a result of which I came up with the following:

1. Islamic religious and state laws do not protect Muslim women's rights to property at the time of divorce.
2. The dual legal system raises jurisdictional conflicts for Muslim women in the division of matrimonial property.
3. The cumbersome legal procedures and unpredictable court findings discourage women from pursuing legal remedies in court.
4. Failure by the Kadhi to interpret Islamic principles widely and apply independent reasoning during the dispute resolution process discourages women from pursuing justice in courts.
5. Women lack knowledge about property rights in Islam, hence, they do not pursue shares in matrimonial property on divorce.
6. Socio cultural and economic factors, class and kinship structures determine women's capacity to actively pursue a share of the matrimonial property.
7. Express substantive provisions in law and legal information dissemination will protect women's rights to property at the time of divorce.

1.6 Research questions

The research questions that emanated from the above assumption are:

1. Do Islamic religious and state laws protect Muslim women's rights to property at the time of divorce?
2. Does the dual legal system raise jurisdictional conflicts for Muslim women in the division of matrimonial property?
3. Do the cumbersome legal procedures and unpredictable court findings discourage women from pursuing legal remedies in court?

4. Does failure by the Kadhi to interpret Islamic principles widely and apply independent reasoning in dispute resolution discourage women from pursuing justice in courts?
5. Does women's lack of knowledge of property rights in Islam hinder their pursuit of shares in matrimonial property on divorce?
6. Do socio cultural and economic factors, class and kinship structures determine women's capacity to actively pursue a share of the matrimonial property?
7. Will substantive provisions in law and information dissemination protect women's rights to property at the time of divorce?

1.7 Demarcation of the research

This study was conducted in Mombasa County, with special attention paid to two main constituencies comprising Mvita (Island) and Likoni (mainland south) areas. The study was conducted between October 2013 and January 2014 and targeted the Muslim community comprising both men and women of marriageable age over the age of 18. There were also a few non-Muslim key informants who were targeted to obtain their perspective because of their special insight into matrimonial property challenges that affect Muslim women. The respondents targeted were from both urban and peri-urban areas within the county.

CHAPTER 2

2.0 MY RESEARCH JOURNEY

2.1 Introduction

This brief chapter delves into the methods and methodologies that I encountered when conducting my research. It relives how I conducted the research process as well as the techniques used to gather data for analysis. The methodologies employed assisted me to prove or disprove the assumptions and in theorisation. The method of data collection was primarily qualitative to ensure the collection of life histories and experiences. The technique highlighted the relevance or otherwise of the law as well as the socio cultural problems faced. The quantitative method was also applied to provide statistical and background data for the qualitative study.

2.2 Re-living the methodological journey

The beginning of the research involved an exploration of the laws and Islamic perspectives relating to women and matrimonial property at the time of divorce. Adaptations were made to some of the initial assumptions based on my experience in the field and further reviews of the relevant literature.

I sought to investigate and determine women's experiences as a starting point in the analysis of their position in society *vis-à-vis* the law, hence, I employed the women's law approach (Bentzon *et al.*, 1998: 91). The method requires that women's experiential data be gathered and analysed against the law and practice (Mbogoh, 2008: 19). To facilitate the collection of relevant data, a number of single, married, divorced and widowed women, were engaged in in-depth individual interviews and group discussions where insights into their level of knowledge of the law and Islamic principles was sought. To ensure the creation of a more holistic picture, single, married and divorced men were also interviewed, making clear the gaps that exist in the lived realities of women as the men showed attitudes and reactions different from those of women.

Some interviewees were known to me as having engaged in the development of property or in litigation; others were identified through the process of 'dung-beetling' from previously

interviewed respondents, while the rest were sampled randomly. (Refer later in this section to the grounded theory approach in relation to ‘dung-beetling’). The interviews were mainly unstructured to allow the respondents to delve deeper into relevant issues and this aided in raising some unforeseen but pertinent emerging issues. With this approach observation of their demeanour, exploration of the attitudes of the sexes and insights into their values and life experiences or those of others around them was made (Bentzon *et al.*, 1998: 93). During the research and in order to understand the lived realities of women, I constantly observed the activities which they conducted in order to support their families. This approach grounded the discovery that applying legal rules (such as evidentiary rules) without taking into account the specific realities of women is discriminatory, unfair and leads to oppression.

Trust was gained through my assuring them of strict confidentiality. Some interviewees, for example, 2 Somali women, refused to be interviewed citing their lack of knowledge of the subject matter. However, this data was later triangulated when I interviewed a man who selected himself and a woman, both of Somali origin.

The use of the actors and structures approach guided me to conducting a number of key informant interviews as I sought to understand the institutional mechanisms and the interaction within them between women’s lived realities, the law, Islamic principles, as well as other norms. I chose this methodology in order to explore the intersections between norms and gender perspectives that take place in the dispute resolution process. This was done with a view to unearthing the effects of the legal pluralistic norms that take effect in society outside the realm of the law (Bentzon *et al.*, 1998: 100). Interviews with the Chief Kadhi, local Kadhis (who have the capacity to officiate marriages), the Imams who lead prayers and sheikhs were conducted. The interview process assisted in unearthing attitudes towards women, levels of knowledge and the manner of resolving disputes. Open interview methods were adopted enabling respondents to delve into lengthy in-depth discussions on any related issues, which possibility was made obvious before beginning the sessions (Bentzon *et al.*, 1998: 93).

I also attended a talk given by Sheikh Al Saggaf, a renowned Muslim scholar and a human rights activist, called ‘Muslim women and challenges of globalisation’. At the end of the talk I deliberately raised the following question, ‘Women’s lack of knowledge may be a major hindrance towards getting their rights. Men often use the principle of *Qawama* to subordinate

and deny women their rights in marriage, especially to property. How should Islamic principles be interpreted to ensure that men do not oppress women and deny them their rights in marriage and during its dissolution?’ The question was to enable him give a comparative view on the interpretation of matrimonial property issues and equality within an Islamic country and to raise awareness among those present. The question and ensuing answer (see findings on the interpretation of Islamic principles in chapter 5) encouraged the overwhelming majority of the audience (comprising both women and a few men) to ponder the issues and start rethinking their approaches to married life. While some women were shocked by the question, others were very receptive to it and they approached me with their views after the meeting. One notable response came from a Nominated Ward Representative who thought that Islamic principles were immutable, while another women’s rights activist thought the question was pertinent in ensuring that women knew their rights.

The use of the actor and structure approach also led me to several lawyers, NGOs, a lecturer and a Family Division judge. The interviews allowed me to determine the level of knowledge on legal and Islamic principles as well as human rights in their practice especially within the Kadhi Court and the University. These key informants shed light on how social and legal change takes place through the interaction of human beings. For example, the discovery that despite reform to the provisions of the Constitution, unless and until the existing case law was challenged by the women (agents) themselves by invoking the constitutional provisions, the judges felt bound by precedent. I was also able to unearth the intersections between the Kadhi Court and High Court in the determination of disputes. A perspective putting into question the legal centralist approach (that sees law as the most important normative order making all other systems insignificant) was made (Bentzon *et al.*, 1998). The respondents led me to some secondary sources, such as court files and the Kenya Law Reports, to determine the nature of arguments and decisions made. Another interview with the Principle Kadhi gave an insight into the comparative approaches to solving disputes and the possibility of a more contextualised jurisprudence. I also participated in a Muslim women lawyer’s forum, where a Muslim female attorney from the United States of America (USA) shared her experience with matrimonial property rights practices there.

Other respondents led me to the chiefs (Administration Office) who had been identified as key in resolving disputes opening up the legal pluralism approach in Mombasa that law is not always the normative system that controls people’s lives. This grounded the recognition of

the Kenyan legal system as pluralistic in allowing other practices on options and choices on how to achieve goals and objectives (Bentzon *et al.*, 1998). A group interview with three chiefs was conducted involving a semi structured and discussion interview revealing the sex and gender dynamics that they frequently encounter at their offices. They disputed the worldview that socially constructs women as passive during family disputes.

The key informant respondents were identified through purposive sampling and involved unstructured and semi-structured interviews allowing them to explore significant issues more deeply. A total number of 23 key informants were interviewed as shown in the table at the end of the chapter.

To further ground my research, I arranged more interviews with men and women through random and purposive sampling as well as a Focus Group Discussion (FGD). The group comprised all categories of women including divorced, married widowed and remarried women as well as monogamous and a polygynous man. With these interviews I was able to do a sex and gender analysis. Sex is the physical distinction between men and women, whereas gender is the social and cultural construction. It socially constructs male as masculine, whereas women were deemed to be the feminine when submissive and dependent (Bentzon, 1998: 82). I observed their attitude and analysed the differently ascribed roles of both men and women as perceived in society. For instance, the demeanour of the men was non-apologetic towards their former wives and their attitude manifested a patriarchal (power hungry, dominating and competitive) attitude against women (Tong, 1989: 2).

I assessed the changing roles of both men and women in society, i.e., those that were different from the dominant world views that men were the maintainers of women or women were submissive. I discovered that it is indeed the case that the understanding of gender is constantly transformed and reconceptualised as socio economic, cultural changes take place (Bentzon, 1998: 84).

For instance, one woman was more vocal than others in the group and persisted in her resolve to share her experience. She was willing to go against the thinking of the group or male views to explain what she thought were the real issues faced by women. Her attitude contrasted with other women who were quite timid even though they had stories to share that would have been helpful in building further insights. To cater for such quiet women, we met to discuss

matters further after the group discussion and this revealed more about the lives of people in the group, one of which was that of a vocal man who was not as strict a follower of religion as he had sought to portray. The women indicated that he is polygynous but does not maintain his poor wives, especially his second wife, forcing her to toil for her livelihood. The interview was more structured towards open discussion to encourage the stimulation and study of the reactions of the participants regarding their experiences as is required under women's law approach.

Participant observation is another technique which was employed to gather information at the mosque to determine the group members' activities, beliefs and interpretations of events and occurrences. This occurred on at least four Fridays where I took note of the main focus of the sermons.

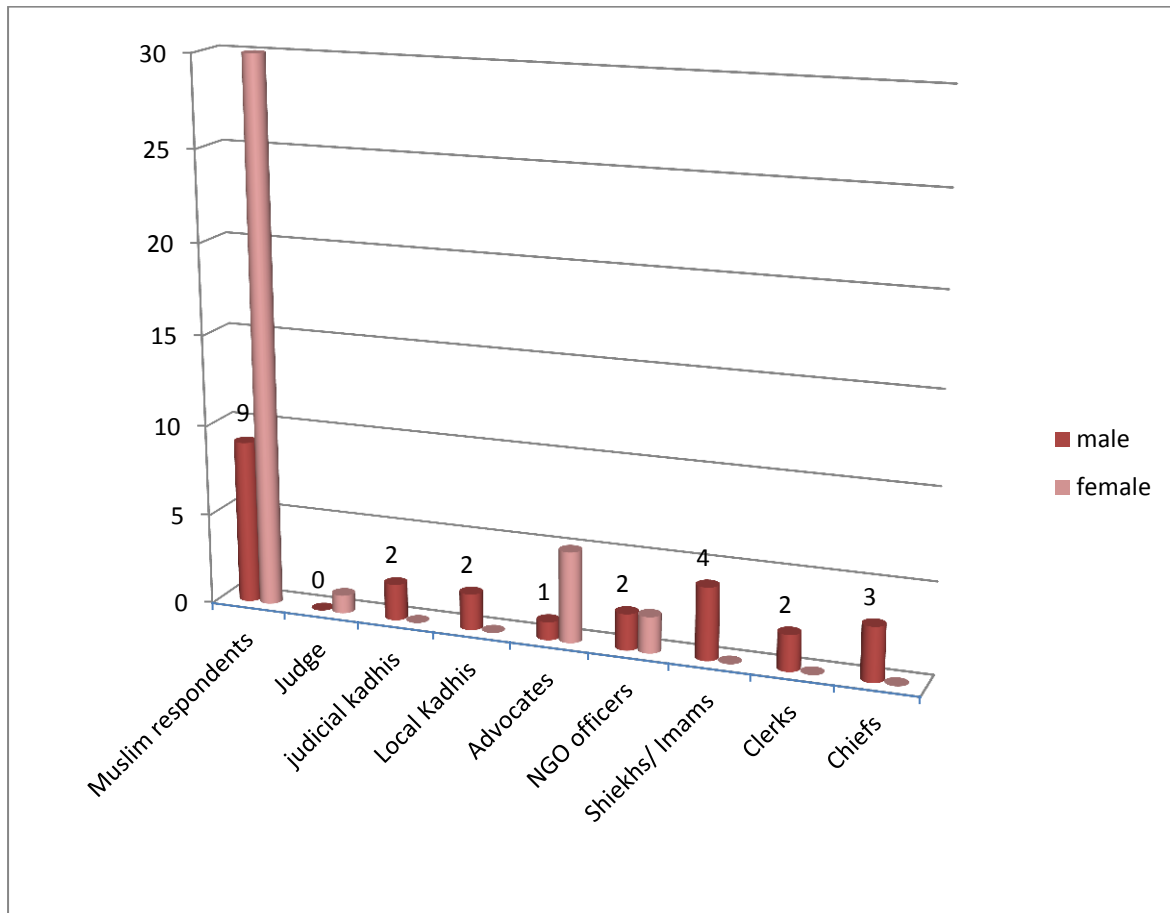
I also applied grounded theory in my research. Grounded theory refers to a process of sifting data (dung beetle) and analysing it to generate new categories (Bentzon *et al.*, 1998). Based on common occurrences in Mombasa, where Muslim women hardly receive any property on divorce, I had developed an assumption that Islamic religious laws do not protect women's right to property. An interview with one lawyer indicated that it is difficult for women to secure shares at the Kadhis' Court. On interviewing some key respondents, such as the Chief Kadhi and other sheikhs, I discovered that there is in fact protection that can be accorded through joint registration and agreements. This led me to a woman who confirmed that even in the absence of joint registration, one can secure an equal share at the time of divorce or the entire inheritance on a husband's death, as had occurred in her inheritance case at the Kadhis' Court. A further interview with the Principle Kadhi revealed that, even in the absence of such agreements or joint registration, sufficient evidence of direct monetary or non-monetary contribution to the property should be enough to secure a woman's share of the property on dissolution.

The human rights based approach was also applied in my research. It involved conducting a desk review of existing literature, i.e., reading and analysing the laws and human rights instruments pertaining to the topic. This helped me in understanding the gaps that exist between the law in theory and the realities of its application in practice. Questions on human rights and Islam were raised. The approach was important in obtaining an understanding of opposing views put forward by Muslim clerics and members of the community in which they

felt that these norms should not be applicable to the Muslim faithful where they have their own Islamic framework. The approach was pertinent in shaping my arguments in support of an Islamic human rights framework for the purpose of winning the community's acceptance and reducing the possibility of a backlash.

The interviews conducted involved a total of 62 respondents as shown in the table below.

Figure 1: Figure showing total number of respondents by sex



CHAPTER 3

3.0 RECOGNITION OF AN ISLAMIC JURISPRUDENCE OF MATRIMONIAL PROPERTY RIGHTS OF WOMEN

3.1 Introduction

Islam, which means peace, submission as well as surrender, enjoins its believers to submit to the will of Allah (God). It is a comprehensive system that governs all aspects of human life, both spiritual and material. It also embraces rules meant to cover the possible range of activities of a person's life both in this world and in the hereafter including the ethos of religion, ethics and tenets of law. The nature of Islamic law is inextricably linked with the belief system (*Aqidah*) and moral values (*Akhlaq*) of Islam. It also covers human intellect, conscience and acts of human beings in relation to God with other human beings as well as with the environment (Goolam in Rautenbach and Goolam, 2003: 14).

The next part of the chapter explores the Islamic divorce process in order to provide the background against which property disputes arise.

3.2 The divorce process

In Islam the divorce process is provided for under Chapter 65, which requires three *talaks* to be pronounced or written by the man. Each *talak* is to be issued after each menstruation period and therefore should take three lunar months to conclude; however, if a woman is pregnant the waiting period ends when she delivers (65:4). The first two *talaks* are revocable (*raj'i*) which means that a couple can decide to reconcile; however, the third one is final and irrevocable and the parties are expected to call two witnesses to prove the dissolution. Besides determination of pregnancy and reconciliation, it is also envisaged that parties can reach equitable terms on ancillary issues such as custody and property rights during the revocable *talak* period (65:2). During the waiting period (*eddat*), which starts at the pronouncement of the first *talak* and ends with the third *talak*, the woman is entitled to maintenance and housing in the same dwelling in which she stayed during the marriage. Thereafter parties cannot remarry unless the woman undergoes an intervening marriage and divorce by another man. Where the woman breastfeeds after divorce, recompense must be given for the service (65:1, 6). A woman can also exercise her right to divorce (*khul*) by

initiating the process at the Kadhis' Court if the man has deserted her or is not maintaining her, or where the marriage has irretrievably broken down. For a woman who is trapped in an unhappy marriage she may initiate the divorce (*talak al tawfid*) without court intervention or losing her dowry (33:28)¹ (Moosa in Rautenbach and Goolam, 2006: 67). A woman can claim her property any time before the irrevocable divorce or after its conclusion at the Kadhis' Court.

With this background in mind, I now continue exploring the Islamic principles relating to property narrowing them down to matrimonial property. I also outline a comparative analysis of International Human rights and Islamic Human rights perspective while looking for workable similarities.

3.3 Islamic principles relating to matrimonial property rights

3.3.1 Sources and rights to matrimonial property

Contrary to common perceptions, Muslims enjoy autonomous rights to property in marriage and this has been the case throughout history. Such rights to property are founded in areas relating to dower, gifts, sale and hire and economic law (right to work and income).

Accounts of women in Islamic history, such as Khadija (the first wife of the Prophet), being treated as equals with men in owning and disposing of property contrast sharply with the diminished status accorded to women today.

The term matrimonial property does not exist in the Quran. This is because the notion of community of property is not recognised in the Quran as each person is considered to be distinct from the other in marriage. Spouses in an Islamic marriage are deemed to maintain their own separate property before and during marriage. The right to acquire, own and dispose of property is seen as a way of compensating women for their diminished inheritance rights. Coveting or killing for that which is owned by another is forbidden; instead one should seek God's bounty. To this end the Quran stipulates under 4:32, 'To men is allotted what they earn and to women what they earn.'

¹ 'O Prophet say to your wives...I will provide for your enjoyment and set you free in a handsome manner.'

The Quran 67: 15 commands both men and women to search for work as a means of survival or sustenance while on earth. It reads:

‘It is He Who made the earth manageable for you, so traverse through its tracts and enjoy of the sustenance which he furnishes...’

The protection of women is provided for where men are obligated to give their women a dower during marriage according to the capability of the man (4:4). The dower given to a woman may comprise moveable or immovable property. Sometimes the dower may be deferred to a later date, and the parties may agree that the same be paid on the dissolution of the marriage or death of the husband. In case of death, the same may be claimed from the husbands’ estate (Badat in Rautenbach and Goolam, 2003: 63). For instance, one *hadith*² of the prophet where a poor man wanted to wed a woman, the Prophet (PBUH) said to him ‘Search for something, even if it is just a ring made from iron’ (by Bukhari & Muslim) are important in explaining the need to give women gifts during weddings. Husbands are obligated to give women compensation for the pleasure they have enjoyed from them’ (4:24).

The Quran 2: 229 makes it unlawful for the man to take back any gift given to a divorced wife unless the wife pays it to free herself (*khul*). This has been reiterated under 4:20.³ Reclaiming gifts such as property or dowry that had been given in good will or as compensation to the wife is equated with a dog licking its own vomit (Bukhari) (IF-UK, undated).⁴ A woman who has lived peacefully with her husband is entitled to claim her gift (Mat ‘a) at the time of the divorce if he divorces her without just cause (Quran, 2:236, 237, 241). These two claims may or may not translate into property rights depending on the type case being handled and the agreement of the parties. Islam seeks to cultivate a culture which accords a wife her entitlement when her husband parts from her.

A logical inference from inclusive reading of these verses can be drawn from the intention of dower which is to make it *halal* (chastises) for intercourse in marriage (4:24). As long as intercourse takes place in marriage then no gift should be returned, ‘And how could you take

² Is the custom, usage or narrations of the Prophet which forms *Sunnah*. They have been transmitted through narrators and their authenticity may be surrounded by controversy (Ali quoting Mernissi, 1991: 46 in Hellum 2009, 383).

³ A husband who has given gifts to his first wife and wishes to take a second wife, is forbidden from recovering those gifts: ‘And if you wish to replace a wife with another and you have given one of them a heap of gold, do not take anything from it. Would you take it a fraud and clear sin?’ Quran 4:20.

⁴ Sourced from Ibn Kathir/ (considered authentic source) and Maarif/Dawat.

it while you have gone in unto each other and they have taken from you a solemn covenant?’ (4:21).⁵ This should be the case regardless of fault, especially in the case of an unconsummated marriage where only half the dower is required to be returned (2:237).

3.3.2 Agreements as a strategy of protection under Islam

The Quran 2: 282 envisages that when people, including friends and relatives, agree to borrow money from each other they should reduce it to writing or the agreement should be witnessed. It may be considered a sign of distrust, especially within a family relationship, but the idea is to reduce misunderstandings and disputes. Further, verse 2:283 enjoins parties where unable to commit it to writing to pledge property. However, in a relationship of trust then the person entrusted should come forward and speak the truth. The verse stipulates:

‘...But if any of you trusts another, let him who is trusted, fulfil the trust and fear Allah, his Lord. And do not conceal what you have witnessed for whoever conceals it, his heart is sinful. Allah has full knowledge of all that you do’ (Quran 2:283).

Further, verse 4:58 directs the return of any property held in trust: ‘Truly God commands you to give back trusts to those to whom they are due, and when you judge between people, to judge with justice...’ Often a marriage relationship falls into this category of a relationship of trust and, as a result, written agreements are rarely to be found.

3.3.3 Application of equal rights in marriage

Gender equality in Islam involves distinctive rights and responsibilities, not undifferentiated, hence, the notion of equal (equitableness, quality) but not identical. The Quran draws no distinction based on the inferiority of men or women. Only piety distinguishes males and females from one another: ‘The most honoured of you (male or female) in the sight of Allah is he who is righteous’ (49:13). This verse clarifies that those exalted are those who relentlessly ensure the progress of their faith. One’s deeds will therefore determine their rank and repayment shall be according to their actions and ‘no one will be treated unjustly’ (49:19, 40:40). Women enjoy similar rights to those of the men who are over them (2:228), confirming the principle of equality between men and women when it comes to the rights that they enjoy. These verses are often misinterpreted to mean that men have more rights than

⁵ It is also termed sinful and unjust.

women. Further, these verses should always be read in context to avoid misinterpretation (Kaltner, 2011:5).

In several of its verses the Quran asserts that women and men are equal in the sight of God. For instance, ‘Never will I allow to be lost the work of [any] worker among you, whether male or female; you are of equal to one another...’ (3:195). Verse 33:35 is most notable in its language of ensuring gender equality in all fields.⁶ The only area where God has given more bounty to men than women is in the sphere of inheritance. A reading of 4:34 in context therefore ousts its application on issues of matrimonial property rights (Kaltner, 2011; 118). Spouses in marriage are required to complement each other which implies that neither spouse is inferior in status or dignity.

In Islam the term homemaker does not exist. Women are not compelled to cook and perform other domestic duties. While her main duty is to supervise, it is considered thoughtful and noble for her to engage in such acts. According to some scholars she may even ask for compensation for the work she does, including that of nursing her child. The Quran 2:233 allows a woman to seek a nursing mother to breastfeed her child within marriage for reasonable compensation.⁷ Therefore a wide interpretation may allow the right of compensation for the mother herself to breastfeed her child. However a different interpretation indicates that this verse applies only to a divorced couple (IF-UK, undated). The general consensus is that these are issues that can be decided upon by the parties.

The Quran 2:228 and 2:233 provides for the issue of *qawama* which imposes a greater responsibility on men to maintain women. According to An Naim (1990), misinterpretations of these verses, however, imply that men are superior to or guardians of women in the family and should stamp their authority over women (Steiner and Goodman, 2008; 535). According to Scholars, the verse provides for the management of life of both the man and the woman. As such, it envisages that men are more naturally inclined to work outside the home to

⁶ ‘The submitting men, the submitting women, the believing men, the believing women, the obedient men, the obedient women, the truthful men, the truthful women, the steadfast men, the steadfast women, the reverent men, the reverent women, the charitable men, the charitable women, the fasting men, the fasting women, the chaste men, the chaste women, and the men who commemorate GOD frequently, and the commemorating women; GOD has prepared for them forgiveness and a great recompense.’

⁷ ‘Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period] ... And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable...’

provide for the family, while the woman will manage the household affairs as suitably as possible. Examples are often given by the Prophet Muhammad (PBUH), including the time when he advised that Fatima, his daughter, who was married to Caliph Ali, conduct her work from home while her husband worked outside the house. This notwithstanding, the Prophet affirmed that the effort of each spouse must be acknowledged and that the results derived from that work must be reasonably shared as joint property between husband and wife as long as there is no proof that the property was either a gift or an inheritance (Muhammad, 2002).

Quran 65: 6 also provides for the maintenance of women by men in view of men's economic position, but this does not imply an increased superiority of men over women. According to Kaltner (2011; 117), *Qawwamuna* refers to those who defend or uphold justice and are committed to their faith. It therefore envisages that men will be steadfast in taking care of and protecting their wives. He adds:

- ‘(a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.
- (b) The husband is responsible for the maintenance and welfare of the family.’

3.3.4 Islamic application of justice and equity in matrimonial property

Islam as a way of life obliges one to incorporate an all-round application of principles of justice and equity in every act. To this end, several Islamic verses entrench these principles, for instance:

‘...and do not let the hatred of a people prevent you from being just, be just...’
(Maidah: 8).

‘Do not consume another's wealth unjustly unless in lawful business or mutual consent’ (4:32).

‘O believers, be the enforcers or establishers of justice...Do not let pursuing your desires come in the way of being just.’ (4:135).

The main role of the human person is to fulfil God's trust through values that are found in *Shari'ah* (Islamic law). The three objectives of Islamic law are to: educate the individual, establish justice (*adl*) and consider public interest (*Maslahah*) (Goolam in Rauntenbach and Goolam, 2003; 16). Numerous verses provide for justice and fairness, for instance:

‘Verily, Allah commands ‘*Adl* (fairness, equity, justice) *Ihsaan* (excellence in servitude to Allah, benevolence towards people, graciousness in dealings) and giving to those close to you, while He forbids *Fahshaa* (indecent, immorality), *Munkar* (undesirable activities, not fulfilling one's obligations), and *Baghy* ... (transgressing limits, exploiting or violating others' rights, abuse of authority or freedom)...’ Quran *Surah An Nahl* 16:90).

These principles can be widely interpreted using the four sources of Islamic law to ensure the justice and fairness envisaged. These sources are divided into primary, comprising the Quran and Sunna, and the secondary, comprising *Ijma* and *Qiyas*.

Quran is regarded as the highest and final word of God revealed to the Prophet (PBUH) straight from God through the angel Jibreel. Its text stands unchanged for over fourteen hundred years and is therefore regarded as more authoritative than any statute, constitution or law of nations which is manmade. It transcends time and space and contains specific and general verses on issues of property in marriage (Goolam in Rauntenbach and Goolam, 2006; 16).

Sunnah is the second authoritative source denoting the way of life, path and mode of actions of the Prophet. *Sunnah* corroborates the Quranic rulings and may explain and rule on issues where the Quran is silent. It was recollect, narrated through *hadith*, and later written by six Imams whose followers divided them into different schools of thoughts. For instance, The Hanbali School rigidly applies the Quran and *Sunnah* rejecting any other source of law. It is the official school in Saudi Arabia (Goolam in Rauntenbach and Goolam, 2003: 16).

The third source is *Ijma* (consensus) supported by the Quran and *hadith* which signifies the convergence of reputable Muslim jurists or Scholars of a given era to discuss a point of law and reach consensus.⁸ It is based upon the distrust of individual opinion and must conform to

⁸ Quran ... ‘Today we have completed your religion’; ‘Obey God and obey the Prophet and those amongst you who have authority (4:59)’; ‘If you yourself do not know, then question those who do’, *hadith*, My community will never agree on an error (Ali, 2007: 145).]] [[fn 9: Quran 57:25, ‘We have already sent

Quranic verses or *Sunnah*. *Ijma* is important in ensuring justice and equity and for the development of jurisprudence in accordance with the changing times. The election of Caliph Abu Bakr after the death of the Prophet illustrates the first recognisable practice of *Ijma* (Ali, 2007; in UNICEF 145).

Qiyas, *Ijtihad* or *Mujtahid* (independent reasoning) applies in instances where the above three sources fail to provide a solution. Jurists can strive to achieve justice and equity through deep reasoning and study to derive a rule by analogy and logical inference. That is, similar situations should be judged in a similar manner. Where the analogy may not exist or where there are several, some schools such as *Hanafi* School (focus on questions of public interest) adhere to ‘*istihsan*’, meaning seeking the best. The *Maliki* school chose ‘*istislah*’, which direct jurists to seek what is in the best interests of the community of believers, while *Shafi* school (adhering to logic and reason) apply ‘*istishab*’ which presumes the continuation of the status quo. The *Shafi* School is prevalent in East Africa, Malaysia and other countries. *Ijtihad* continues to provide Islamic law with a means of adapting to the changing world.

Islamic jurisprudence is concerned with the derivation of laws from the Quran and *Sunnah*. The revelations were given to humans to ensure peace, justice and order in society as well as in the soul.⁹ Hence its interpretation should be done to ensure practicability, coherence and consistency in every society (Goolam in Rautenbach and Goolam 2003: 17-19).

The Quran supports these schools where it stipulates that the use of reason is expected in each case (2:242)¹⁰ and specific provisions must apply to each situation. These provisions, as stated above, cannot be read or interpreted individually but as a composite whole otherwise there would be a corruption of the religious texts (Qureshi, as quoted by Ali in Hellum and Skjeie, 2009: 393).

our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice...’

⁹ Quran 57:25, ‘We have already sent our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice...’

¹⁰ ‘Thus does Allah make clear to you His verses that you might use reason.’

3.4 International human rights versus Islamic human rights framework relating to property rights

3.4.1 Introduction

Among so-called Muslims who practise their culture within Islam, there is often confusion and blurred lines between Islamic principles and culture. Martha Nussbaum recognises the need to highlight religion's potential for internal change, which will require a legitimate demand for a special form of respect from the state (Hellum and Skjeie, 2009; 234). A sensitive and careful recognition of Islamic religious and political sensitivities can help deliver international human rights more effectively in Muslim societies, without offending Islamic principles (Sait and Lim, 2006).

The discourse in Muslim societies has been wary of the origins, ownership and nature of international human rights, necessitating the debate on these issues. Many Muslim societies believe that the Universal Declaration of Human Rights (UDHR, 1948) as a starting point is foreign to them, since it does not recognise Islamic principles.

Recognition that Islamic principles, which may, according to Western adherents, play second fiddle due to their seemingly discriminatory values, are not subject to censure on any ground whatsoever to Muslim religious adherents is paramount. The latter believe that international human rights and religion are in conflict as the former are individualistic whereas the latter is communitarian. The question then becomes, 'Why should present day concepts of human rights, a product of western ideas, culture and notions serve as a yardstick?' Secondly, 'Why should provisions in the Quran (a divine law that transcends time and space), be brought into line with a secular legal system which is always changing?' (Rautenbach in Rautenbach and Goolam, 2002; 115).

What has fuelled the divergence on these two sources both between Muslims and non-Muslims or Muslim communities, is the characterization of Islamic critiques as either incomprehensible or irrelevant, hence, a threat to civilization. A dismissal by writers, such as Donnelly, of inquiries over the philosophical foundations of human rights as unnecessary since it would not affect the existing consensus, is merely counterproductive and imperialist. Such a top-down imposition of human rights isolating them from social cultural, political and economic environments ignores the lived experiences and expectations of those outside the

Western realization. There, thus, may be need for recognition of cultural relativism (recognizing human nature as both social and biological) especially where the universality of human rights has proved challenging to implement. It is also important to recognise that the essentialised Western ideas may retard development of workable responses within the Islamic set-up hence needing flexibility and dialogue to ensure success (Sait and Lim, 2003; 86-87).

As I explore the international and Islamic frameworks below, the acknowledgement of the Islamic framework as an alternative approach with a wider following by its adherents, may ensure greater success. Failure by the Western world to recognize these alternative approaches to human rights only marginalizes the Muslim faithful.

3.4.2 Islamic human rights

In discussing this segment it is important to clarify that the principles discussed under Islamic matrimonial property rights above, also fall under Islamic human rights. Islam expressly indicates that there should be no compulsion in religion (2: 256) recognising the ability to make your choice. On matters pertinent to the topic at hand, Islam asserts the equality of all men and women without discrimination on the basis of sex or social status, with superiority being based solely on one's piety and good deeds (49:13).

The commonly held perception by many writers, such as Skjeie (in Hellum and Skjeie 2009: 232), that Sharia regimes are at odds with the equal ability or rights of women to conclude contracts and administer property, are not true. There is no Islamic principle that impedes women from exercising equal status as men to own, deal, administer and conclude contracts. She is *femme sole* with financial independence. Islam does not prohibit women from working, or acquiring legitimate property equal to the right of men.

Islam does not represent preferential treatment or show bias in the interests of men. Precedence is given to the broad welfare of society, not genders. It is a balance of interest between both genders which benefits all members of society. The rights and obligations of a man are equally proportioned to those of a woman, but they are not necessarily identical. Equality and identicalness are two diverse issues (Swaleh, 2000).

To this end, Islam is concerned with doing right for other individuals so as to please God, as Sait and Lim (2006) explain in their discussion of Islamic human rights:

‘Human rights in Islam are not about how man against man but how man discharges his duties towards God. It is not preoccupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man and his maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place’ (Weeramantry 1988: 116-17).

3.4.3 *International human rights*

The UDHR has several provisions that guarantee everyone the right to property, for instance, to adequate living standards, right to own property alone or in association with others and the right to work. Article 16(1) is more specific as it guarantees parties to a marriage equal rights at the time of marriage and its dissolution. These rights guaranteed under the declaration have to be read alongside Article 2 on non-discrimination (UDHR, 1948).

The Convention on Economic, Social and Cultural Rights (ICESCR, 1966) and the Convention on Civil and Political Rights (ICCPR, 1966) have similar provisions to those of the UDHR. Article 6(j) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (The Women’s Protocol, 2003) gives married women equal right to acquire, own, administer and manage their own property. It provides for equitable sharing of joint property on the dissolution of marriage and the right to adequate housing regardless of marital status.

The Convention on the Elimination of Discrimination Against Women (CEDAW) seeks to challenge the numerous variations of cultural, socio economic and religious structures based on assumptions of inferiority of women to men. Hence ratification by states such as Kenya is an express commitment to taking measures towards the elimination of such discriminatory practices in order to ensure equality with men in its legal systems (Hellum and Skjeie, 2009).

Aside from discrimination (Article 2), CEDAW condemns any cultural practices that propagate the inferiority or superiority of men or women. Article 15 accords women equal protection before the law and gives them equal rights to conclude contracts and administer property. While Article 16 gives women equal rights in marriage and at its dissolution, Article 16(1h) is more specific on issues of property and gives spouses equal rights to acquire, own , manage and dispose of property in marriage (CEDAW, 1981).

The Universal Islamic Declaration of Human Rights (UIDHR, 1981), which is non-binding and lacks coercive force, provides a comparative framework. It provides for freedom from discrimination, equality and protection of property. It also gives married women the right to a standard of living equal to that of their spouse and maintenance regardless of the property or income they have. These principles, based on Quranic injunctions if coupled with objective interpretations through *Ijtihad* (independent reasoning), will yield positive results for Muslim state parties or adherents (Sait and Lim, 2003).

To explore a workable relationship it is necessary to reconcile the similarities that will ensure an alternative human rights framework for the benefit of all. I, just like some Muslim commentators, do in fact find the UDHR compatible with Islamic concepts of human rights on property. In other words, there is a close resemblance between the UDHR and the UIDHR which, though not universally made, borrows largely from accepted Islamic principles. For the purposes of clarity, I use a table to compare these similarities below.

Table 1: Showing comparison between International and Islamic Human Rights Articles or Verses.

	Non discrimination articles/verses	Equal rights of spouses at marriage and divorce articles/verses	Right to property articles/verses	Adequate living standards articles/verses	Right to work articles/verses
UDHR	2	16(1)	17	25(1)	23
ICESCR	2	3		11	6
ICCPR	2	23(4)	17		
CEDAW	2	16	16(1h)	14	11
Women's Protocol	2	6, 7(d)	6(j)	16	13
IUDHR	Preamble (g-i) and III	XX	XVI	XVIII, XVI,XX	III, XV, XVIII
QURAN/ <i>SUNNAH</i>	Quran 49:13, 33:35	Quran 2:228 33:35	Quran 4:4 4:32 2:188, 2: 229, 2:282, 2:283	Quran 2:233, 2:237, 2:241 4:12, 4:34, 65:6	Quran 4:32 3:195 67:15

3.5. Conclusion

The discussion above shows that there can be solutions for both adherents of Islam or secularisation. Indeed the age of Islamic human rights which have existed for more than fourteen hundred years, well before the advent of the UDHR gives it a validity worthy of recognition.

However, it is important to acknowledge that the mere presence of human rights in both the international and Islamic context does not guarantee their implementation. This may be due to political, entrenched patriarchal ideologies making it difficult to realise intrinsic rights within specific pluralist or cultural contexts (Sait and Lim, 2006: 82). Giving these principles a legal force within the country can ensure better implementation.

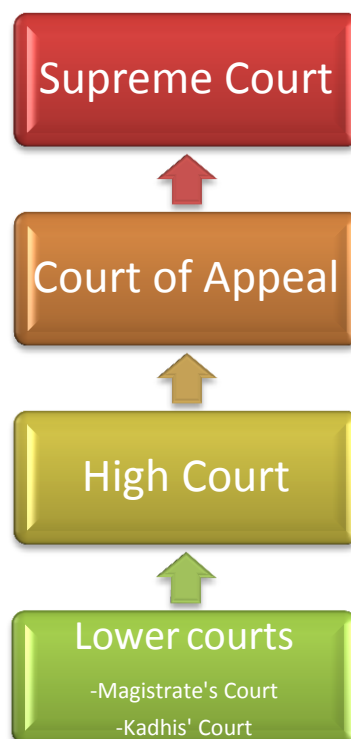
CHAPTER 4

4.0 LEGAL AND CONSTITUTIONAL FRAMEWORK

4.1 Introduction and background to the legal system in Kenya

Kenya, like many other countries, has a legal system which was greatly influenced by European law due to colonisation. When Mombasa became a British Protectorate in 1897, the ruling Sultan of Zanzibar negotiated certain conditionalities with the British. One such conditionality was that Islamic personal law should continue to be applied to Muslims living along the Coast (ten mile Coastal strip). A number of ordinances were thereafter made and repealed affecting the courts. Initially, appeals from the Muslim Court were made to the Supreme Court. The 1963 Constitution renamed the Supreme Court the High Court and the Kadhis' Court replaced the Muslim Court. Currently, under the new Constitution, appeals from the Kadhis' Court lie to the High Court, with further appeals proceeding to the Court of Appeal and thereafter to the Supreme Court (Odero, 2013).

Figure 2: Existing Hierarchy of Courts



4.2 The laws applicable in the High Court and Kadhi's Court

4.2.1 Laws applicable in the High Court

For many years and at the initial stages of the research, the law applicable in the High Court relating to matrimonial property was the Married Women's Property Act of 1882 (MWPA), a statute of general application borrowed from the United Kingdom and made applicable in Kenya under the Judicature Act (Chapter 8). This Act provided a procedural framework for the institution of suits relating to property acquired by women. Section 1(1) of the Act recognised women as *femmes sole* (i.e., having the equal right to hold, deal and dispose of property without interference). The factors considered in rendering judgment were based on case law and section 17¹¹ which gave great discretion to the presiding judge to decide a case and override both equitable and legal rights (*Hine v Hine* [1962] 1 WLR 1124¹²). Section 17 often proved problematic as it was deemed not to provide a court with powers to interfere with proprietary rights in cases in which property was registered in the name of one spouse and required to be divided in order to allow transfer of a share of the property to the other. This Act has now been repealed by the Matrimonial Property Act, 2013 (MPA).

The Matrimonial Causes Act (MCA) (Chapter 152) though applicable in matters of divorce and separation of parties, makes some provision under sections 27 and 28 regarding the distribution of property at the time of divorce. It focuses more on the issue of the fault of the parties and may determine whether a woman should receive a share of the property or not. However if custody is granted to their mother, the existence of children may secure a woman's right to shelter in order to protect the children. With the advent of the new MPA these provisions may be deemed inapplicable as this specific Act, the new MPA, has now made provision for specific remedies.

The MWPA and the MCA were also deemed to apply to Muslim women who appeared before the High Court. For instance, in the case of *A. v N.* [2006] eKLR the Muslim parties filed a case relating to matrimonial property in the Mombasa High Court. The husband then sought the court's ruling on a preliminary objection on whether the court had jurisdiction to determine the matter which was already pending before the Kadhi's Court. He also sought a

¹¹ 'In any question between husband and wife as to the title or possession of property, either party ... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice ... and the judge may make such orders with respect to the property in disputes, and to the costs of and consequences on the application as he thinks fit.'

¹² As quoted in *Echaria v Echaria* [2007] eKLR.

further ruling as to the applicability of the MWPA *vis-à-vis* the (Mohammedan Marriage, Divorce and Succession Act) MMDS Act to Muslims. Arguments were put forward under the section 66(5) of the old Constitution regarding the jurisdiction of the Kadhi on matters of personal laws relating to Muslims. This had the effecting of ousting the High Court's jurisdiction on matters where the parties had already been divorced (*talak*) and the process was complete. The court, however, disagreed and upheld the case of *Essa v Essa* [1996] EA 53, stating that the statutes also applied to parties who were Muslim and the divorce was not complete until a certificate was issued.

In the landmark case of *Echaria v Echaria* [2007] eKLR,¹³ monetary contribution was deemed to be an important factor in determining shares. The contribution had to be direct or indirect and when women did contribute, the share was dependent more on the extent of the contribution than on the principle of equality of the sexes.

Even with the section in the new Constitution in 2010, the judges still upheld the *Echaria* precedent and are yet to rule acknowledging Article 45(3) which provides for the equality of the parties at the time of marriage and its dissolution. Their argument is that until a case challenging the precedent has been filed, they are bound by it.

In late 2013, Parliament, amid great resistance from women parliamentarians and Women Rights Organisations, passed the much awaited MPA.¹⁴ Instead of recognising the equality provision under Article 45(3) of the Constitution, the MPA digressed by providing that women must show contribution, thereby upholding the *Echaria* case. According to FIDA the Act went against the principles of equality, failed to recognise collective effort and goodwill in marriage and, in addition to violating international human rights principles, would most likely adversely affect children who would be exposed to parental feuds (Aura, 2013).

¹³ This High Court case commenced in 1987 and progressed all way to the Court of Appeal where judgment was delivered in 2007 and later in the African Commission where it was ruled inadmissible (Communication 375/09). The husband was married to his wife in a civil ceremony. He was later posted to a diplomatic mission abroad as the *charge d'affairs* and moved there with his wife who was not allowed to work. Properties were acquired in Kenya during this period and later with direct contributions made by the husband. They later came back to Kenya where she delivered her third child and was employed by the Ministry of Education until her retirement when she did consultancy work. She claimed that she had made an indirect contribution to the purchase of the property by virtue of taking care of the family and contributing to the expenses of the house and the duties she carried out as an Ambassador's wife. Her contribution to the family was calculated and a quarter share (25 acres) granted to her based on the percentage contributed *vis-a-vis* the value of the farm.

¹⁴ Act No 13 of 2013 commenced on 16 January 2014, repealing the MWPA of 1882.

Under the MPA, state law now provides substantive provisions recognising the rights and responsibilities of spouses in relation to matrimonial property. In relation to marital property, the Act recognises that contribution may be monetary or non-monetary, direct or indirect in nature. Section 6(1) of MPA describes matrimonial property as including the matrimonial home or homes, household goods, moveable and immoveable property jointly owned and acquired by spouses in marriage. The Act seeks to protect both sexes from exploitation where a woman is regarded as a femme sole and with equal status to men; as such, ownership of property is dependent on the contribution of the spouses to its acquisition. The MPA also recognises improvements of a spouses' property by granting a party a beneficial interest in it. The Act protects women from eviction from the home except by order of court and provides for the protection of shares of polygamous unions in accordance with the hierarchy of wives and their respective contributions. To prevent homelessness, a wife's consent must be sought before the property is mortgaged.

Aside from the choice given to Muslims to apply Islamic law under Section 3, the MPA allows the customary laws of the parties to be taken into consideration at the time of division. This can have a beneficial effect for Muslim women in that they can opt to apply their diverse pluralistic norms to protect women's transience and facilitate access or user rights (Section 6(2)).¹⁵

Spousal liability in marriage is considered joint; this, however, is contrary to Islamic principles where each spouse bears their own liability towards their property (Black, 2012: 6). The MPA nonetheless removed the previous handicap under the MWPA in that it now gives legal standing to any spouse or former spouse to file a case. The Act has also left open and permitted Muslim parties to make a choice on the law applicable to their case.¹⁶

¹⁵ This subsection may also have a claw-back effect where women may be denied the envisaged ownership rights, as some Kenyan customary laws do not allow women to own property. Furthermore, women may suffer social stigma from their families and enforcing these customary laws for spouses of different tribal and customary backgrounds may be problematic. However, this is an area that needs further research at the grassroots level to ensure an understanding of the *living custom* and values of communities derived from unearthing the effects of these diverse practices.

¹⁶ Section 3: A person who professes the Muslim faith *may* be governed by Islamic law in all matters relating to matrimonial property.

The High Court is also governed by the international human rights framework as recognised by Article 2(5) and (6) which provides that it automatically forms part of Kenyan law. As such, all international instruments, including treaties and conventions ratified by Kenya which touch on this subject matter, are part and parcel of the Kenyan law.

4.2.2 Laws applicable in the Kadhi's Court

Article 170 of the current Constitution authorises the Kadhi's Court to determine questions of Muslim law relating to personal status, marriage, divorce and inheritance in which all parties profess the Muslim faith and have submitted to it. The Constitution further provides for the criteria for the selection of Kadhis. Apart from professing the Muslim faith, a Kadhi must also exhibit knowledge of Muslim law applicable to any sect of Muslims. Aside from conferring jurisdiction, Article 24(4) of the Constitution limits the equality clause for Muslims who appear before the Kadhi Court on marriage and related matters. This allows Muslims to apply Islamic principles on equality contrary to the provisions of international human rights instruments. The Kadhis' Court Act also has a similar provision relating to jurisdiction.¹⁷

Similarly, section 3(2) and (3) of the MMDS Act¹⁸ confers jurisdiction on both the Supreme Court (now High Court) and the Kadhis' Court to handle matters relating to matrimonial causes where special relief by way of divorce is being sought. They are required to apply Islamic principles. This is problematic since a majority of the High Court judges do not have a background in Islamic law.

The lack of any substantive provisions in the MDDS Act gives Kadhis a wide discretion in deciding matters before them.

¹⁷ Chapter 11, Laws of Kenya, Section 5(5).

¹⁸ The 1926 Act has undergone no amendments to date.

CHAPTER 5

5.0 LEGAL COMPLEXITIES IN THE APPLICATION OF MATRIMONIAL PROPERTY RIGHTS IN THE KADHI'S COURT

5.1 Introduction

This chapter analyses the legal and institutional intricacies that come into play within the institutions that apply the law. It also highlights the challenges women face as a result of the interplay between these actors and structures. The chapter, therefore, deals with the findings relating to assumptions 1 to 4.

5.2 Legal and institutional complexities

5.2.1 *Lack of protection for women under Islamic and state laws*

As indicated earlier, since the MMDS Act does not provide any substantive provision regarding rights to matrimonial property, the Kadhi's discretion comes into play. The Quran and *Sunnah*, however, do provide protection for Muslims in respect of property during divorce and women who have some awareness and take advantage of the system are able to secure their rights during divorce. The Muslim clerics confirmed that despite the concept of matrimonial property not being expressly covered by the Quran (it only mentions the matrimonial home in so far as a husband is obliged to provide a home for his wife during the marriage), it is possible for women to secure rights to property in marriage.

This can be done through the giving of gifts or a dowry to wives. One Sheikh as well as a women activist indicated that the Quran allows husbands to give gifts, including property, to their wives which become theirs and cannot be forfeited at the time of divorce. 'Give women their dowries with a good heart' states the Quran in 4:4 and 4:24 and other verses. This provision provides that the dowry must be given to women and not be kept by their guardians as had been regularly done during the *jahilliya* (pre-Islamic) period. I discovered that among Somalis this malpractice continues unchecked as fathers misappropriate their daughter's dowries, and, thus, binding them to unhappy marriages.

The Islamic clerics confirmed that the Quran allows a woman, like a man, to own, use and abuse her property as she deems fit. They indicated that at the time of or during marriage parties are allowed to enter into binding and enforceable pre-nuptial or nuptial agreements which remain valid unless revoked. In the absence of a written agreement, joint registration of property will secure women's rights to matrimonial property at the time of divorce, as the Chief Kadhi expressly stated:

‘A woman jointly registered as owner can claim her share as the Quran expressly indicates that no one should take another's property.’

It is important to make a joint ownership declaration in writing to avoid misconceptions and misunderstandings. For instance, a case in point is *Salma Abdul v Feisal Awadh* (KCCC 73/2001) in which a husband threw his wife out of the matrimonial home. They had jointly constructed a matrimonial home comprising of a house on land which also contained some business premises in respect of which the defendant was collecting all the rental income for himself. She claimed certain household items, a half share of the property and the rent. She produced evidence of the contributions she had made. The court allowed her claim and declared joint ownership of the property granting her a half share of the matrimonial home and business premises. Where property is jointly registered without any contribution having been made by a wife, her share will be deemed to be a gift from her husband and that share will still be granted to her at the time of divorce.

I also found that negotiating women's property rights in marriage (through agreements) or by registration will also secure their inheritance rights at the time of death or polygyny. This reduces feuds between the spouses' families at the time of the husbands' demise. Further, since a woman can own and dispose of property, she also has the capacity to bequeath her shares to her own kin upon her death. For example, one respondent, a woman who was Comorian by descent and had been widowed by a Kenyan, indicated that she had purchased four plots of land on which she and her husband had jointly contributed to the building of improvements but her name had never appeared on the title deeds of any of the properties as her husband always registered them in his name. She confronted him and he agreed to write an agreement to the effect that the properties were owned in common by both of them and that should he predecease her she would inherit all the properties and vice versa. On the death

of her husband, she appeared at the Kadhi Court with the agreement and the Kadhi enforced it. The children were only awarded a share of the husband's pension fund.

Despite the provision for the making of agreements in the Quran, it is important to acknowledge that many women in Mombasa, despite their contributing significantly to the acquisition of matrimonial property, find it culturally difficult to enter into agreements with their husbands, many of whom register such property exclusively in their own names. This negatively affects their wives' claims in that they lack evidence of the contributions they have made and, as a result, when they try to sue in court they lose their claim to a share of the property. In the majority of court cases the women end up getting an order for the dissolution of the marriage only but no order relating to the immovable matrimonial property. For instance, in the case of *N.S. v K.A.M.* (KCCC 73/2009), a claim for the distribution of property was dismissed for want of tangible evidence. This forced the wife to consent to negotiations in which her share of the property was deemed to be or treated as the children's share. This confirms the relational character of women in that they readily forego their own entitlements for the benefit of others. Similarly, in the case of *F.A. v A.* (KCCC No. 253/2012), the marriage was dissolved but the order for the division of property was denied.

Agreements permit parties to couch their claims in different terms, for example, they may take the form of commercial claims. A case in point is *Nasra Abdulwahab Ahmed v Mohamed Bakhressa*¹⁹ in which a husband, the defendant, sought to revoke an agreement between himself and his wife, the plaintiff, on the grounds of non-disclosure of material facts because it sought to protect illegal *benami* transactions.²⁰ Briefly, the husband a tycoon businessman, married a woman who was unemployed in Mombasa. The marriage lasted for only four years and was not blessed with any children. During the marriage, the wife was allegedly gratuitously involved in the running of her husband's business affairs as he was frequently out of the country. By way of appreciation for her services, the defendant gave her gifts, including a Mercedes Benz and a stipend the proceeds of which she used to acquire three properties, comprising flats, without the knowledge of her husband. Upon the dissolution of the marriage, the parties appeared before an advocate in Mombasa and an

¹⁹ (CA NO 32 of 2007 eKLR) emanating from the original suit in the High Court at Mombasa No 136 of 2006, *Mohamed Bakhressa v Nasra Abdulwahab*.

²⁰ The Indian *Benami* Transaction (Prohibition) Act of 1988 prohibits the Indian Muslim practice of trust in which property is registered in the names of others. *Benami* means without names or fictitious name or transaction.

agreement was drafted providing that some properties, including five motor vehicles, a house registered in her name and Kshs 71 million, be returned to the husband in full and final settlement of the parties' shares in the matrimonial property. She willingly signed the document. Later, the husband conducted investigations and discovered the existence of twenty one (21) other properties, including twelve registered pieces of land with improvements, two boats, and more than nine (9) bank accounts as set out in the schedule of assets, which had not been transferred to him. This schedule included the matrimonial home which the husband had allegedly given to his wife as a wedding gift and, according to her, he was forbidden to claim. It was contended by the plaintiff's advocates that the *benami* principle which had been outlawed in India could not apply to Kenya and in fact there was a clear case of presumption of advancement; hence, the titles held in the defendant's names were indefeasible. The matter went all the way to the Court of Appeal. Eventually in 2011, the parties agreed to share the properties equally, with the wife leaving the marriage with an estate worth at least Kshs 225 million (US\$2, 647, 058.80) (Mudi, 2011).

One Kadhi reiterated that in the absence of the concept of matrimonial property in Islam and written documentation, it is only the husband who is entitled to share the matrimonial property with his wife at the time of dissolution of the marriage if he wishes to practice benevolence and he may not be coerced into doing so. He indicated that moral obligations under the Quran are not enough to secure women property rights at the time of divorce. Thus, the performance of domestic chores, according to him, cannot give rise to a right to matrimonial property.

For parties appearing in the High Court, the Constitutional article on the right to equality of parties in marriage,²¹ though applicable, was still not practised. According to the Family Division Judge, unless and until the *Echaria* precedent providing for direct contribution was challenged and the decision over-turned, the court was bound by that case law. Luckily, in the month of January 2014, Parliament undertook its Constitutional mandate and enacted the envisaged legislation intended to protect matrimonial property under article 68 (ciii). The MPA is, therefore, the applicable law but its applicability *vis-à-vis* the lived realities of the parties it affects is yet to be determined. The Act gives the parties the choice to apply Islamic

²¹ Article 45(3): 'Parties to a marriage are entitled to equal rights at the time of the marriage, during ... and at the dissolution.'

law either before the Kadhi or chose to appear before the High Court. The MPA recognises both monetary and non-monetary contributions.

5.2.2 Duality of the legal system

Parties who appear before the Kadhi Court are always governed by Islamic law. Such parties whether married or divorced, may seek a remedy for their claims.

Prior to January 2014, parties who chose not to submit to the Kadhi Court but to seek a remedy in the High Court had some procedural impediments that they had to overcome in order to succeed before that court. These factors were: the woman must still be married with a pending divorce action either in the Kadhi Court or in the High Court. Women whose divorce was complete could not get a remedy in the High Court, as the MWPA was deemed to apply only to married women. The MWPA was also deemed not apply to Muslims and joint property could only be declared as such if a party had contributed. These arguments were put forth in several decisions such as *Amina Abdulkadir v Ravindra Narshi* [2006] eKLR, a Mombasa High Court case. In this instance, the wife had already been divorced (non-revocable *talak*) and was awaiting a divorce certificate. However, the court disagreed indicating that the divorce was incomplete until the certificate was issued.

Again, in the case of *Afwa Ramadhan v Athuman Juma* [2005] eKLR HCCC No174/2005 at Mombasa, a husband divorced his wife and quickly moved before the Kadhi Court to obtain adverse orders against her. The wife objected and argued that the divorce was incomplete and the properties were acquired jointly by the parties. She then sought to review the decision before the High Court but it declined to do so on the ground that the parties should not canvass the same issues before two different fora at the same time. The High Court judge allowed the Kadhi's Court to proceed with the hearing.

Currently, however, parties who choose not to submit to a Kadhi Court under article 170(5)²² may choose to apply mainstream laws in the High Court. This article has been given more impetus under article 3 of the MPA, 2013 allowing parties either to have Islamic personal law

²² 'The Jurisdiction of the Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which ALL PARTIES profess the Muslim Religion AND SUBMIT to the jurisdiction of the Kadhi's Court.'

applicable to their matter or not (the word ‘may’ being key).²³ The Kadhi confirmed that this is permissible since there is no compulsion in religion.

According to the findings, the applicability of the dual legal system in courts provides a choice in dispute resolution. The intention is made apparent by the choice of law forum, which means by appearing before one system or another or appealing to the High Court. The judge was clear that the presence of the Kadhi on appeal is procedural, since his opinion is not binding. With no legal background on Islamic law, the judge does not apply it.

The duality of the legal system may still be a problem for individual litigants and lawyers who may raise preliminary objections. In the case of *M.M. v N.O.M.* (KCCC No 96 /2011), the parties had filed a previous case in the Children’s Court where orders were made that the matrimonial home be deemed the shelter for the children. The husband wanted his former wife to vacate the home to make way for his occupation with his current wife. His former wife’s lawyers objected and the case was dismissed by the Kadhi for want of jurisdiction. This was because there was another case pending in another forum touching on the same issues, contrary to Section 6 of the Civil Procedure Act.

The majority of the female respondents indicated that they would prefer to appear before the Kadhi; however, where they felt that justice had not been served by him, then they would seek an alternative decision under the secular system.

5.2.3 Cumbersome legal procedures and unpredictable court findings

Some of the decisions reached in the High Court may finally be published in the Kenya Law Reports for reference purposes and predictability. These law reports may also contain High Court judgments of the few cases that come on appeal from the Kadhi Court, some of which involve the reversal of their judgments based on government laws applicable at the time of hearing. However, there is no data base of cases concluded in the Kadhis’ Court which makes a comparison of previous cases and precedents almost impossible. A perusal of some of these judgments shows that no substantive case law is used as precedent as the Kadhis rely for their authority solely on the *hadith* and Quran. The lack of compilation of judgments for reference

²³ Section 3: ‘A person who professes the Islamic faith MAY be governed by Islamic Law in matters relating to matrimonial property.’

purposes leads to variations between and unpredictability of judgments as well as an under-developed jurisprudence.

A perusal of the files at the Kadhi Registry indicated that women make few attendances at the beginning of their cases and then just stop attending altogether. For instance, in 2008, a total of 126 (or 34% of the total cases filed) were dismissed for want of prosecution. Secondly, there are only a very limited number of women (or an average of only 2.5% of matrimonial claims) who claim immovable matrimonial property or debts from their husbands.

Table 2: Property claims at the Kadhi Court

Year	*Matrimonial Claims filed	Number of Matrimonial property cases filed	Consents entered	Decided	Ongoing/ Undecided	Dismissed for want of prosecution	Withdrawn/ Reconciled
2008	398	10	1	2	1	3	3
2009	300	8	2	4	1	-	1
2013	90	2	1		1		
Totals	788	20	4	6	3	3	4

*Matrimonial cases: those filed claiming divorce and ancillary claims such as debts and property.

In the opinion of the Chief Kadhi:

‘Women do not bring cases to court because they know they have no rights.’

This sentiment, coupled with legal advice solicited from lawyers’ offices or court clerks (where women discover that without proof they have no case), make women give up. However, this legal centralist approach does not reflect the reality on the ground. The majority of the respondents (73 %) stated that upon the dissolution of their marriage, they would first visit the marriage Kadhi, family members, NGOs or the chiefs to solve their case and if their husband concedes, the case ends there. If he does not, however, they do have rights and they may approach the Kadhis’ Court to file a case, a position supported by 27% of

the women. One marriage Kadhi indicated women do not go to court due to socialisation; he says he handles at least three cases per day, some of which are ongoing. However, for some women their belief that the system is corrupt made it pointless for them to pursue a share of the matrimonial property at the Kadhis' Court.

Women often forfeit their right to property for the benefit of having their children taken care of by their estranged husbands. This finding was important in discovering the relational character of women who are usually out to satisfy the pleasures of others not for themselves. Further, whereas a man would readily and without consultation initiate a case seeking formal adjudication, often times it appeared that for women their relatives had to play an active role in persuading them to do so.

According to Robin West (Becker, 2007: 144), for most women the quality of suffering and joy is different from those of men. The pain for most women is equated, for instance, with punishment for leaving their husbands and they often constrain their potential to respond as necessary. Some women are often tired of the marriage and would rather forfeit their rights to property for the sake of a peaceful existence. In order to ensure that they administer substantive justice it therefore becomes imperative that courts empathize with women and their needs. They are essentially unselfish nature and generous. Further the Kadhis need to be mindful that treating all women as a homogenous group will not secure social welfare and wealth distribution envisaged in Islam.

The Kadhis and the lawyers indicated that the court procedure of the Kadhi Court is simpler and more people friendly, as a claimant can file a single case seeking numerous remedies. In the High Court, on the other hand, it is more cumbersome as several cases have to be filed seeking different remedies. For instance, if one seeks a divorce they would have to file a case for dissolution at the Kadhi Court since it the only forum that can dissolve Islamic marriages; if property exists, then a property case has to be filed in the High Court and if there are children, then a claim at the Children's Court has to be made. Simplicity notwithstanding, a majority of the lawyers indicated their preference to appear before the High Court instead due to the predictability of its judgments, its developed case law and adherence to systematic procedures.

Although the use of a standard simplified form as a claim form for filing a case in the Kadhi Court makes that court accessible, such forms also have their limitations. The FIDA lawyer indicated that the women end up claiming only what fits into the space provided in the form, forcing lawyers to amend the pleadings when they take over the matter later (See Appendix 1).

Women often appear at the Kadhi's Court without legal representation. They can become easily discouraged when they fail to understand the court's procedures or the effect of some of their decisions. The idea of effecting personal service on their husbands who may be away or have parted with them on bad terms may also be discouraging for them. The alternative of engaging a court process server was too expensive for them. Many expected the length of time to resolve their dispute would be brief and they were easily exhausted when matters dragged on endlessly without tangible results being achieved or predicted. Other respondents also indicated that many women find the court fees expensive, especially where they also had to meet other costs for which they were responsible, such as fulfilling the needs of their children.

With all these issues facing women, many of them prefer an out of court settlement that would be quick, efficient, 'impartial' and cheap. According to the legal officer at FIDA, women prefer mediation to solve their disputes. The simple process would involve writing a letter inviting their husband to a hearing at which both parties would be heard after which a reconciliatory agreement would be reached or not. Women also find the chief's and marriage Kadhis preferable because (aside from no cost being attached) a similar technique is used in which decisions are reached based on consensus. It is only the unsuccessful cases that are referred to the Kadhi Court for decision making, thus highlighting the major reason for the low number of cases filed at the Kadhi Court.

5.2.4 Lack of wide interpretation of Islamic principles and independent reasoning

Difficulties often arise for women when conservative readings of the Quran are intertwined with gender discriminatory customary norms (especially from the Arab world) and presented as God's immutable word. A woman faced with such patriarchal constructions of the *sharia*, especially where they seek to fulfil their duties to God in this world and after death while also seeking their rights to property, experience immeasurable conflict. Such conflicts, argues Al Hibri, can only be solved through a solid jurisprudential basis which clearly sets out that

Islam demands that the rights of women to property be given, not removed (Sait and Lim 2003: 131). Women may chose to work within the Islamic framework while seeking democratic Islamic objectives through working out new limits in *ijtihad*.

The Chief Kadhi, asserting a stereotypical role of men and women that does not reflect realities on the ground, indicated that it is men who usually buy clothes, homes and cars in the family. He stated:

‘I only look at the prima facie evidence of ownership without venturing into how the property was acquired. I follow the *Hadith* (narration) which says *Hukumu kulingana na ushahidi* (judge according to evidence). However the intention of parties (for instance, if to avoid tax) is what is taken into account at the time of the divorce.’

This approach disagrees with Al Juziah’s (1961) interpretation that title should merely be an inconsequential basis for conferring matrimonial property rights placing a higher burden on women to prove entitlement (Muhammad, 2002). The court, by applying a male standard to property issues, ousts women’s claims and fails to recognise the differences between women and men in society (Bannet, 1998: 16). The burden of proof is higher on women to prove their contribution. Hence, the ‘gender neutral’ application of the law leads to discrimination and often extinguishes deserving women’s shares, thereby adding further misery to the divorce. One woman’s case related by a local Kadhi, who handled it, went as follows. The wife single-handedly earned the cash which she would hand over in trust to her husband so that he could purchase materials for improvements to land, the construction of which he also supervised. He wrote all the ownership documents relating to the property in his name and to the exclusion of his wife. He later divorced his first wife, took up with another and was living with her in the premises. He adamantly refused to relinquish any portion of the property to his first wife in the absence of evidence of the financial contribution she had made.

However the Principle Kadhi said he looks at the duration of the marriage, when the property was acquired and the role the parties played during the acquisition of the property. He stated:

‘The person’s whose names appear on the title is the *prima facie* owner. However, there are exceptions, for instance, where she can prove direct contribution by providing written evidence or where she can bring witnesses to show she supervised or directly contributed in one way or another towards

the acquisition of the property. In such instances in my court I will grant a share.’

For both Kadhis, the lack of direct contribution to property by a woman disentitles her to a share since she was presumably maintained during marriage. The Chief Kadhi mused that if she is not happy with the marriage she can quit and claim past maintenance.

According to Sheikh Al Saggaf from Jiddah, to whom I had posed a question during a forum on women (see Chapter 2 on the methodology of the research), the Quran contains all possible solutions for daily problems that people face and enjoins that justice and fairness must be upheld at all times. He added:

‘The Quran must be read in its widest possible meaning. The religious principles must be applied in their entirety with equality in mind to ensure justice... Women’s rights must be defended from the oppression of men.’²⁴

According to three female lawyers, the failure by the Chief Kadhi to look beyond the Quran and *Sunnah* is problematic as he fails to take into account the lived realities of women. The lack of reference countries and failure to apply *ijtihad* also leads to an under-developed jurisprudence which curtails people from making fruitful engagements.

Ms Moza²⁵ indicated that a woman must receive her share based on the value of the development. Shares should not be dependent only on strict evidence and documentation as this can be falsified and may not reflect the source of income. She argues that in Islam ‘your word’ should be as good your bond and that religion thrives on truthfulness. She adds that even in the absence of evidence her direct contribution should be repaid. She relied on the Quran 2:282-283, where one is forbidden to consume the property of others and on fiduciary contracts. A wide interpretation of Islamic principles to include equity and justice must prevail and must conform to varied circumstances. Written agreements are meant to enforce future obligations; the meaning of a contribution is that it is ‘OURS’ and that in itself gives rise to implied future obligations. The Quran is given its timeless value through *Ijma* and *Qiyas*.

²⁴ Sheikh Habib Momhamed Al-Saggaf is a world renowned scholar and ambassador for peace. He spoke at a forum in Mombasa on the challenges of globalization facing Muslim women on 29/1/2014.

²⁵ A legal and development consultant, legal practitioner, women’s rights activist and lecturer at the University of Nairobi.

This approach was confirmed by a number of the sheikhs and local Kadhis who are more in touch with realities and who said that, in the absence of express agreements regarding the division of property on divorce, Islamic principles through *Ijma* and *Qiyas* must be applied.

5.3 Conclusion

There was a general consensus of recognition that women do indeed contribute to property either by adding value or actual development to property acquired during marriage. A further recognition of the rampant culture of failure to write agreements especially in Mombasa would be a second step. *Ijtihad* may then allow the subversion of stereotypical suppositions of women as transient hence allowing meaningful and more empowering strategies for women's security to matrimonial property rights.

CHAPTER 6

6.0 SOCIO-CULTURAL AND ECONOMIC COMPLEXITIES ENCOUNTERED IN THE PURSUIT OF MATRIMONIAL PROPERTY RIGHTS

6.1 Introduction

This chapter examines the social, cultural and economic factors that would facilitate women's agency or its absence. It also looks at the family structure and its effects on women's choice in their pursuit of shares to matrimonial property. Lastly, it looks at the possibilities of securing women's shares through legal reform and awareness-raising. These discussions cover assumptions 5, 6 and 7.

6.2 Social, cultural, economic and other underlying factors determining capacity to pursue matrimonial property

6.2.1 *Social and cultural factors*

Socialisation plays a major role in shaping women's choices. Most of the women lacked control and decision making powers over property, they placed a low value on their labour and their own lives and, thus, they laboured throughout life for no valuable return. For instance, women would often stand silently and witness their husbands purchasing property in their own names or totally relinquish their ownership, access and user rights to such property. Despite the high rate of divorce, women are socialised to believe that marriage is an end in itself and better than being single. Socialisation and a patriarchal culture (giving power and status to men over women), as well as misconceived notions about religion, played a major role in encouraging women to obey, to be manipulated and to submit to their husbands. According to Sheikh Al Saggaf, the notion of *Qawama* should not be misconceived to oppress women, but rather to appreciate them. He said:

‘Qawama relates to the household affairs with women having distinct rights and responsibilities as do men...Taking care of one's wife is *Jihad*, Caliph Athman, who failed to go to *Badr* to care for his ailing wife was rewarded by the Prophet who affirmed, “The best of you is he who is best to his wife”. Women's rights must be defended from the oppression of men.’

Women themselves see men as the primary source of authority resulting in their subordination, even when the woman is the breadwinner. This has perpetuated the continued deprivation of women's entitlement to property rights and resources as they internalize these male concepts of rights over property. These societal and cultural behaviours lead to the domination of women tallying with Mackinnon's dominance theory (Becker *et al.*, 2007).

All the women that I interviewed indicated that they engaged in running their household and were actively engaged in performing domestic chores. Despite their knowledge that it was neither exclusively their job nor did it have a religious basis, they did them because they had no choice in the matter or because they were following tradition and culture. The women stated that they performed care work even when they were sick, and especially when they have no domestic help. Many women had internalized domestic chores as normal, in the belief that it is taboo for a man to do such duties or that doing them made them feel useful as women. This is especially the case with some women, one of whom admitted to doing them because she liked them and because she had seen her mother and others perform them.

Culturally, husbands use their 'perceived' traditional roles as the maintainers of the family and controllers of property as a means of oppressing and subordinating wives in their households. They expect women to continue doing the 'trivial' jobs in their households for no pay. These issues all work against women when issues of division of property arise.

While some men did appreciate that domestic chores are not a woman's duty, they rejected the idea that these chores can translate into proprietary rights. One unmarried man expressed the view that if he had a wife he would give her a portion of the matrimonial property based on her sacrifices for the family but that he would only do so on humanitarian grounds. The married men, on the other hand, indicated that a share of the matrimonial property can only be given to a wife to hold on behalf of the children, and, in fact, two men had included their wives names on the title deed of property based on this understanding. On the other hand, the men who had already undergone a divorce expressed a different view. They took the women's sacrifices for granted and never showed any appreciation for their contribution. One divorced man said:

'A wife must cook and do all domestic chores. What a woman does is not contribution; domestic chores are traditionally a woman's job. They cannot

give a woman a right to property. Religion enjoins us to compensate women for the tasks but we follow culture instead of religion on this issue.’

Such statements reinforced the position that conservative interpretations of Islamic Law and customary or traditional practices are often used to altogether extinguish women’s property rights (UN HABITAT, 2005). Whereas Islam acknowledges the complementary gender roles played by women and advocates for equal but differentiated equality, society and culture do not appreciate these roles. A previously divorced and now remarried female respondent summed up this notion as follows:

‘Men (Digo tribe) are selfish; they say the woman should not get anything at the time of divorce. They fail to see the contribution a woman makes in the marriage. They believe the woman has only duties, no rights. Her ‘right’ is to eat and bear children while in the home. When the marriage is broken down, they believe the women should go and go away with nothing.’

I also witnessed that women sacrificed their time and energy helping their family’s efforts to improve matrimonial property in the hope of securing access to and use of them during the marriage. Their work during such periods is, however, not recognised or compensated because a woman’s work is always regarded as unpaid labour. The women would often contribute to property because they saw themselves as partners in their marriage and also what they did was done for the sake of their children. The men, however, viewed property issues as being subject to individual entitlements (i.e., their own) and they had their wives witness agreements even where they contributed monetarily towards the property. This simply shows that those who own the means of production (capital) tend to exploit the labourers as part of the interplay between class and labour. In this instance, women are the labourers who provide the valuable work itself (whether direct or indirect) and yet the value of that work is largely undervalued in that the women are underpaid to the point that they receive barely enough to provide them with a basic subsistence; instead, women’s work should be valued directly in relation to the gains it achieves within and through the production process (Tong, 1989: 40).

Whereas women were groomed to become good housewives, men are socially constructed from infancy to be the unquestioned superior in the home. It became clear that women will always be treated ‘as the other’ in family relations while man is the ‘self’, perpetuating the the practice of women being subject to treatment inferior to that of men (Tong, 1989: 201).

Women have also internalized these stereotypical and alien views that man is the essential while she is the inessential, thus, confirming Beauvoir's existentialist theory (Bannet, 1998).

During the FGD, it was made clear that there are times when women would refuse to pursue their property rights in the hope that the parties would reconcile. Women often refuse to think about life after divorce until it happens. When it became clear that reconciliation and consensus could not be reached, women gave up. The problem for women would be their socially-entrenched apathy and lack of agency to pursue their shares, their common reaction being, '*Sasa nitafanyaje?*' ('Now, what should I do?'), 'I leave it to God.' Sometimes a stressful divorce wore out the women's spirit and eventually they only desired a peaceful existence without their husband. Women often forget that religion often enjoins us to fight for what is rightfully ours.

Aside from these disempowering views on culture, it also emerged that culture could have empowered women. One respondent indicated that certain Mijikenda communities used to follow the matrilineal system where property would be passed through the female line. During a FGD one man indicated that before Islamisation (conversion) of Mombasa, divorce was rare, but when it happened women were given homes by their husbands' families within the same homestead. In support of empowering cultural practices, the Sheikhs did confirm that where culture was not contrary to religion, its continuance is encouraged.

6.2.2 Family and kinship structures

In Mombasa like in many other communities where the marriage is a community affair, the actual recovery of property may be determined by the relative strength of the respective families and the willingness of the woman's family to support her claim. Thus a lack of familial support may force women to claim divorce and abandon other claims, such as matrimonial property (WLUML, 2006: 319).

There is an assumption that women in an urban setting, such as Mombasa, are more likely to claim rights according to the law than women in the rural setting where customary claims prevail (UN HABITAT, 2005). This was also confirmed by the legal officer at FIDA, but the reality was different. While it is likely that a man would take up a case and seek its formal adjudication based on his own initiative, it was found that of the cases pursued by women 45% had done so because of the active encouragement of their relatives, 35% of women had

not sought their relatives' approval and 20% of them did not disclose information about this. Further, while I was at the Kadhis' Court I observed that women would often be accompanied by relatives, who sometimes spoke on their behalf or even appeared during court hearings and reported that the woman was unable to attend court for some reason. This may have a negative impact on their cases as the representatives may mislead them, especially where they lacked expertise. Relatives may also press women not to assert their rights altogether when they themselves are tired or are apathetic.

There are times when the husband may withhold divorce itself or fail to appear in court delaying the proceedings due to numerous adjournments, which may simply indicate the husband's unwillingness to meet his obligations ancillary to the grant of the divorce. Such power or ability of the husband gives him considerable leverage to press his wife into surrendering her financial claims, simply to end the painful divorce process (WMLUL, 2006: 318). Furthermore, the lengthy and involved procedures may force women to forego their rights to property for the perceived benefit or maintenance of the children. The unreported case of Mwanahawa Somo Mbwana is a case on point, where despite being unhappy with the judgment of the Kadhi that her solely acquired immovable property be deemed as the children's trust, she refused to appeal the matter for her children's sake. The fact is that there are no guarantees for a mother or her children unless the property is transferred into their names.

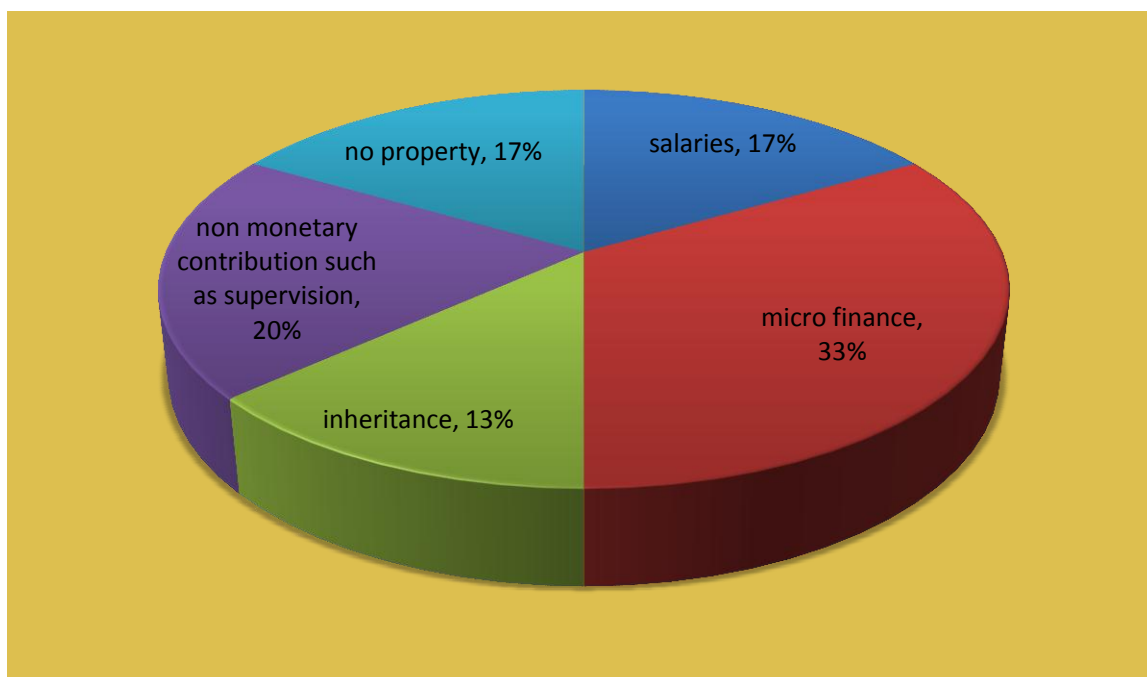
6.2.3 Economic or class structures

As a result of changing dynamics and globalisation, women are taking an active part and performing multiple roles to support their families. These roles or burdens are not readily recognised. A number of women indicated that their husbands were retired or were unable to shoulder the economic expenses of the household; they were thus forced to enter into businesses and microfinance to raise cash for educating their children and taking care of the household expenses. For others, women's assistance with the household expenses even gave their husbands the capacity to develop property. Many husbands do not assist in repaying these loans, thereby forcing women to shoulder these expenses alone. There were times when men would take up loans that would cover a higher share hence cutting back on the women's share in the household expenses. This forced women to raise cash to supplement or even cover the deficit in the home.

In the FGD it emerged that men are untrustworthy and in many instances expected management roles to be handed over to them by women at all costs. Even when the wife was the sole source of the finances, they expected her to hand over the finances and management role in respect of any developments. Some women complied for fear of disrespecting or emasculating the man or of provoking squabbles in the house. However on being handed over the moneys, the husbands would register property exclusively in their names and omit those of their wives. This makes women vulnerable to exploitation as they are outside the ambit of protection under conservative interpretations of Islamic principles. Misconceptions by a male respondent that Khadija (the Prophet's wife) handed over management of her property to him after marriage did not augur well with the women during the FGD. A story was shared by one female respondent whose cousin was married to a pauper; his jealousy of her and her property was so strong that it drove him initially to misappropriate the property and eventually to murder her.

It emerged that all the women who considered themselves housewives, apart from performing domestic chores, were actively engaged in small businesses to supplement their husbands' incomes. With this income they were also able to take care of their own needs and service the loans that they received from the microfinance institutions. This demonstrated that men do not always maintain their families, let alone their wives. Of the 30 female respondents interviewed, microfinance accounted for the highest contributions by women towards immovable matrimonial property accounting for 33% as shown in the chart below. The Administration Office indicated that since the advent of microfinance, women are now exposed and are contributing towards property whether or not they are employed. This was exhibited by the large number of women visiting their offices for verification of forms.

Figure 3: Chart showing the source of women’s contributions towards immovable matrimonial property



However, despite microfinance being a blessing, it has also become a curse as some men abdicate their duties or marry second wives when they see that their wives are able to support themselves. One respondent confirmed this when she shared her story in which she was unemployed and her husband worked as a teacher. She joined a microfinance scheme to supplement her husband’s salary to finish the construction of the matrimonial home. Her husband then totally abdicated his duty of supporting his family and married a second wife. His first wife eventually became exasperated with the situation so she and her children left the home. Since the house was built on family land, her husband told her that it was pointless for her to even try to claim a share in it. In the case of another woman, her husband sold the property without any regard at all for her share in it, settled elsewhere and married another woman forcing his former wife to engage in vending *samosas* in town to sustain herself and their children.

Class differences may provide wealthy Muslim women with options that are not available to poorer ones. For instance, in the case of *Bakhressa*,²⁶ the wife, Nasra, was economically able

²⁶ See footnote 27 below.

to engage more than three advocates to defend her claims and acquired immeasurable wealth after divorce despite being married for only a short period of time, had no children and was not gainfully employed. It therefore becomes clear that economic, social and ideological factors in society affect men and women differently.

6.2.4 Agency by women

Sometimes women are powerless to help themselves, especially when they treat marriage as an end in itself. For such women the breakdown of their union brings about a breakdown of their spirit as emerged after a FGD in which a woman who was used to a comfortable life became disoriented on divorce. Two respondents shared the following about her:

‘I don’t understand why she did not want to share her story, whereas she lost everything after the divorce when the husband threw her out, she was so broken and desperate she resorted to selling illicit brew!’

Such a picture forms the common assumption and essentialised Western perception that all Muslim women are homogenous and passive and they all accept their bleak lives. This is because they are perceived as not knowing any other alternative or because they do not have the option to fight the prescribed law of God as administered by a patriarchal system. For women of The Third World it is worse as they are painted as victims of a demonised government of men who oppose gender rights and such a perception tremendously underestimates women’s ability to rework gender dynamics (Sait and Lim, 2006: 130).

The converse is true, however, as many Muslim women have found room to articulate their own distinctiveness and have realistically manoeuvred to combat discrimination through selected Western feminist or traditional strategies, especially where they are not in contravention of Islamic principles (Sait and Lim, 2006). This is the case where, for example, women engage the services of advocates to represent them and continue to seek legal counsel to ensure the fulfilment of their rights.²⁷ Similarly, the women respondents indicated they would prioritise the Kadhi first because of religion. However, in the absence of a favourable decision, they would opt for the High Court where the recognition of equal shares on dissolution are a constitutional guarantee. To this end some Muslim women have filed 5% of

²⁷ The case of *Nasra Abdiwahab v Bakhressa; Salma Abdul v Feisal Awadh*.

the cases in the High Court as shown in table below. The numbers are still low; however, ingrained agency can increase them tremendously.

Table 3: Showing the number of cases filed in the High Court by Muslim women

Year	No of matrimonial cases	Muslim parties
2011	51	2
2012	63	5
2013	84	3
Totals	198 (100%)	10 (5%)

O'Brien is right on point when she argues that contrary to the common belief that it is a woman's biology that is the source of her oppression, reproduction can also be the source of her 'untapped possibilities' (Tong, 1989:78). This was demonstrated in cases where women used their children to secure their right to access or use property, if not ownership. Instances are where women file a case in the Children's Court to ensure that the matrimonial property is deemed to be shelter for the children.²⁸ Several cases in the Kadhi Court also had the effect of giving women a share to use (to live in or to collect rent) with their children, for example, in *Esha Maulid v Mohamed KCCC 105/2009*, the court issued an order against the husband to prohibit him from chasing away his wife and she was allowed to use two rooms for herself and the children. On the other hand, in the case of barren women there may be a need to employ alternative techniques as the Chief Kadhi stated that in the absence of direct contribution and evidence barren women will leave empty-handed and he gave the analogy of 'others will sow but not reap'.

Women resettle priorities and use tactics to contend with a varied religious and socio-cultural context within the Islamic framework while applying Islamic judicial reasoning (*Ijtihad*) (UN HABITAT, 2005). For one respondent, an agreement made during the lifetime of her husband secured her matrimonial property rights during and after his death making her sole owner. In the case of another Muslim convert, production of all the requisite evidence with respect to the debts owed by the husband and claims regarding her rights as a Muslim wife ensured she recovered a considerable sum amounting Kshs 3, 602,948/40 (Approximately US\$42,

²⁸ The case of *N.O.M v M.M. Mombasa Children's Case No 32 of 2010* (pending).

387.60) at the time of judgment in 2010.²⁹ For another, she had her husband construct two houses on two parcels of land she received as her share of an inheritance and since the divorce she has lived there with her children.

Outside the court system, semi autonomous social fields, such as the Chief's office, are often used. Debunking the myth that Muslim women are passive are stories of women who refused to leave their husband's houses or properties that they had perceived were bought as 'gifts' for them because they had 'negotiated' with their husbands. One woman appeared before the Chief and threatened to reveal 'to the entire world' her husband's poor bad marital behaviour, including his desire for anal sex. The Chief also narrated a story of one middle-aged woman whose husband appeared at the Chief's office threatening to evict her. On the day of the hearing she appeared with a cup in her breasts and calmly demanded that her husband refills all the 'secretions she has ever unleashed' during marriage (meaning that her husband should return her to her youthful position). Such tactics humiliate husbands into leaving their wives or former wives in their houses without any further disturbance.

Often in-laws can be a source of oppression, but apparently they can also be a source of strength. Women keep their husband's families close to them to ward off any irresponsible behaviour from them during marriage. Often times they would side with their own, but families who practise fairness often support women who have been wronged by their male relative. For example, in one case a convert wife was returned to her natal home by her husband, who resorted to living in the matrimonial home with a prostitute. He refused to bury his child or attend his mother-in-law's funeral after the separation thereby infuriating his family who then supported his former wife in her pursuit of her property claim.

It appears that equipping women with agency at the early stages of their married life, when they are made to face reality even before it dawns on them, will ensure that they take charge of their matrimonial property rights. Waiting until the marriage breaks down before a woman is forced to pursue her rights is often counterproductive.

²⁹ *Angelika Linke Alias Malika v Abdul Waheed Ali* (KCCC No 136 of 2009). The plaintiff was a foreigner living in Mombasa on an alien certificate. On divorce she claimed, among other things, past maintenance, cost of installation of grills, wrongful divorce, *eddad* and compensation for relocating from Germany. Orders were granted and the attachment and sale of property made against the husband's property on refusal to pay.

6.2.5 Experience as a teacher

The status of woman is not only determined by religion but by class, kinship, location, ethnicity, literacy, age, as well as displacement. On the issue of displacement, those who had undergone a previous divorce are likely to be more alert about the issue of their right to shares in matrimonial property than those who have not. For example, one respondent who had undergone 2 divorces and widowhood indicated that she was not going to give up on her share easily:

‘After my first marriage I left with nothing. In my second marriage, despite directly contributing to the property, my former husband refused to give me a share, I did not pursue the issue because I feared being bewitched. With my last husband I contributed 50%, when he began his behaviours (abusing drugs) and was selling stuff from the house, I made him write a letter that the property is mine and the child’s to prevent him from disposing it.’

Two women respondents who had both experienced divorces and left their former husbands with nothing or only a small share, indicated that in view of their previous experience, they had to secure their interests in the property. One decided to purchase separate property while the other wanted her husband to acknowledge his as well as her shares in their houses, especially since he had other children from a previous marriage.

6.3 Lack of awareness of rights

All women indicated that they were socialised to be dutiful homemakers so their guardians felt it was wasteful to educate them as girls since they would simply end up in the kitchen. The survey of 50 respondents revealed that the majority of women, 30 %, were educated up to basic primary level, while 8% were educated up to secondary level (see Table 4, below).

Table 4: Showing the level of education of the respondents

Respondents	Level		Primary school		Secondary school		College/ University	
	No formal school	Undisclosed	Complete	Incomplete	Complete	Incomplete	Diploma	Degree
Women	4	2	15	2	4	3		
Men		1	4		3	1		
Sheikhs/ imams		1	1		4			5
Totals	4	4	20	2	11	4		5

In Islamic education of the 54 respondents, including lawyers, a majority of women, 35%, can hardly read Arabic texts having been educated to basic level, while 7% of men and 7% of women reached intermediate level where they can read with a little translation of the familiar texts (see Table 5, below).

Table 5: Showing the level of Islamic religious education of the respondents

Sex	Never attended	Basic (can hardly read Arabic)	Intermediate (can read with little translation of familiar areas)	Diploma (can read and translate literally)	Degree (translate and apply reason)	Not disclosed
Women	3	19	4	1		3
Men			4			4
Sheikhs/imams/chief				3	3	4
Lawyers				1	1	4
Totals	3	19	8	5	4	15

In marriage, women are generally unaware of the rights of a breastfeeding mother. The majority of women indicated they are supposed to compensate their children if they fail to

breastfeed them for two years. This is contrary to 2:233, which provides that a nursing woman should be compensated for nursing the child. Surprisingly, none of the Sheikhs or Imams knew of this verse but rather of the verse that insisted on compensation for a nursing woman after divorce under 65:2.

I discovered that women were generally aware that they have a right to unsettled dowry or maintenance (*eddat*) for the period during a divorce, unless a woman is pregnant at the time of pronouncing *talak* (divorce) in which case her maintenance ceases upon delivery. However, when it came to issues of property, 82% or the majority of the group confused their religious rights with their secular ones. (The minority, 18%, comprising one woman and some female lawyers did not). Alternatively, they confused their inheritance rights with their rights to division of property on divorce indicating that they are entitled to an eighth (1/8) share of the property on divorce, regardless of the amount of their contribution. Others indicated they had no rights under Islamic laws on matrimonial property. Some common replies were as follows:

‘I have heard that when one is married she is entitled to a share of the property especially where there are children. If there are no children she still has a little share of “*thumni* (1/8)..., *chake ni chetu, changu ni change*” (“His is ours, mine is mine.”).’

‘We began when we had nothing. We built together. I gave him the idea to buy some property. I would prefer normal laws under Constitution because under Islamic law I am not entitled to anything until he dies. The only applicable law in Islam is inheritance. A woman only gets dowry if it has not been paid on dissolution.’

Others indicated that the first wife is entitled to a half share, especially where her husband wants to marry another wife. The women often replied:

‘If parties are divorcing they will divide the property equally regardless of any other issues such as other wives.’

Some respondents indicated that self-sacrifice is enough to secure a share for them:

‘Women sacrifice their entitlements to enable husbands to invest. I have denied myself my right to proper maintenance and pleasurable life hence my share would be equal when divorcing.’

On the other hand, men believed more in the concept of separate property, and they would easily convert a woman's share into theirs. Men do not support sharing matrimonial property equally and are quick to indicate that it has no basis in religion. According to one respondent, who was already divorced and had a case against his wife, it was a clear case of selective application of Islamic principles in that he even refused to pay the balance of his wife's dowry saying he would pay it in heaven. He refused to acknowledge the contribution made by his wife. An interview with the wife confirmed that she had contributed to the property directly and had even secured the job for her husband when she had visited the local Mayor at the time who had given her a blank letter of appointment. (By way of comparison, using a woman's status to obtain property in Malaysia is deemed a contribution³⁰). He appeared to know the state law position as well but he clearly refused to comply with it. He indicated:

‘I know both Islamic and state law. The state law allows for equal sharing but I do not support it. Where property is registered in my name alone then it is mine, for the woman she should only take what is hers (*chukua kilicho chako*). If she had allowed me to divorce her in peace, I would have allowed her to stay in the house because I do not want my children to suffer.’

One man in the FGD said, ‘Leaving property to one woman is *Kufru!* (a transgression of God's law!)’. Agreements are known by few in the community, and even then they believe that when women propose that they enter into one, it is because women are thinking of a divorce. The general thinking among men was that agreements are out to commercialise marriages.

The Sheikhs acknowledged women's lack of knowledge. They indicated that women themselves were very ignorant and refused to seek knowledge on issues pertinent to their lives. The blame cannot be placed entirely on the sheikhs or imams; women also have a duty to seek knowledge. The sheikhs were aware of the difficulties that women face and were sympathetic towards women who seek advice from people or Imams who themselves have a very limited knowledge or lacked a deeper understanding of Islamic principles and, hence, are being misled. They agreed that even in the absence of express provisions on matrimonial property in the Quran, it is possible to use *Qiyas* and *Ijma* to reach a just decision.

³⁰ *Tengku Sahara v Dato Dr Hussain.*

The sheikhs were aware that several factors contributed to the problems mentioned above. These include a general lethargy towards seeking knowledge by the Muslim community, ignorance, cultural practices being confused with religious principles and a general concentration on devotional acts during information dissemination. These factors were confirmed by more than 80% of the sheikhs interviewed. One key informant added that the focus on devotional acts always stresses that life after death is better than a thousand years on earth. Another stated that the small number of qualified Imams (approximately 1% in Mombasa) is also problematic.

I attended four sessions of Friday prayer in a mosque in the town area, where the sermons were always focussed on the wife's sacrifices for her husband; that obedience and forgiveness will take people to heaven, while forgetting that religion enjoins one to fight for what is rightfully theirs. In fact, the Imam concluded by questioning, 'In this current world are there any such women who would sacrifice themselves and their well being for the love of the husband?' One woman respondent attending another mosque commented as follows:

'In the mosque, the sermons always focus more on the duties of a woman leading to our further oppression. It is usually about what a woman will do for a husband. You are told that the heaven of a woman is at the feet of the husband. You will however not be told what the husband is going to do for you or what you will get in this lifetime. When I question relatives, I am told, "*Mama, wakufuru.*" ("Mother, you are transgressing.")'

The lack of awareness or limited knowledge of Islamic principles governing matrimonial property does not only affect women; it affects even lawyers. They tended to argue Islamic principles using limited Islamic law arguments that may affect women adversely. For instance, one lawyer indicated that in the absence of the concept of matrimonial property in Islam, a woman cannot benefit. Furthermore, even those in political leadership perceiving themselves to be speaking on behalf of the Muslim community mislead many women in the quest for equity and equality, especially where such information is disseminated through audio or visual electronic media. For instance, in 2012 during the debates on the Marriage Bills, prenuptial agreements were denounced as being un-Islamic and likely to discourage marriage in place of cohabitation. Sheikh Dor, a nominated Member of Parliament (as he then was) and leader in the Council of Imams, reading a statement in the media and quoting Hassan Omar, a Human Rights Commissioner (as he then was), said:

‘Islamic law rights are divine rights and responsibilities will not be compromised by Muslims...The Matrimonial Properties Bill proposes a regime on sharing of matrimonial property, and, among other things, allows couples to enter into pre-nuptial agreements, that, according to Omar, will discourage young people from marrying or force them to enter very cold marriages or just stay together without formal marriages’ (Ochami D. 2012).

According to Ms Moza, women do not read the Quran but rather wait for men to inform them as they view religion as the preserve of men. They are often told God never sent a female prophet and are therefore misled into believing that they are the lesser beings. They are ignorant and do not seek authentic sources. There is also a lot of misinformation that is based on culture and socialisation. The general approach tends to lean towards spreading half the knowledge while omitting important parts of history that empower women. For instance, Abdelkader³¹ (2012) exemplifies Aisha, the wife of the Prophet, his confidant and advisor. She was a Muslim scholar of great eminence and voice of jurisprudence. She was the first to assume the caliphate position over the Muslim community following the Prophet’s death. Such stories are hardly shared.

6.4 Legal reform and awareness raising

This section explores the way forward to facilitate legal and attitude change. It also explores comparative jurisprudential developments towards exploring possibilities for reform in the Kenyan context.

6.4.1 Awareness raising

The investigation revealed a lack of knowledge as well as misconceived perceptions regarding Islam and women’s matrimonial property rights. It therefore follows that a strategy involving the Islamic leadership needs to be employed, to unshackle women from the conservative approaches to religion as well as the oppressive cultural regimes. For instance, misconceived views of some sheikhs that *talak* is only a right that can be exercised by men puts women in the vulnerable position of being easily but falsely persuaded to forego their entitlements. This is contrary to the Islamic notion of *talak al tawfid* (30:33) which is hardly practised as compared to the prevalent practice of *khul* (ransom) divorce where a return of property is expected.

³¹ Engy Abdulkader, a female Muslim human rights attorney and activist, during a talk on 25/11/2013 at Leven House, Mombasa.

To end such misconceptions, Sheikh Al Saggaf stated that other jurisdictions such as Malaysia have taken steps to curb such ignorance through marriage counselling. He said:

‘The lack of knowledge of women (and men) can be dealt with through a Council that gives a marriage course and advises couples on conditions prior to the marriage including property, as it happens in Malaysia. Consequently, the divorce rate has also been tremendously lowered...’

Currently up-and-coming international female Muslim scholars, such as Abdulkader, S.S. Ali and locally, Ms Moza, have taken the initiative of adopting positive Islamic teachings for the benefit of women. Ali stresses that the emergence of female Muslim scholars in the society will play a major role in evolving interpretative strategies on the basis of the Quran and other authentic sources. This will assist in providing a basis for Muslim women to argue for their rights and entitlements from within religious traditions which men and their leadership will find difficult to denounce. Such a move will raise their discomfort levels as the power of religious discourse shall no longer be the preserve of the self-appointed ‘clergy’ who will see an increasing number of women engaged in scholarly research and interpretation of religious texts (Hellum, 2009: 402).³²

Abdulkader indicated that in countries where legal pluralism has been given constitutional backing it is much easier for women to articulate their religious views; however, it is important for women to be empowered. She referred to the fact that within the American system agreements made by Muslim parties who had not been married under the government system were rejected by courts, especially where the men denied the existence of the marriage. This forced the Imam to insist that parties get married under both the nation’s regime as well as the Islamic law in order to validate such agreements. She stresses the need to raise awareness by re-looking at women’s rights using an historical approach to ensure that the human rights agenda is fulfilled in society. She states:

‘Specifically, Muslims can further the human rights agenda by re-examining the lives of the very first Muslim women who lived during Islam’s formative period as more than historical figures but as modern Islamic models to be emulated today. Indeed, these women embody viable political, social and financial models with modern applicability’ (Abdulkader, 2012).

³² Ali S. S (2009) Interpretative strategies for women’s human rights in a plural legal framework.

She gives examples of women in Islam who played leadership roles, such as Shafah bint Adwiya, an intelligent woman and skilled politician who administered medical treatment to patients. Aisha bint Abubakar who, as earlier stated, was a capable leader, whose education and intellectual spirits were nurtured by the Prophet himself. On the death of Caliph Athman she gave a speech in the mosque in front of both men and women, swearing to avenge his death (Abdelkader, 2012). In addition, Khadija (the first wife of the Prophet) was a very rich and capable merchant who owned and controlled her own wealth without interference from the Prophet. These lessons from historical perspectives should help women to acquire tools that empower them to falsify stereotypical expressions, such as women cannot be leaders or managers of their own property.

Such treatment of women, however, was shown by the research to be problematic in the Mombasa of today where even educating a girl child was regarded as a waste of time or inconsequential.

Ms Moza encouraged us to look at *Ibrah* (history) to learn lessons from the past. She started reading the Quran by herself in order to increase her level of knowledge as she continuously compares and contrasts different authentic sources. Such approaches will ensure the empowerment of women and their awareness.

6.4.2 Legal reform

Many women indicated that they could not trace the Islamic principles within the Quran and had to consult others to find out what they provide, and, when told that they had no rights, they surrendered. The Kadhi's discretion played a major role in decision making. A legal reform process towards substantive provisions in the MMDS Act to ensure that there is a uniform application of Islamic provisions which may eliminate the confusion created and misinterpretations often perceived was supported by 48% of the respondents. Another 4.6% did not think law is the solution since it may interfere with religious freedom. Their view is that the Quran should be applied in its original form to ensure authenticity or it will result in 'secularising Islam'. A further 39% did not disclose the way forward, while 7% had no idea what was needed to secure women's rights.

A perusal of the Kadhi Bench Book revealed the narrow approach being applied by the judicial Kadhis which affords them a wide, unfettered discretion. No attention was given to matrimonial property issues and the focus was on maintenance and inheritance issues.

According to El-Fadl (2009) as quoted by Ali, codifying Islamic law may not be easy in view of the divergent legal opinions that apply to different schools of thought (such as *Hanbali*, *Hanafi*, *Shafi*, etc.) and the application of debated principles to different communities. It, therefore, becomes difficult to ascertain the predominant view within a particular society, let alone establish a predominant view in Islamic juristic thought as a whole (Hellum, 2009: 392). This however should not make it entirely impossible.

In ensuring a successful reform process, conservative religious practices and views (where men think for themselves and refuse to rock the boat, i.e., diverge from the norm) or even practices of fundamentalism (that this is God given and cannot be changed, biased, dogmatic, rigid and without reason) must be dealt with. Such an approach will ensure the social equality envisaged under the Quran and Islam (AWID, 2008).

Legal reform may also be allowed to include the contested issue of a female Kadhi, this is because she may be able to solicit more information from the litigants and offer decisions that women feel are more justiceable and acceptable to them. However, the key informant male respondents were clear that a female Kadhi cannot officiate over marriage. One suggested that the problem will be in their name and not necessarily the other duties that will be bestowed upon them by law.

A total rejection of difference in roles between the sexes will be counter-productive in ensuring substantive justice during law reform. Since Islam recognises these differences, it is imperative that a legal reform process accounts for women's difference and biological roles. The decisions made by courts will otherwise be irrational when power inequalities and male supremacy which subordinate women are recognised as the standard in a court of law (Becker et al., 2007: 115).

On that note it is important that laws are made not by individuals alone, but by a group of scholars including women, who are able to interpret the Quran while applying it to the context and the prevailing situation. A social audit to determine the contemporary issues

affecting the Muslim society in Mombasa or Kenya as a whole must be done. Codification of the law should be allowed based on Islamic principles. According to one key informant the application of the four reference points from Quran to *ijtihad* can ensure positive legislation that can work for the benefit of all. Applying comparative jurisprudence from other countries, such as Malaysia and Morocco, while mindful of the local context will also assist the process instead of reinventing the wheel as discussed below.

6.5 Comparative Islamic jurisprudential developments

The example set by countries such as Malaysia and Morocco that have successfully reduced Islamic rights to family laws and entrenched Islamic principles relating to matrimonial property should be emulated. The starting point has been to acknowledge that the Muslim marriage is a contract which can allow parties to negotiate its conditions. These conditions are allowed as long as they are not contrary to the meaning of an Islamic marriage. They may range from place of residence, division of household responsibilities, educational options, restrictions on polygyny, as well as the proprietary rights of the parties during and at the dissolution of the marriage (WLUML, 2006: 168-169).

6.5.1 The Malaysian context

Malaysia, which is governed by a dual legal system, has provided for separate Islamic and secular family laws. They have a comprehensive law and developed jurisprudence on family issues such as marriage, divorce and maintenance that acknowledge Islamic principles. The applicable law for the majority of the States for Muslims is the Islamic Family Law (Federal Territories) Act (IFLA) of (1984). In the Act they have acknowledged the matrimonial property concept referred to as *harta sepencarian*, which is described as property jointly acquired by a husband and wife during the subsistence of their marriage in accordance with the conditions stipulated in *hukum syarak* (Islamic law according to any recognised Muslim sect (*mazhab*)) (Ibrahim, 2005).

The *Shariah* (*Syariah*) Court has jurisdiction to hear and determine claims relating to matrimonial property. Section 58 of IFLA gives power to the court on the pronouncement of the divorce order or *talak* to rule that the matrimonial property acquired by the joint effort of the parties during the marriage be divided or the property be sold and its proceeds be divided between the parties. The court in carrying out this power considers:

- (a) The extent of contributions made by each party in monetary terms, property or work involved;
- (b) The debts owed by one of the parties for their joint venture;
- (c) The needs of the children from the marriage who are not of age and the court must make a fair division according to each person's effort or contribution.

In instances of jointly acquired property, the court is required to be inclined towards equality of division. The court is also given power to divide property or the proceeds of property acquired by the sole effort of one party during the marriage. The court has to look at the efforts of the party who did not contribute because for instance they were taking care of the children or performing domestic chores or working in the family business, e.g., a farm; however, the party who acquired the property as a result of their own efforts is given a greater proportion of it. The court may also look at the substantial improvements that have been made by one party to the property acquired by the other (Section 58 (2-5) of IFLA). Both direct and indirect contributions made by the parties during their marriage are recognised in an effort to protect housewives.

The definition of assets that comprise matrimonial property is, however, left to the judges to decide. Decisions on what comprises 'matrimonial property' have been made to include the matrimonial home, chattels, capital as well as the earning power of the spouses³³ (Jammaluddin, 2010).

Where a widow contributed to property through a piece of land inherited from her parents, the Kadhi decided to give her half a share of the property even though it was registered in her deceased husband's name.³⁴ He stressed that the concept of *harta sepencarian* is property that is acquired by parties in marriage through money or joint effort.

The principle recognises the role played (such as monetary, joint labour or effort) by a divorced spouse in its acquisition or improvement. Upon the production of proof that the

³³ *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109.

³⁴ *Yang Chik v Abdul Jamal* (1985) 6HJ 146; [1982] s MLJ xxix.

property was acquired during covertures, it is presumed to be matrimonial property. It therefore falls upon the party who denies the claim to rebut the presumption. Not all property acquired before or after marriage falls under this principle unless substantially improved by the other spouse or jointly acquired during marriage where contribution must be in the form of direct financial input (Ibrahim, 2005).

In *Noorbee v Ahmed Sanusi*,³⁵ the court recognised the stereotypical roles of the sexes as the wife stays home to look after the household while the husband goes out to seek a livelihood. Without a housemaid, her contribution in the form of cooking, washing and looking after the house should be recognised (Rauntenbach and Goolam, 2003: 66). In the case of *Haminah Bee v Shamsudin*,³⁶ the court stated that work done by an unassisted wife without a servant, relieves the husband's burden by at least a third. Even the utilisation of the wife's name (in this instance, she came from the royal family) to facilitate property acquisition by her husband amounts to a moral contribution made by the wife.³⁷

The judges faced with these claims usually rely on some Islamic jurisprudence (*fiqh*) references. In the absence of agreements, jurisprudence developed in other jurisdictions can significantly improve a woman's prospects of obtaining a share of the property. According to Al -Man Qayyim al Juziah (1961),³⁸ an Egyptian scholar as quoted by Mohammad (2002), where property acquired in marriage is registered under the name of one spouse, usually the husband that does not exclude the wife, he stated:

‘It cannot be assumed based purely on what is held in hand or having authority over a name or by having the name on a land title and the likes becoming the rights of only a single person if the property is acquired during the duration of the marriage, in fact its existence is of no consequence...’

The Malaysian perspective of taking into account the tangible and intangible contributions is both equitable and just.

³⁵ (1978) I Journal Hukum 63.

³⁶ [1979]1 HJ (2);71.

³⁷ *Tengku Saharah v Dato Dr Hussain* (1980) 3 Journal Hukum 125.

³⁸ (1961) Al TARuq Al Hukmiyya Fi al-Siasah-al – Syariyyah book printed by Maktab'ah Al-Madani, Egypt .

6.5.2 *The Moroccan perspective*

On the other hand, Morocco provides a middle ground under the Family Law Code (2004) (*Moudawana*) which requires two officials known as *adouls* (public notaries) attending the marriage to inform the parties of their property regime rights during the marriage ceremony. This is to address women's ignorance of the possibility of negotiating property rights.

Article 49 of *Moudawana* establishes property regimes but also allows parties to own separate property, although the parties may agree on the investment and distribution of assets acquired during their marriage. Women can use these agreements to protect their rights in marriage and at its dissolution by including clauses that protect their property either acquired before or during their marriage. These rights extend to financial relations, ownership, administration, use and disposition of property (UN Women, undated).

Parties are allowed to make an additional binding agreement that can be varied or modified upon application to court by the party bound (articles 47 and 48). The usual additional contractual clauses give the parties the choice between:

- (a) Community of property where property acquired before and after marriage is all considered joint property. This regime may deny women their reserves for instance on inheritance.
- (b) Modified or partial community of property where property and money obtained during marriage are considered joint property. Property acquired before marriage remain the separate property of the spouses unless stated otherwise. This may have an empowering effect for women where they are protected from abuse by their husbands, for example, where they dispose of property without spousal consent. A woman is guaranteed a share in the property.
- (c) Separation of property where property acquired before and after marriage as long as it is registered in a spouse's name remains individual property. This has the potential of denying women their rights to shares at the time of dissolution (UN Women, Undated).

Where parties do not enter into an agreement, general standards of evidence taking into account each spouse's contribution, the efforts and responsibilities assumed before the development of the family assets are resorted to.

In conclusion, these two countries which use Islamic principles provide a comparative basis for reform that can be emulated to ensure that Muslim women's rights are protected. They place an obligation on the government to protect women from their own ignorance and stereotypical roles that discriminate against them by providing an alternative matrimonial property law regime that ensures the Muslim minorities are protected.

6.6 Emerging themes: An analysis

Islam is supposed to govern the individual in all aspects of life. Within the Kenyan system Islamic family laws have been left to operate alongside the mainstream law. However, confusion reigns when these Islamic laws are unclear. To this end the unanticipated issues that I encountered which I had to deal with superficially were:

Custody: where women used children to obtain access to or ownership of matrimonial property and maintenance. The common belief was that if children are given their share, women will also have shelter and food. Women chose the mainstream Children's Court to file their cases due to its predictability, despite the expectations being higher on them (i.e., joint equal responsibility to maintain minors) than in the Kadhi Court where the duty to maintain falls exclusively on the husband. This is because maintenance can be spread over lengthy periods, mostly until the child is 18 years, as compared to the Kadhi Court where a man can be given custody of a seven year old boy. Women were not comfortable with step-mothers taking care of their children.

Polygamy: many women were suspicious about second or subsequent wives coming in after property development. They did not want them to get any shares to the property. The men took advantage by marrying second wives when they were able to obtain property and enjoy the fruits with them. This left out the first wives although they may have been the source of the improvements or labour. Many women labour tirelessly throughout their marriage in the hope that that will prevent the husbands from pursuing another wife. However these sacrifices did nothing to deter men. The absence of a legal framework dealing with this issue also makes it hard for women to know how they stand in relation to the law.

Inheritance: women confused their inheritance shares with matrimonial property shares during divorce. Once again, children's inheritance rights were sought to be relied upon at the

time of divorce despite their not being applicable. Women abandoned their rights to property if they believed that their husband had written a will (which can be changed at any time before death) distributing shares to their children.

The lack of a legal framework dealing with family issues at the Kadhi Court is the main source of confusion for women.

Due to time constraints, these issues cannot be discussed fully and can form topics for further research in future.

CHAPTER 7

7.0 CONCLUSIONS

7.1 Introduction

This study set out to explore the concept of matrimonial property within Islamic and legal frameworks in Kenya *vis-à-vis* the social, economic and legal realities of Muslim women in Mombasa County. The study also delved into whether contributions made by women to their households are being taken into account and translated into matrimonial property rights. The available literature, especially in Mombasa and in Kenya, in general, was insufficient to answer the questions raised. The questions for determination included: whether the legal and Islamic frameworks protect women's matrimonial property; whether the duality of the legal system is problematic for women; whether the interpretation and application of state law and Islamic principles relating to women's matrimonial property rights and court procedures are problematic for women; whether socio-cultural and economic factors, class and kinship structures and the extent of the knowledge of their property rights determine women's capacity to actively pursue a share of the matrimonial property and whether substantive provisions in law and information dissemination protect women's rights to property at the time of divorce.

7.2 Findings

The findings were discussed in chapters five and six of this write up. Here we only seek to synthesis the main findings.

Despite common misunderstandings, there are workable similarities between international and Islamic human rights. These similarities call for the acceptance of an alternative approach in human rights as offered in Islam which has a considerably unyielding following.

Currently, there exists a comprehensive matrimonial property framework in Kenya that has been applicable in the High Court since January 2014. Despite the Quran's lack of specific on these issues, a wide interpretation of its verses on property, agreements, gifts, equality, equity and justice, etc., provide potential avenues for protecting women and their rights. The key is to weed out gender-deprecating norms with reference to gender-empowering Quranic

provisions. However, the absence of a comprehensive framework under the MMDS Act and the use of discretion by the Kadhis make it difficult and perpetuate variations between decisions.

The duality of the legal system provides litigants with a choice which the majority of women preferred. The procedures were deemed cumbersome for the ordinary woman with many doubting the fairness of the process, especially where the judgements were unpredictable and varied. This discouraged many women from seeking justice in the courts.

On the other hand, social cultural and economic factors as well as awareness were major determinants in pursuit of their rights by women. Despite women contributing significantly to property, they easily surrender their rights depending on how these factors played out for them. That notwithstanding, other factors such as agency and experience could assist women in resolving to pursue their rights.

Legal reform, therefore, becomes imperative in ensuring predictability and security for women. However, that alone is not sufficient without awareness raising so as to entrench their agency.

The approaches dealing with matrimonial property for Muslim women, especially those appearing before the Kadhi, need to be revisited to ensure sufficient protection. This dissertation presented a contextual outlook on the issues facing women in Mombasa. The human rights approach requires that both monetary and non-monetary contributions be accounted for in reaching justice for women whether an agreement between the parties is in place or not. In essence, women's unpaid work must be attributed the value it deserves when dealing with matrimonial property. This dissertation therefore seeks to improve the current approach taken by the Kadhi Court and hopes to adopt improved jurisprudential Islamic systems such as those of Malaysia or Morocco. The research has highlighted the need for legal reform of Muslim family laws which will facilitate justice for women who currently operate outside the constitutional legal protection. The scale of this debate is, therefore, extensive and multifaceted even at the local level. To ensure successful results, further research on the issues are needed for the attainment of this goal.

7.3 Conclusion

In spite of the dominant worldview that the absence of the concept of matrimonial property within an Islamic framework is untenable, this research indicates otherwise. This research shows that wide and non-conservative interpretation of Islamic principles can facilitate matrimonial property entitlements thus offering more protection for women.

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Appendices

Appendix 1: Claim Form 1 for filing a case in the Kadhi's Court

Form 1

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT

SUIT NO.

..... CLAIMANT

VERSUS

..... RESPONDENT

CLAIM FORM

1. CLAIMANTS PARTICULARS

- a. FULL NAME
- b. ADDRESS (physical, postal and telephone)
- c. GENDER (MALE/FEMALE)
- d. AGE
- e. OCCUPATION/PROFESSION
- f. WHETHER SOUND
- g. RELIGION

2. RESPONDENT'S PARTICULARS

- a. FULL NAME
- b. ADDRESS (physical, postal and telephone)
- c. GENDER (MALE/FEMALE)
- d. AGE
- e. OCCUPATION/PROFESSION
- f. WHETHER SOUND
- g. RELIGION

3. Number of Children and particulars of the Children and their names.

4. Date of marriage between the parties.

4

5. Full details of the Claim.

6.

7. State briefly the evidence in support of the Claim.

(e.g state number of witnesses you intend to call and attach clear copies of the documentary evidence you intend to produce)

8. The facts showing that the Court has jurisdiction

9. Averment to the effect that there is no other suit pending and there have been no previous proceedings in any court between the claimant and the respondent over the same subject matter.

10. Relief Sought.

DATED AT _____ This _____ day of _____, _____

CLAIMANT

Appendix 2: Claimant's verifying affidavit for filing a case in the Kadhi's Court

**Form 2
Verifying Affidavit**

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT**

SUIT NO.

..... **CLAIMANT**

VERSUS

..... **RESPONDENT**

VERIFYING AFFIDAVIT

I, _____ P.O.Box _____ makes oath and states as follows:-

1. THAT I am the Claimant herein and my true place of abode
2. THAT I have read the contents of the Claim herein.
3. THAT I do verify the contents thereof to be correct.
4. THAT I swear this affidavit in verification of the contents of the plaint filed herein.

SWORN at _____ by the said
this _____ day of _____ 20 _____)

BEFORE ME)

DEPONENT

COMMISSIONER FOR OATHS/MAGISTRATE/KADHI

Drawn & Filed By:-

Appendix 3: Rules of procedure and practice in the Kadhi's Court

*Sub
Committee* * *background
document*

RULES OF PROCEDURE AND PRACTICE IN THE KADHI'S COURT

(1) Institution of suits relating to matters of personal status, marriage and divorce.

1.0 A suit for personal status, marriage or divorce shall be commenced by way of a claim form substantially in **form 1** to the schedule hereto accompanied by a verifying affidavit in **form 2** to the schedule hereto to and shall be signed by the Claimant.

(2) Issue and service of summons.

2.0 Summons to appear and reply to the claim shall be issued upon the filing of the claim form and shall be in **form 3** hereto and signed by the Court.

2.1 Service of the summons shall be effected upon the respondent in person by delivering or tendering a copy thereof with a copy of the claim unless the court otherwise directs.

(3) Appearance and reply

3.0 The respondent may appear in person or through an advocate at the Court's registry within 15 days from the date of service of the summons and claim to file a memorandum of appearance and either to admit or oppose the claim. The memorandum of appearance shall be in **form 4** in the schedule hereto.

3.1 Where the respondent admits the claim he shall file a Notice of Admission in **form 5** to the schedule hereto and judgement shall be entered forthwith in favour of the Claimant to the extent of the respondent's admission.

3.2. Where the respondent wishes to oppose the claim and/or make a counterclaim, he shall within 10 days after entering appearance file his reply and/or counterclaim as the case may be and effect service of the same on the Claimant within 10 days from the date of filing thereof.

3.2.1. Where the Respondent fails to appear and reply to the Claim within the stipulated time and the Court is satisfied that the Summons to appear and the Claim were duly served, a hearing date shall be fixed by the Court at the request of claimant.

Provided where there is more than one respondent and either one or some only appear the court shall upon notice issued and served by any of the parties fix a hearing date which shall be served on all parties on record.

3.2.2. Where the respondent makes a counterclaim, the Claimant shall file his reply and defence to the counterclaim if any within 15 days and shall serve the same on the respondent within 10 days from the date of filing thereof.

Appendix 4: Petition against Assent to the Matrimonial Property Bill, 2013

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DAILY NATION
Tuesday December 3, 2013

3rd December, 2013

His Excellency Hon. Uhuru Kenyatta, C.G.H.
President and Commander in Chief of the Defence Forces of the Republic of Kenya,
Office of the President
8th December, 2013



Dear Hon. Uhuru Kenyatta, C.G.H

Petition against Assent to the Matrimonial Property Bill, 2013

Greetings from the Federation of Women Lawyers (FIDA), Kenya

In 1997, FIDA Kenya with the support of several other women's rights organisations launched efforts seeking legislators to enact laws that would protect woman's rights to access, use and own matrimonial property in Kenya. The struggle was enhanced during the drafting and enactment of the Constitution of Kenya 2010, a glimmer of hope for all citizens.

FIDA Kenya is perturbed by Parliamentarians decision to amend the Matrimonial Property Bill, 2013 to exclude the critical components of equal ownership of matrimonial property by spouses in a marriage.

FIDA Kenya is well aware of Your Excellency's commitment to promoting gender equality in all spheres in the country. However, Your Excellency, it is disheartening to see Members of Parliament pass a bill that is unconstitutional and goes against the will of Kenyans, who overwhelmingly voted for the Constitution, very aware of its provision on equal rights for all parties in a marriage. Your Excellency assenting to such a bill would not only defy the Supreme law of the country but also go against the Jubilee Government manifesto and promises to the women of Kenya.

The judiciary of Kenya, through several well thought out judgments, has taken the country steps ahead in developing jurisprudence and granting the women of Kenya their rights. Any legislation contrary to this progress would mean severe regression, and take Kenya back to the decades when the courts struggled with the interpretation of contribution to matrimonial property and the quantification thereof. FIDA Kenya, beseech you, Your Excellency, Mr. President not to ignore efforts and progress made this far and provide leadership in spearheading gender equality in the country and the region.

It is FIDA Kenya's candid opinion that if the bill is assented to in its current form, it will have far reaching implications for the Kenyan citizens. Some of the implications are:

- **Contravention of the Constitution**
The legislation would contravene the equality of rights for parties in a marriage as entrenched in the Constitution... *equality at the time of the marriage, during the marriage and at the dissolution of the marriage.*
- **Unfair practice**
It is great progress that the bill legislates on and defines contribution to matrimonial property to include monetary and non monetary. The initial bill had further quantified distribution of matrimonial property to be equal. It is unfortunate that the members of parliament maimed the bill disregarding equal share as a standard of quantification. Your Excellency, this therefore takes Kenyans back to a situation where there is no set standard for quantification of contribution. For example there is no precedence on how to quantify domestic work. Neither are there economic indicators for quantifying such contributions. This exposes spouses in a marriage to historical injustices where quantification by the judiciary was skewed, unfair and many instances had no basis.
- **Collective effort & goodwill in a marriage**
Kenya is a country with majority believing in religious practice and marriages anchored on religion. The teaching on marriages anchored on good will, unity of spouses, trust and collective effort will all go down the drain if at onset of the marriage, spouses are exposed to laws that do not recognise the parties as equals. The bill erodes the collective effort of both spouses in the acquisition of matrimonial property and the motivation to consolidate resources for the collective good of the family.
- **Effects on the Children of a marriage**
Where ownership of matrimonial property is not harmonised, children will be exposed to waning suffering due to ensuing wrangles within the family over ownership of matrimonial property.
- **Effects on International Community relations**
Kenya is a member of the international community which has largely embraced equality between men and women not only in marriages but for sustainable development of a Nation. Kenya would be alien to the international community as a result of deviation from values, respect for the Human Rights principle of equality and standards within which members of the community are intended to operate.

FIDA Kenya, on behalf of the women of Kenya, calls upon you Mr. President not to assent to the Matrimonial Property Bill, 2013 and allow for a review of the untenable provisions. We urge you to be guided by the spirit and letter of the Constitution and progressive legislative reform agenda.

Yours faithfully,

Ruth Aara
FIDA Kenya Chairperson

Appendix 5: Photographs of houses and women (conducting businesses) in Mombasa Island

