

Matrimonial Property Act in Kenya - What Property is Each Spouse Entitled to in a Marriage?



Marriage makes the parties to it one. However, during the subsistence of the marriage and in the event that the couple divorces and the property has to be divided, there is a distinction between what is/ was matrimonial property.

In the past, Kenyan Courts have had varying definitions of matrimonial property. There were judges who believed that a married woman who forbore the chance to pursue economic activities to take care of the family contributed immensely to the wealth of the family. Others thought otherwise. There was no distinction as to ownership in the property owned by a married couple. As such, when it came to division of

property after a divorce, there were varying ratios for distribution depending on the judge; some thought the parties deserve 50% while in others there were different ratios. **The Matrimonial Property Act, 2013** came to regularize the parameters of dividing matrimonial property.

Though by dint of Article 45 (3) of the Constitution of Kenya the parties to a marriage have equal rights during the marriage and at the dissolution of the marriage, this does not mean that they have a 50:50 share in the property that they have during the subsistence of the marriage and after divorce. It only means that each spouse has an equal right to own property, enter into transactions, to sue and to be sued. In essence, it means that if for instance a husband enters into a contract and defaults on his obligations, the consequence is that his wife will not be held liable. For debts and liabilities acquired before the marriage, the spouse who acquired them has the liability for them even after getting married. Section 4, 10 and 16 of the Matrimonial Property correspond to article 45(3) of the Constitution of Kenya.

The Act allows pre-nuptial agreements where the parties can distinguish between what they own jointly and that which does not form matrimonial property. Without such an agreement, the law presumes that matrimonial property includes:

- Matrimonial home(s)
- Household goods and effects in the matrimonial home jointly owned and acquired during the subsistence of the marriage.

- Any other movable or immovable property acquired during the subsistence of the marriage.
- For the avoidance of doubt, the Act has stated in clear terms that property that is held in trust under customary law (inherited), even if it is the matrimonial home, does not form part of matrimonial property. However, a spouse can acquire beneficial interest in it if he/she makes a contribution towards the improvement of such a home.

In the event of a divorce, the property acquired **during the subsistence of the marriage** is divided according to the contribution of a spouse towards that acquisition. In considering what constitutes contribution, the Courts are guided by Section 2 of the Act under which both monetary and non-monetary contribution are considered. Non-monetary contribution includes farm work, management of the family business or property, companionship, child care, domestic work and management of the matrimonial home.

Property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally, until proven otherwise. For property registered in the name of one spouse acquired during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse. As for property held

in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property. Therefore, in division of such properties, each party has to prove his/her level of contribution, whether monetary or non-monetary.

It is important to note that property rights do not have to be determined only after the dissolution of the marriage. A person can move to court by way of a petition for declaration of rights over any property that is contested between that person and a spouse or former spouse of that person. This can happen when for example auctioneers wrongly attach property that is presumed to be matrimonial property.

In a polygamous marriage set up, the principles espoused above remain the same. However, each wife owns her property distinctly from the others, and is presumed to co-own it with the husband unless the contrary is proved. The Matrimonial Property Act applies to all kinds of marriages except those contracted under Islamic law. Marriages under customary law apply customary to the extent that they are consistent with the Constitution of Kenya.