

COVER STORY

SO YOU THINK YOUR MARRIAGE IS COURT-PROOF?

The draft Marriage Bill 2007 is set for debate in Parliament this year, and contains clauses that are bound to provoke explosive debate. By
MILLICENT MWOLOLO

Angela Chebet and George Kiplangat had lived together for six years and were known as a couple even before he decided to visit Angela's parents and pay dowry in part. But they had no children, although Angela kept hoping it would happen one day. In early 2007, she discovered that George had children with other women. She was very shocked and hurt, but tried to continue living as normally as possible. But the relationship became strained over time.

They would argue for days on end "until he kicked me out of our home," says Angela. She adds that it has been two years since they separated and George has not bothered to find out how or where she is.

"He is living with two different women; he paid dowry for one last year and they have two children." She now wonders: "Am I recognised as his legal wife? Am I entitled to any of the property we acquired in the time we lived together? Can I marry another man?"

Under Kenyan law, Angela and George were actually married even though he had not finished paying dowry. With George having paid part dowry and even visited Angela's parents - if these actions are constituted to signify customary marriage according to her cultural traditions - Angela is indeed, still married to Kiplangat. So, unless she nullifies the first marriage (by following the traditional divorce procedures), she would be committing bigamy if married to another man.

Wife's contribution

As to whether Angela can claim any property, a wife's contribution to the acquisition of matrimonial property is not recognisable under the law unless there is proof of contribution in whatever form. This means Angela can move to court, but she must prove she was married under customary law, and that she contributed to the purchase of property. If not, she is likely not to enjoy any part in it, given a 1995 High Court ruling in the case of Kimani vs Kimani.

In this case, Beatrice Wanjiru Kimani and Evanston Kimani Njoroge had lived as husband and wife under the African Christian Marriage Act for 16 years besides periods of intermittent separation in between. After a strained marriage relationship, the two moved to court seeking divorce. But between them there was property in dispute. Beatrice alleged that she partly contributed to the purchase of this property with money she



Judy Thongori (left) says the draft bill team collected some very interesting - and no doubt controversial - views at the grassroots.
Photos/Photos.com, Peterson Githaiga and Anthony Omuya

borrowed, as a teacher, from the Mwalimu Savings & Credit Co-operative Society. On this basis, she sought a half share of the property.

Evanston denied that she had contributed towards the purchases, adding that some of them were made at a time when their relationship was strained and marked by repeated separations. Other than paying the house help's salary, she made no contribution towards household expenses or the children's welfare, he alleged.

Beatrice lost the case when a High Court decision was made in favour of the husband's argument. The judge ruled that the wife had no claim whatsoever in the property, as the parties were unlikely to have co-operated in acquiring it together in view of their strained relationship.

It was difficult for Beatrice to understand that in 16 years and being a salaried wife, she made zero contribution to assets acquired in the course of the marriage. But the judge ruled that a wife's contribution cannot be presumed: "Contribution of whatever form must be proved on evidence unless it is admitted. There is no presumption that every wife is an automatic asset... A wife, whether she be a working woman or a housewife, must be considered on the basis of her individual worth."

The proposed Marriage Bill 2007 provides for recognition of a wife's contribution whether financial, material or in any other form to acquisition of property within the marriage period, explains Nancy Barasa, the vice-chairperson of the Kenya Law Reform Commission. She emphasises that the proposed bill seeks to safeguard matrimonial property and inheritance rights of either

spouse or children.

It would, therefore, ease procedural issues in the distribution of this property. "In cases where divorce is being pursued, interim measures will be taken so that neither spouse abuses the property," she says.

Apart from customary marriage, there are thousands of Kenyan couples living together in what are known as "come-we-stay" marriages. Although a couple living like this may consider themselves husband and wife, the law does not recognise this as a legal union. Here is a scenario that is becoming frighteningly common in Kenya.

Angry woman

On August 25th last year, the press reported that an angry woman stormed a wedding ceremony at the Kitengela Deliverance Church soon after the vows had been exchanged. Esther Wangari started demanding that the pastor call off Thomas Gitau's wedding to Esther Wanjiru. Drama followed after Gitau and his relatives tried to throw Wangari - who explained that she had obtained a temporary court injunction, while trying to stop the wedding - out of the church.

Wangari reportedly said she met Gitau in 2001 when she moved to Kitengela to work at the Export Processing Zone factory. They

Highlights of the proposed Marriage Bill 2007

- Men required to declare upfront - before any marriage certificate is signed - if a marriage union is potentially polygamous, so that wife-to-be can consent to it or not.
- Non-payment of dowry not necessarily a reason to sue defaulter.
- 'Come-we-stay' unions to be recognised under this law.
- Conciliatory body to resolve marital conflicts before divorce proceedings.
- Either spouse to have the right to pledge credit on the other, as long as they are not separated.
- Matrimonial property and inheritance rights of either spouse or children to be safeguarded.
- Men to enjoy privilege of moving to court and claiming maintenance if there is proof that the wife has been maintaining him prior to the 'neglect'.
- Grounds for divorce to be standardised to include physical emotional and psychological abuse, adultery, cruelty and desertion.
- Child-marriages to be criminalised.

started living together in 2003. At the time, Gitau ran a dry-cleaning shop in Kitengela.

"It was the perfect relationship," Wangari was quoted saying. "Even though his business was not doing well, we were very happy." Cracks in the relationship, which she said was "a marriage in everything but name" started to emerge in 2005, when she became pregnant.

"I had a complication during labour and doctors performed a Caesarean section delivery," she said. "Gitau refused to pay the hospital bill, saying it was too high."

Wangari's brother eventually paid the bill and her parents forbade her from seeing the father of her child. "After a while, we became friends again and he would visit his son. The

"I can't force him to stay with me with for seven years. I want him to support our

This is another of the areas the proposed bill seeks to address. The bill wants unions like these legitimatised as long as it can

together for two years or more and they

wife.

"In addition, if they have a child and have acquired property together, it will be easier for them to legalise their union. This can be done by visiting the nearest district registrar's office and

But as Claris explains, this clause too, is likely to raise a fuss because many communities, and even religious groups such as Muslims, highly value the dowry system and will sue dowry defaulters. "This provision in the bill is likely to be rejected by Islamic leaders," she says.

Apart from addressing issues such as these, the proposed bill also seeks to

contentious provisions are likely to arouse

The proposed bill allows for polygamous

This is in view of the fact that women have always taken men to court to claim maintenance. With the draft bill, men too, will be able to enjoy the same rights.

While some of these issues are a definite plus and face no potential hindrances when the bill goes to Parliament some time this year, others are sure to be hotly debated, such as the standardisation and broadening of grounds for divorce, which may not go down well with religious leaders and the wider society. If passed, the proposed Marriage Bill 2007 will be the first home-made law on marriage.

According to Judy, this is a view that emerged from the grassroots as the draft bill team conducted civic education. And although such a law would give a woman the power to determine the kind of a union she wants, from a moral point of view, Kenya would be moving towards 'legalising' infidelity if the clause were allowed to pass. In fact, cheating husbands would no longer exist since men would have licence to confidently marry as many women as they want, because the law says it is okay.

"This is almost as if to say moral decay will have been given a clean bill of health even as HIV and Aids continues to be a great challenge in our families," says Claris Ogangah-Onyango, the Senior Legal Counsel

at FIDA and another member of the draft bill team.

In addition, she points out, it would be hard for a man to declare from the onset that the marriage will be polygamous. It would be equally hard for a woman to consent to the same.

"This clause is likely to stir controversy, as few men would want to give such powers to a woman. Whether it will pass or be 'uprooted' from the bill remains to be seen," she says.

In 1981, a draft bill was rubbished and shot down by MPs as 'un-African' because it empowered wives.

Here's a clause in the bill that will make men smile: non-payment of dowry should not necessarily lead to a lawsuit. Customary law marriage is based mainly on the payment of dowry. There have been many instances in which men have been taken to court by the girl's family for defaulting on dowry payment, and they have ended up having to pay the amount initially agreed upon by both families.

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In general, the proposed bill recognises that the modern Kenyan family is way ahead of its laws. No wonder it makes provision for all forms of marriage and does not ignore the fact that payment of dowry is a big issue or that there are quite a number of men being maintained by their wives!

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Would you seek permission from your wife to marry again?



Martin Maina, 30, taxi driver

"It would not be her authority I am seeking, rather information I would be sharing that someone else can be part of our family. It is very tricky, but it is better to be honest than lie by saying I would not marry again because things change."



Julius Musembi, 40, businessman

"No because it would cause problems in our home. She would lose her morale and the heartbreak is sure to affect our relationship very negatively. It is better that she stays without knowing that I intend to marry another wife."



David Mwangi, 33, shop attendant

"No, I cannot attempt it because even before I finish asking, I would have lost her support. In addition, all trust would be lost in the marriage and we would be divided on many other matters. And anyway, the tough economy does not support polygamy."



Sammy Waweru, 35, photographer

I wouldn't dare tell her about such intentions. That would break up the house! It is better for a man to hide what he is doing. But I wonder whether there are still men who support polygamy in these days of economic hardship?"

Would you allow your husband to marry a second wife?



Magdalene Mueni, 25, clothes dealer

"What?! I cannot allow it to happen. I am totally for monogamous marriages. If someone else comes in then we will cease to be a couple and become a group! There would be no love as one wife would always be jealous of the other."



Tabitha Njeri, 23, salesperson

"I cannot agree to it. This would only lead to mistreatment in the marriage. I will have given a man the go-ahead to treat me like trash because, after all, he can marry another wife. I will have legally limited my rights!"



Sarah Wanjiru, 25, businesswoman

"Yes, I would rather give my husband the go-ahead to marry again - at least then I would have an idea who he is seeing rather than have him cheat on me. It is a good thing that a man can marry even up to three wives, but a woman would always belong to one man."



Grace Nyambura, 23, sales executive

"No. As a Christian, I must follow the principle of a one-man-one-woman marriage. Other than that, polygamy raises the chances of contracting HIV and with the current prevalence rates, no woman should agree to it."

- Millicent Mwololo

LIVING POSITIVELY

Candles for my mentor

She had every reason to keep living, but it was her time to go

The Aids Candlelight Memorial is commemorated annually - every third Sunday of May. And this year I want to remember Lynda Frances who passed on recently. I was 'cleaning' my mailbox late one Friday, about a month ago, going through a batch of unread e-mail messages and hitting the 'delete' button on most of them. Just when I was about to delete one particular message, a familiar name caught my attention. For a moment I thought I was reading wrong. But the message was clear: an international women's organisation had sent a message of condolence with regards to my friend and mentor, Lynda Frances. I opened my eyes wider. How could Lynda have died? I was in denial and started sweating. I was totally lost for words, my gaze frozen on the screen.

"Where are those who say I'm strong?" I thought. "They should see me now and know they've been wrong all along."

I reached for my mobile phone, still unsure about the accuracy of what I was reading and hoping it was a sick April Fool's Day message. I called Dorothy, the Executive Director of Women Fighting Aids in Kenya (WOFAK). Dorothy is many things to me - from mentor and sister to adviser, particularly in NGO-related issues. She's the giantess whose big shoes I have endeavoured to march in, having preceded me in forming an organisation for women living with HIV.

Years ago while attending a conference in Zambia, Dorothy introduced me to Lynda Frances. Our friendship and sisterhood, despite the distance, was instant and tight. Although Lynda was Zimbabwean - meaning we were culturally poles apart - we shared many things as women living with HIV, including sensitive stuff, gossip and sometimes very intimate personal details.

"First, I want to tell you this isn't an April Fool's spoof," I warned Dorothy. "Please tell me you've seen the sad e-mail."

"You mean to tell me you didn't know?"

Silence.

"In fact, she will be buried next week."

My worst fears had been confirmed. "But how?" I asked no one in particular. And I went on asking as if I didn't know that once a person tests HIV-positive, it is almost as if the Grim Reaper parks outside his or her house to wait...

"But Lynda was too strong to die, too healthy, too..."

"Asunta, are you forgetting I'm still on the phone with you?"

"Sorry. Why didn't you guys tell me earlier? Something could have been done to stop her death. Dorothy, I feel like I'm the next one on the line!"

Dorothy laughed. This is one side of her I have never understood. Even when the whole world is collapsing, Dorothy can afford a word, a laugh, something positive. She's a fortress.

"That was Lynda's time and we have to wait for ours. It will come when it will come."

That's how Dorothy helps me separate issues and deal only with what I can, one at a time.

"Be strong, girl," and without another word she hung up.

I had every reason to be downcast because the last time I met Lynda - and said what would be our last goodbye - was last year in Mexico, at an HIV conference. She was in high spirits.

"When do you plan to become a grandma?" she asked, showing me the picture of yet another grandchild.

"I envy you. I still have a long way to go. Joshua isn't even two years, and Peter's hardly through high school," I responded.

Even now, it's hard to comprehend that she's no more. She had so much to live for, not to mention her international stature in HIV-related matters.

What did Lynda mean to me? The world. We met at a time when I was still green about HIV issues. She inspired and helped me look at Aids from the daredevil angle. And it's been that way ever since. Every time we met she would laugh at me, remembering the days when I was inexperienced.

My mentor was among the first women in Zimbabwe to disclose her HIV-positive status. She started an organisation called The Centre in her own living room. This grew into a community-based organisation that supported thousands of people and was run by and for people living with HIV. The Centre and the work she did nationally, regionally and internationally has become her legacy. Lynda celebrated a whopping 23 years of living with HIV in March this year. She leaves behind a huge family around the world that includes 10 grandchildren.

This year I'm lighting 23 eternal candles to remember, honour and celebrate Lynda's life. She touched and changed my life in a way that has impacted many other people's lives. She will be sorely missed by yours truly.

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This is the diary of Asunta Wagura, a mother of two who tested positive 20 years ago. She is the executive director of the Kenya Network of Women with Aids (KENWA).