THE SPOUSAL CONSENT PARADOX:

Navigating Matrimonial Property Claims, Proof of Contribution, and Title Security after Resma v Ngattah (2025)

The Court of Appeal's judgment in Resma Commercial Agencies v Ngattah (2025) KECA 2214 (KLR) represents a transformative shift in Kenyan property law. By reviewing the boundaries of the Matrimonial Property Act (2013) alongside the Land Registration Act (2012), this decision resolves a long-standing commercial friction: the tension between the constitutional guarantee of spousal equality and the absolute commercial principle of title indefeasibility.

1. DEFINING MATRIMONIAL PROPERTY: USE VS. PROPRIETARY INTEREST

A common misconception in family law is that a long-term family residence automatically vests a beneficial interest in a non-titled spouse. In Resma v Ngattah, the Court of Appeal clarified that labels such as 'family asset' are merely descriptive of physical use, not deterministic of legal ownership. Relying on foundational precedents like Pettit v Pettit and Gissing v Gissing, proprietary rights must be legally established rather than presumed based on occupancy.

Pursuant to Section 6 of the Matrimonial Property Act, 2013 (MPA), matrimonial property is strictly restricted to:

- The matrimonial home or homes;
- Household goods and effects within such homes; and
- Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage.

Consequently, for the purposes of requiring statutory spousal consent for alienation under Section 12 of the MPA, proprietary interests are created solely through proven contribution to the asset's acquisition or improvement. Occupation alone does not grant an automatic half-share capable of overriding formal title.

2. THE EVIDENTIARY DIVIDE: DOCUMENTARY AUDITS VS. LIVED REALITIES

The decision reveals a profound intellectual divide regarding the burden of proof for domestic labor and informal economic contributions. The majority opinion (Warsame and Korir JJA) established a stringent standard, requiring credible, cogent, and documentary evidence to establish a beneficial interest. Asserting that one managed a retail shop or subsistence farm, absent bank statements, receipts, or M-Pesa records, is no longer sufficient to secure a claim. The contribution must be directly referable to the acquisition of the asset.

In stark contrast, the dissenting opinion (Ngugi JA) critiqued this threshold as a 'male-coded documentary economy' that discriminates against informal and domestic contributions. The dissent argued that consistent oral testimony, corroborated by surrounding realities, should suffice to meet the standard on a balance of probabilities, reflecting the informal nature of pooled family finances in typical Kenyan households.

3. TITLE SECURITY AND THE PROTECTION OF THIRD-PARTY PURCHASERS

While the trial court originally nullified the transaction for lack of spousal consent, the Court of Appeal majority reinstated the purchaser's title, prioritizing the commercial stability of the land market. The Court held that a purchaser's due diligence is fully satisfied by a formal search of the land register. Because domestic arrangements are not visible on a public register, bona fide purchasers for value cannot be held liable for undisclosed internal marital disputes.

Furthermore, the Court ruled that marital secrecy does not constitute constructive fraud if the selling spouse holds sole legal title and the non-titled spouse has failed to legally prove a beneficial interest. In the absence of proven fraud, the certificate of title serves as absolute, indefeasible evidence of ownership.

4. OPERATIONAL GUIDELINES FOR CONVEYANCERS AND INVESTORS

To navigate this legal environment safely, practitioners, lenders, and investors must adopt a refined, risk-averse approach to conveyancing:

Risk Mitigation Measure	Procedural Action Required	Commercial Value
Spousal Status Audits	Secure formal statutory declarations or affidavits of single/marital status from the seller.	Shields the buyer from claims of secret disposals by establishing a reliance on sworn documentation.
Physical Site Inspections	Conduct physical site visits and interviews with neighbors/ occupants.	Identifies overriding interests or actual matrimonial occupation not visible on the registry.
Strategic Spousal Waivers	Utilize independent waivers for commercial or non-matrimonial transactions.	Prevents future constructive trust claims without accidentally implying a spouse's beneficial interest.

5. POSTHUMOUS COLLUSION & SHIFTING TESTIMONIES

A crucial litigation risk highlighted in Resma v Ngattah is the risk of posthumous collusion, where a surviving spouse recants previous statements or affidavits to validate a deceased partner's unrecorded beneficial interest. The Court of Appeal firmly ruled that late-stage, contradictory testimonies unsupported by documents do not discharge the high burden of proving a trust. Once a party walks back on a sworn statement, the court is entitled to prioritize the earlier adverse statement, protecting bona fide third-party buyers from collusive claims.

HOW CM ADVOCATES LLP CAN ASSIST

At CM Advocates LLP, we work proactively with private clients, developers, and financial institutions to manage the risks highlighted by this landmark precedent. We assist in:

- **Advanced Conveyancing & Transaction Risk Audits:** Conducting robust spousal status audits, drafting watertight statutory declarations, and performing comprehensive physical due diligence.
- **Litigation & Dispute Resolution:** Representing lenders, purchasers, and spouses in complex beneficial interest disputes, and defending bona fide purchasers against frivolous caveats.
- **Proactive Wealth & Asset Protection:** Structuring prenuptial and postnuptial agreements, facilitating joint registrations, and establishing a clear, verifiable audit trail for matrimonial and separate property.

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