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**SPLITTING THE DIFFERENCE:
SUPREME COURT HANDS DOWN
A LANDMARK DECISION ON
MATRIMONIAL PROPERTY
RIGHTS IN KENYA**

LEGAL ALERT

MAY 2023

Splitting the Difference: Supreme Court Hands Down a Landmark Decision on Matrimonial Property Rights in Kenya

The concept of matrimonial property, and the rights of spouses thereunder, has undergone significant changes in Kenya's legal history. Before the colonial period, division of matrimonial property was largely dictated by customary law, which invariably meant that wives had no rights to their husband's property.

It was not until colonial rule that a legal framework was introduced to govern the division of matrimonial property upon divorce. This was through the Matrimonial Causes Act (Cap. 152) Laws of Kenya, which recognized matrimonial property and the equitable division of property in the event of a divorce.

The Matrimonial Property Act, 2013 ([the Act](#)) provided a major development in the law as the Act sought to comprehensively provide for the rights and responsibilities of spouses in relation to matrimonial property. The Act further sought to provide a legal framework for the ownership, management and division of matrimonial property, applying to all types of marriages and to provide clear guidelines as to what constitutes matrimonial property.

Jurisprudential Evolution of Matrimonial Property

On 18th August 1882, the Married Women's Property Act came into force. This legislation was enacted in the United Kingdom and applied to Kenya and aimed to provide married women with greater control over their property, separate from their husbands and recognise their contributions to society and the economy. It gave married women the right to own and control property, including the right to buy, sell, and inherit property, to enter into contracts and to sue or be sued in their own name.

While interpreting this statute, Courts required parties to prove their contribution towards the acquisition of matrimonial property. For example, in the case of [Gissing v Gissing \(1971\) AC 886](#), the House of Lords held that a spouse could only get a share of matrimonial property commensurate to their contribution.

Similarly, in [Pettitt v Pettitt \(1970\) AC 777](#), the House of Lords proclaimed that the improvements by the husband were insufficient to create an equitable interest in the property.

These two cases demonstrate that the contribution was required to be direct for it to be recognised by the Court. This position was prejudicial to spouses whose contribution towards the matrimonial property was non-monetary, for instance, those who managed the matrimonial home and oversaw all the domestic work, cared for children, provided companionship, managed family businesses and properties.

Overtime, the Courts shifted from this approach to appreciating non-monetary contribution in determining the distribution of matrimonial property, most notably in the case of [Kivuitu v Kivuitu \(1991\) KLR 248](#), in which the Court held that where property was jointly registered in the names of the husband and the wife and a spouse made a substantial indirect contribution towards its acquisition, that spouse was entitled to an equal share of the property.

However, in 2007, the Court of Appeal in the case of [Echaria v Echaria \(2007\) eKLR](#) overruled the [Kivuitu v Kivuitu](#) decision by stating that contribution had to be strictly proven and non-monetary contribution could not be considered as contribution, for purposes of matrimonial property, neither would performance of domestic duties be considered.

The Constitution of Kenya, which was promulgated in 2010, under Article 45 (3) buttressed the right of parties to a marriage to equal rights at the time of marriage, during the marriage and at the dissolution of a marriage. It was, however, unclear whether these rights meant the equal division of matrimonial property upon divorce.

The enactment of the Matrimonial Property Act, 2013 attempted to clarify this equivocality. Under section 2, the Act defined matrimonial property to include matrimonial homes, household goods and effects and other movable

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and immovable property, jointly owned and acquired during the subsistence of the marriage. The Act further provided in section 7 that where there was no prenuptial agreement, ownership of matrimonial property was vested in the spouses, according to their contribution towards its acquisition. Under the Act, contribution could either be monetary or non-monetary. Further, vide section 9, a spouse who improved a property acquired a beneficial interest in the property equal to their contribution.

Recent Supreme Court Decision

The Supreme Court was recently called upon to render itself on the division of matrimonial property upon divorce in the case of *JOO v MBO (2023) KESC 4 (KLR)*. The brief facts of the case are that the parties entered into a marriage under Abagusii customary law in 1990. On 30th August 1995, they formalised their union under the Marriage Act (Cap. 150) Laws of Kenya (now repealed), where they were issued with a marriage certificate. During the subsistence of their marriage, they had two children. The parties also acquired several properties, where the Respondent claimed that they constructed rental units on one of the properties and that she had successfully applied for a loan of KES 200,000, which she gave the Appellant, to enable him complete the construction of the said units. In 2008, the marriage irretrievably broke down and the husband filed for divorce, culminating into the commencement of division of matrimonial property proceedings.

The suit began at the High Court, where the Court awarded the wife a thirty percent (30%) share of the land and twenty percent (20%) of the rental units constructed thereon. Dissatisfied with the decision, the wife appealed to the Court of Appeal, where while citing legal developments in the area, the Court held that she had acquired a beneficial interest in the property and divided the property at a ratio of 50:50.

Dissatisfied with the decision of the Court of Appeal, the husband appealed to the Supreme Court, where various issues for determination were formulated.

However, this article focuses on the whether Article 45 (3) of the Constitution provides proprietary rights and whether the said Article can be a basis for apportionment and division of matrimonial property on a 50:50 basis.

The Supreme Court held that the guiding principle in determining whether Article 45 (3) conferred proprietary rights is that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution. The Court stated that the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties, or the fact that the wife was economical in spending on housekeeping. Therefore, a party must prove contribution to enable a Court to determine the percentage available to it at distribution. This safeguards a blanket expectation that the principle of equality will be applied generally in the division of matrimonial property, irrespective of contribution.

With respect to whether Article 45 (3) provides for an absolute division of matrimonial property in the ratio of 50:50, the Supreme Court appreciated the two school of thoughts with respect to the interpretation thereof. On one hand, the Supreme Court noted that there has been an argument that Article 45 (3) ought to be construed to mean a division of property down the middle, through the literal application of the 50:50 division ratio. On the other hand, proponents of the second approach argue that the term 'equal' as established in the said Article means that a party obtains an equivalent of what one contributes, monetarily or otherwise.

In determining the issue, the Supreme Court cited the equity maxim of 'equality is equity' and stated that Article 45 (3) underscores the concept of equality as one that ensures that there is equality and fairness to both spouses, in ensuring that all parties have the same rights at the dissolution of a marriage based on their contribution.

The Supreme Court noted that each party's contribution

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to the acquisition of matrimonial property may not have been done on an equal basis, as a party may have significantly contributed more to acquiring property financially as opposed to the other party. This notwithstanding, the principle of equity denotes that the other party, though not having contributed more resources to acquiring the property, may in one way or another, through their actions or their deeds, provide an environment that enabled the other party to have more resources to acquiring the property (indirect contribution).

The Supreme Court further added that when it comes to matrimonial property, what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. That any substantial contribution by a party to a marriage that led to acquisition of property, although indirect, but has nevertheless enabled the acquisition of such property amounts to significant contribution.

In upholding the decision of the Court of Appeal and distributing the property in issue on a 50:50 ratio, the Supreme Court held that while Article 45 (3) deals with equality of the fundamental rights of spouses, the provision does not lead to the assumption that spouses are automatically entitled to a fifty percent (50%) share by fact of being married. The Courts are therefore to ensure that each party to a marriage gets a fair share of the matrimonial property based on their contribution.

Conclusion

The Supreme Court decision reaffirms the importance of the principle of equity and fairness in the division of matrimonial property, upon dissolution of a marriage. The decision emphasizes that the division of matrimonial property must be based on the contributions of each spouse, whether direct or indirect, to the acquisition and development of the same. Though these contributions may not have been made equally or in the same form, what matters is that each party must be recognized for the

their contribution, no matter how small, to the acquisition of the property.

The decision therefore serves to protect the rights of spouses to matrimonial property in Kenya, by ensuring that the division thereof is fair and equitable. Accordingly, it emphasizes the need for spouses to prove their contribution towards the acquisition of matrimonial property, which aids the Courts in determining the percentage available to each party at distribution.

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