A commentary on the matrimonial property conundrum in Kenya in *JOO v MBO*

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Abstract

Since the promulgation of the Constitution of Kenya 2010, Kenyan jurisprudence has tussled with the question of division of matrimonial property in the instance of divorce. This is due to the conundrum posed by the meaning of Article 45(3) of the Constitution on equality of spouses in the realm of matrimonial property. Arguably, the courts, including the Supreme Court, have failed to put to resolve this conundrum. This is by dint of the inexistence of any strict formula for the sharing of matrimonial property during divorce despite the question finding its way to the Supreme Court of the Republic of Kenya (SCORK). As chance would have it, SCORK got another grand opportunity to put this question to rest in the JOO v MBO case. However, this commentary opines that history repeated itself and the jurisprudential ambiguity in the sharing of matrimonial property is still with us, alive and well. This paper evaluates the question of matrimonial property sharing in Kenya in the lens of the SCORK's JOO v MBO decision.

Keywords: matrimonial property, equality, equity, contribution to matrimonial property, Article 45(3)

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Introduction

The *JOO v MBO*[1] case invoked the its appellate jurisdiction of the Supreme Court of Kenya (SCORK), under Article 163(4)(b) of the Constitution.[2] JOO (appellant) and MBO (respondent) had contracted a marriage in 1990 where they then begun cohabiting as husband and wife and later formalised their union under the repealed legal regime governing marriage[3] in 1995. The duo then moved to their matrimonial home on a piece of land located within Tassia area in Embakasi, Nairobi. In 2008, their marriage broke down and the appellant successfully applied for its dissolution which culminated into the commencement of proceedings on the division of matrimonial property. The respondent claimed that while together, they constructed rental units on their Tassia land which, she successfully applied for a 200,000 shillings' loan in support of the project. This formed the basis for the petition which found its way to the highest court of the land.

At the High Court, it was held that the respondent failed to prove her direct contribution to the property registered under the appellant's name.[4] However, the Court was lenient to the fact that she had done some indirect non-monetary contribution towards the family's welfare. The Court hence awarded her 30% of the matrimonial property and a 20% share of the rental units.[5] Aggrieved by the decision, the respondent appealed alongside the appellant's cross appeal. The Court of Appeal found that, having been married for 18 years, 15 of which were spent in gainful employment by the respondent, she constantly took loans

1 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* Petition No 11 of 2020, Judgement of the Supreme Court, 27 January 2023, [eKLR].

2 Constitution of Kenya (2010), Article 163(4(b); J*OO v MBO Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 1.

3 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 3.

4 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* Petition No.11 of 2020, para 10.

5 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 10.

and helped acquire the matrimonial home jointly with the appellant.[6] This gave birth to an order overturning the High Court and directing the sharing of the rental units in a 50:50 ratio.[7] When brought before the SCORK, it dismissed the appeal on ground that the 50:50 ratio was reasonable in the specific circumstances of the case.

Being the highest court of the land, this paper posits that the SCORK failed to rest the question of division of matrimonial property in Kenya. Over and above settling the matter at hand, Section 3 of the Supreme Court Act[8] obligates the apex court to develop rich jurisprudence, which this paper is at pains to establish in the said judgement.

The dilemma of Article 45(3) in the matrimonial property question

Pursuant to Article 45(3) of the Constitution, parties to a marriage are entitled to equal rights at the time of the marriage, during the subsistence of the marriage and at the dissolution of the marriage.[9] Rightfully interpreting this provision, the constitutional wording envisions a 50:50 formula when sharing matrimonial property. The argument, which this paper is in congruence with, has been advanced by the Federation of Women Lawyers Kenya in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another.*[10] Notably, the importation of the said provision into the new constitution was to protect women from their historical injustice in matters matrimonial property and thus the quest for pragmatic equality.[11]

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6 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae)*, para 15.

7 *JOO v MBO*, Civil Appeal No 81 of 2017, Judgement of the Court of Appeal, 23 February 2018, [eKLR].

8 Supreme Court Act (No 7 0f 2011), Section 3.

9 Constitution of Kenya (2010), Article 45(3).

10 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*, Petition No 164B of 2016, Judgment of the High Court, 14 May 2018, [eKLR].

11 Freyda Konno Owino, 'The division of matrimonial property in Kenya: A feminist approach', Unpublished LLB dissertation, Strathmore University, 2017, 25-26.

Purposively, a historical contextualisation of Article 45(3) dates back to the epoch of the coverture principle where married parties were regarded as one even though the husband was the custodian of matrimonial property.[12] As Lord Denning put it in the *William & Glyn's Bank Ltd v Boland case*,[13] the law regarded the husband and wife as one and the husband as that one. This is to say, in as much the husband and wife enjoyed equal rights in marriage, in the context of matrimonial property rights, the husband was the most powerful and the ultimate decision maker. Redressing the equality myth in the coverture principle, Article 45(3) envisions a situation where both parties are equal with equal rights both in theory and practice of law.

However, it is evident that both the Matrimonial Property Act[14] and the Kenyan courts have deliberately misconstrued the wording of Article 45(3). Section 7 of the Matrimonial Property Act provides that matrimonial property rights vest on the parties based on their individual contributions towards the acquisition of the property in question.[15] This has also been buttressed by the SCORK insisting that the implication of Article 45(3) is that at the point of dissolution of the marriage, each party should depart with what they brought on the table. This fuels a war between equity and equality in the interpretation of the article in question in the context of matrimonial property. It is noteworthy that as the ancient maxim 'equality is equity'[16] posits, equality may mean equity but equity does not necessarily mean equality.[17]

Equality speaks to the question of fact in distribution unlike equity which connotes ethical judgement and considerations during

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12 Rosemary Auchmuty, 'Book review - *Married women and the law: Coverture in England and the common law world*, Tim Stretton and Krista J Kesselring (eds),' 85(3) *University of Toronto Quarterly*, 2016, 328-329.

13 *William & Glyn's Bank Ltd v Boland,* AC 487 [1979], House of Lords (UK).

14 Matrimonial Property Act (No 49 of 2013), Section 7.

15 Matrimonial Property Act (No 49 of 2013), Section 7.

16 J McGhee, SB Elliott and M Conaglen*, Snell's equity: Third cumulative supplement to the thirty-fourth edition,* Sweet & Maxwell, 2023, 101-102.

17 McGhee, Elliott and Conaglen*, Snell's equity*, 101-102.

distribution.[18] As Minow puts it, equality is a question of sharing and/or considering each party as factually equal regardless of their needs, abilities and capabilities.[19] On the flipside, equity extends to the consideration that the parties in question have different abilities, capabilities, and needs which should be considered in the sharing and/or distribution of any resources.[20] Article 45(3) explicitly speaks to equality of the parties' rights and not equity. Thus if the said rights were to be construed in the lens of proprietary rights, then no interpretation can depart from the 50:50 formulae.

Evidently, SCORK has shied away from confronting the ambiguity and impracticability in Article 45(3). If rightfully construed, this constitutional provision lacks a pragmatic sense. In the constitutional wording, the married parties are unconditionally expected to give a 50:50 contribution towards matrimonial property at the formation and subsistence of the marriage.[21] Equally, at the dissolution of the marriage, the parties are expected to have equally shared the property in question. This equality is also statutorily echoed under Section 3(2) of the Marriage Act.[22]

It is noteworthy that a marriage is a voluntary union between parties[23] based on, *inter alia*, affection, love and trust between the contracting individuals; an enterprise which enjoys state recognition and protection.[24] The trust, affection and the hope for eternal togetherness practically disallows the parties to live anticipating a separation or divorce. This hence informs this paper's contention of how impracticable equality is, in the question of spousal contribution to matrimonial property, development and equal division of the same.

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18 Martin Bronfenbrenner, 'Equality and equity' 409(1) *The Annals of the American Academy of Political and Social Science'*, (1973), 9-23.

19 Martha Minow, 'Equality vs equity', 1 *American Journal of Law and Equality*, 2021, 167-193.

20 Minow, 'Equality vs equity', 167-193.

21 Constitution of Kenya (2010), Article 45(3).

22 Marriage Act (No 4 of 2014), Section 3(2).

23 Marriage Act (No 4 of 2014), Section 3(1).

24 Constitution of Kenya (2010), Article 45(1).

Spousal contribution to marriage versus spousal contribution to matrimonial property

Though *prima facie* simplistic, it is worthy establishing an explicit dichotomy between the parties' contributions to the wellness of a marriage and their contributions towards matrimonial property. This confusion has first been established by the Matrimonial Property Act in its interpretation of 'contribution' at Section 2.[25] The Act defines 'contribution' to mean monetary and non-monetary contribution which includes: domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.[26] However, the Act fails to appreciate the difference between a contribution to the wellbeing of a marriage and a contribution towards the acquisition and/or development of matrimonial property. Notably, the latter falls under the former but the vice versa is not feasible.

A family institution entails ten different aspects/thematic areas.[27] These include, marriage, religion, culture, family education, family health, economy, environment, vulnerability and social protection, media and technology as well as family safety and security.[28] This speaks to the broadness of a family set up contrary to the unfair narrow understanding of family in the context of matrimonial property.

This paper therefore bifurcates the concept of contribution to mean either a contribution towards the wellness of the marriage or a contribution towards the matrimonial property aspect of a marriage.

A party's contribution towards any of the ten aspects amounts to a contribution towards the wellness of the marriage and not necessarily towards matrimonial property. Interestingly, the question of matrimonial property may only find its way into one of the many aspects, the economic aspect of the family/marriage. It thus begs the

25 Matrimonial Property Act (No 4 of 2014), Section 2.
26 Matrimonial Property Act (No 4 of 2014), Section 2.
27 Draft Family Promotion and Protection Policy, 2019.
28 Draft Family Promotion and Protection Policy, 2019.

question whether a party's contribution towards the other nine or so aspects should be ignored during marriage dissolution at the expense of one aspect. To this end, there should be consideration of all sorts of spousal contribution at the point of dissolution of a marriage. Unfortunately, the only mode of considering spousal contributions to the other aspects of a marriage is by monetising the contributions and proprietarily quantifying them so that they can at least find a seat in the matrimonial property omnibus.

The proof of contribution question

Much might not be clear, but at least, the rule of evidence is; he who alleges must prove![29] The requirement of evidence of contribution found its way in the Kenyan written laws vide Section 17 of the then Married Women Property Act.[30] The instances of its practice have been more futile than successful. Attention is brought to the Matrimonial Property Bill of 2013[31] before its amendment. The bill stated that ownership of matrimonial property vested in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition.[32] I am made to believe that this was a blanket redress mechanism towards the 'evidence of contribution' problem before its amendment to demand proof of contribution from the parties.[33]

The requirement to proof contribution is impracticable more especially in marriages with no prenuptial agreement addressing the same. It is therefore too much to ask couples who hope for eternal togetherness to keep a record of every financial contribution that they make towards the acquisition of property.[34] Furthermore, there lacks a

29 Evidence Act (No 80 of 2014), Section 107.

30 Married Women Property Act, Section 17 [repealed].

31 Matrimonial Property Bill (No 49 2013).

32 Matrimonial Property Bill (No 49 2013), Section 7.

33 Matrimonial Property Act (No 49 2013), Section 7.

34 MO Odhiambo and RK Nyaigendia, 'End of an era or error? A contextualised analysis of the historical evolution of the law on the division of matrimonial property', March 2023, *The Platform for Law, Justice and Society* 90.

clear guideline on what amounts to indirect contribution to matrimonial property and the quantification of the same at the point of property division.[35]

Conclusion

The genesis of the matrimonial property division conundrum in Kenya is the forceful imposition of the equality principle under Article 45(3) in the realm of matrimonial property division. Kenyan scholarship must first make peace with the fact that the wording of Article 45(3) is ambiguous and impracticable in the ambit of matrimonial property acquisition, development and division if at all. In my view, the rightful doctrine under matrimonial property division would be equity and not equality. Secondly, as afore-opined, marriage is a trust, love and affection affair, an enterprise independent standby gathering of evidence in anticipation of break-ups. To this end, it averts logic to expect the parties to prove contribution more especially in instances of substantial though unascertainable spousal contributions. As Dr Carl Sagan puts it, the absence of evidence is not the evidence of absence.[36]

Conclusively, to remedy the matrimonial property jurisprudential kerfuffle, I propose that the Kenyan laws should merge the two conflicting schools of thought i.e. the 50:50 distribution formulae and the 'division based on contribution' approach. This can be effectuated by a legislative or judicial adoption of a 'matrimonial property presumption clause'. The clause should have the presumption that, both parties, whether directly or indirectly, contribute to the general wellbeing of the marriage and their contributions must be put to account during property division. This is whether each contribution was in the realm of matrimonial property or not. The clause should hence guarantee each party a specific constant percentage of the cumulative matrimonial

[35] Ojima Abalaka, 'Once you get out you lose everything: Women and matrimonial property rights in Kenya' *Human Rights Watch*, 16 May 2023.

[36] Magda Feres and Fernando Neuppmann, 'Absence of evidence is not evidence of absence', *National Library of Medicine (NLM)*, 3 November 2023.

property during division. Say for instance, each party should be guaranteed 15 percent of the matrimonial property which will cater for *inter alia*, the non-monetary, indirect and direct though unascertainable contributions. Notably this basically means a 50:50 sharing of 30 percent of the cumulative property. The remaining 70 percent can then take the 'division based on contribution' approach. This will then require the parties prove their contribution whose percentage equivalent they shall receive from the remainder.