

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: GATEMBU, OCHIENG & MUCHELULE, JJ.A.)

CIVIL APPEAL NO. 238 OF 2018

BETWEEN

**FEDERATION OF
WOMEN LAWYERS KENYA (FIDA-KENYA).....APPELLANT**

AND

**THE HON. ATTORNEY GENERAL.....RESPONDENT
INITIATIVE FOR STRATEGIC
LITIGATION IN AFRICA (ISLA).....AMICUS
CURIAE**

*(An appeal against the judgment and decree of the High Court at
Nairobi
(J. Mativo, J.) dated 14th May
2018 in
Petition No. 164B of 2018)*

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JUDGMENT OF THE COURT

1. The Federation of Women Lawyers Kenya (FIDA-Kenya (the appellant) is a non-governmental, non-profit, national organization that works towards ensuring the promotion of women's individual and collective power to claim their rights in all spheres of life, in a bid to guarantee that women are free from all forms of injustices based on their gender, sex, class, ethnic, physical disability or religious beliefs. It has the experience of representing women in *pro-bono* legal cases involving property, custody and

maintenance of children and sexual and gender-based violence, among others. The

appellant challenged the constitutionality of **section 7** of the **Matrimonial Property Act, 2013**. This was done through the petition dated 20th April 2016 that was filed in the High Court in its Constitutional and Human Rights Division at Nairobi. The petition was filed against the Honorable the Attorney General (1st respondent).

2. It was the appellant's case that, to the extent that **section 7** of the **Matrimonial Property Act** provides that, on divorce or dissolution of a marriage, the matrimonial property be divided between spouses according to the monetary and non- monetary contribution of either spouse towards its acquisition, the section was unconstitutional because it contradicted and contravened **Article 45(3)** of the **Constitution**. **Article 45(3)** of the **Constitution** provides that parties to a marriage shall have equal rights at the time of the marriage, during the marriage and upon the dissolution of the marriage.
3. According to the appellant's petition before the superior court, the way **section 7** of the **Matrimonial Property Act** is written, it infringes on married women's rights to own property after the marriage ends since they must prove their contribution to acquire it. While the definition of contribution now included monetary and non-monetary contribution, a spouse who contributed money was in a better position. This meant that the man spouse was

advantaged compared to the woman

spouse whose non-monetary contribution had been left to the whims of the courts to calculate and or estimate. The effect has been discrimination and the denial and violation of the women's rights to property and has led to decisions that are in conflict with the constitutional command under **Article 45(3)** of the **Constitution** which, according to the appellant, means a 50:50 sharing of matrimonial property upon the marriage ending irrespective of contribution.

4. Additionally, it was contended that **section 7** of the **Matrimonial Property Act** was in conflict with **section 10(2)** and **(3)** of the same **Act** which stated that spouses must share equally any liabilities incurred during the marriage.
5. The appellant thus sought judgment against the respondent seeking a declaration that **section 7** of the **Matrimonial Property Act**, to the extent that it bases division of matrimonial property upon contribution, is invalid as it is in conflict, is inconsistent, and contravenes **Articles 27, 40, 45(3)** and **60(1)** of the **Constitution**, and its therefore null and void. An order of mandamus was sought compelling the 1st respondent to publish a **Statute Miscellaneous Amendment Act** within 30 days of delivery of judgment, deleting **section 7** of the **Act** and its place inserting the following:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouses in

equal shares irrespective of the contribution of either spouse towards its acquisition, and shall

be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.

6. The petition was opposed by the respondent through several grounds of opposition. The respondent's case was that, the **Matrimonial Property Act**, having defined "contribution", it was only fair and just that, upon the ending of a marriage, the spouses claim to matrimonial property be measured in accordance to their respective contribution to its acquisition. Therefore, **section 7** of the **Act** does not lessen the claim of woman spouse, or contravene or contradict **Article 45(3)** of the **Constitution** by asking what each spouse contributed, either by way of money or otherwise, towards the acquisition of matrimonial property. The respondent pleaded that the appellant had not demonstrated that **section 7** of the **Act** was unconstitutional, and had not placed on record sufficient evidence to support its case and to rebut the presumption that the section was valid and constitutional.
7. Regarding the sought order of mandamus, the respondent's position was that, one, the role of the court to interpret the law and the doctrine of separation of powers prevented the court from amending the law, and, two, legislation was a process involving many stages of consensus building, and therefore the order sought was unsuitable in the

circumstances.

8. The superior court (the learned J. Mativo, J. (as he then was)) heard the petition and the rival arguments. In the judgment that was delivered on 14th May 2018, the court reviewed the history of the division of matrimonial property from the time of the receipt of the **Married Women's Property Act, 1882** through to the promulgation of the **Constitution of Kenya, 2010** until the enactment of the **Matrimonial Property Act**. Various international instruments and delivered cases, both in Kenya and the commonwealth were made reference to. At the end of the day, this is what the court observed: -

“58. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

59. Article 45 (3) of the Constitution treats parties to a marriage as equal partners. That equality is reflected in the provisions of the act which recognize that the contribution of parties to a marriage whether monetary or non-monetary will be treated equally. The same equality is maintained by section 7 of the act which provides that upon dissolution of a marriage, parties are entitled to a

share of the property equal to their contribution whether monetary or non-monetary. The Petitioner's fear as I understood it is that

it is difficult to prove non-monetary contribution. I do not think so. Section 2 of the act defines contribution in very clear terms. All that a party is required to do is to provide evidence on details of his or her non-monetary contribution in the marriage and leave it to the Court hearing the dispute to determine. I have no doubt that the Court will rise to the occasion and in the circumstances of the individual case, apply the evidence, the law and appropriate legal skills and arrive at a fair determination of the valuation of the non-monetary contribution in the circumstances of the case under consideration, and determine the respective rights of the parties in the case. That, our Courts are capable of doing.

- 60. The interpretation preferred by the Petitioner in my view is an open invitation to this Court to open the door for a party to get into a marriage and walk out of it in the event of divorce with more than they deserve. The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.**
- 61. The greatest injustice which in my view forms the basis of the Petitioner's fear as I understood it is that there has been failure to reward or recognize a**

spouse whose contribution to the family has been or was through being a homemaker, performing household chores, bearing children and

raising children or a spouse who used his or her resources for the day today subsistence requirements of the family and thereby deprived himself or herself of the opportunity of acquiring durable property. Historically, majority of these were or are women, hence, the Petitioner's fear that women are disadvantaged. I am clear in my mind that the drafters of the act were conscious about this, hence the clear definition of non-monetary contribution in the act. The essence of this provision is that Courts will evaluate the interest of the parties and the property and make a just and equitable distribution of the property or properties.

62. The argument that the Bill was passed amid protest in Parliament cannot suffice. It was subjected to a vote as required and it sailed through after the majority voted in its favour. It became law. Its constitutionality cannot be assailed on the grounds that some members of Parliament voted against it. The Bill went through the legislative processes and was enacted into law.

63. I also find that the impugned section does not contradict section 6 of the Act which provides for liabilities incurred during marriage to be shared equally. The provision was meant to curb situations where one party to a marriage would be left to settle debts incurred during the subsistence of the marriage.

64. Further, the assertion that the section infringes to the right to property cannot succeed. First, the act

recognizes monetary and non-monetary contribution which is clearly defined. By providing that

a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.

65. It is my conclusion that the impugned section does not offend any of the provisions of the Constitution as alleged, nor does the section contradict any of the provisions of the act. Having so concluded, I find and hold that the Petitioner does not qualify for any of the reliefs sought in this Petition. In the circumstances, I dismiss this Petition with no orders as to costs."

9. These are the findings that aggrieved the appellant and caused it to proffer this appeal. The grounds of appeal are as follows:-

"1) That the learned judge failed to consider and or interpret Article 45(3) of the Constitution and the principle of equality vis a vis section 7 of the Matrimonial Property Act.

2) That the learned judge failed to consider that the raison d'être of Article 45(3) of the Constitution is to uphold the equality of the different roles of parties in a marriage, irrespective of monetary or non-monetary contribution.

3) That the learned judge failed to consider and or determine whether section 7 of the Matrimonial Property Act violated specific international treaties and conventions which have been ratified by Kenya and form part of the law of Kenya.

4) That the learned judge erred in law and fact by finding that section 7 of Matrimonial Property Act does not stand in stark

contrast and contradiction to section 10 of the same Act, which provides for liabilities incurred during marriage to be shared equally.

- 5) That the learned judge misdirected himself in finding that there was no discrimination of any nature in section 7 of the Matrimonial Property Act.**
- 6) That the learned judge erred in law and in fact by placing reliance on the decision by the Honourable Justice Kiage in PNN -v- ZWN Civil Appeal Number 128 of 2014 (Court of Appeal Nairobi) (2017 eKLR) which decision was obiter dicta and ought not to be relied upon as a binding decision by the court.**
- 7) That the learned Judge erred in law and in fact in holding that the beneficial share of each spouse ultimately depends on the parties proven respective proportions of financial contribution, either direct or indirect towards the acquisition of the property.”**
10. Vide the ruling dated 23rd February 2024, this Court (Ali-Aroni, J. Mativo and M. Gachoka, JJ.A.) admitted the Initiative for Strategic Litigation in Africa (ISLA) as an *Amicus Curiae* to address this Court in this appeal on the comparative regional and international jurisprudence on the distribution of matrimonial property upon the dissolution of a marriage; relevant law reform initiatives; and any judicial pronouncements that have had retrospective effect to the property rights of women.
11. When the appeal came up for hearing on the virtual platform, learned counsel Ms. Kemunto appeared for the appellant, learned counsel Mr. Peter Thande appeared for

the respondent, while learned counsel Ms. Nyokabi Njogu

appeared for the Amicus Curiae. Learned counsel Ms. Kemunto and learned counsel Ms. Nyokabi Njogu had filed written submissions which they were each allowed to highlight. Learned counsel Mr. Thande did not file any submissions. He urged us to uphold the superior court's judgment in its entirety.

12. It was the submission by learned counsel Ms. Kemunto that, in view of the equality provision in **Article 45(3)** of the **Constitution**, when **section 7** of the **Matrimonial Property Act** states that at the end of the marriage the parties will have the matrimonial property distributed between them in accordance with their contribution, and the **Act** has defined contribution to mean both monetary and non-monetary, the differentiation in the Act offends the equality principle in the **Article**. This is because, it was urged, monetary and non-monetary contributions are not of equal importance in a marriage; that it was easy to ascertain what monetary contribution was and not easy to ascertain what non-monetary contribution was. In the case of our society, it was submitted, non-monetary contribution primarily belonged to women while monetary contribution belonged to men. It was easy for a man to keep bank statements, pay slips or purchase statements and therefore, at the end of the marriage, he can produce them to prove his contribution to the acquisition of a matrimonial property. But it was different for a woman to put value on

giving birth, bringing up the child, maintaining the

home, for instance, to show how much she contributed to acquire the property. As a result, women end up walking away from marriages poorer, and in all decisions that have come from the courts since the enactment of the **Matrimonial Property Act**, the contribution of women has proved problematic and treated unequally *vis-à-vis* the monetary and direct contribution attributed to men.

13. This is how the learned counsel put it:-

“It is our submission that there is no basis for differentiating monetary and non-monetary contribution during the subsistence of the marriage, whether financial or non-financial is of equal importance. That differentiation is what we are impugning and we submit that it is unfair and unconstitutional.

Our second argument is that section 7 of the Matrimonial Property Act is discriminatory against women. Judges have time and again interpreted that financial contribution as being of a higher degree than non-financial contribution. As we know, as Article 100 of the Constitution provides, women are already vulnerable and face severe discrimination.....

With treating these two contributions differently, it is discriminatory in the sense that the day-to-day activities which women contribute towards cannot be logically quantified. And so, at the end of marriage, money that was utilized to buy a property is quantifiable, a bank transfer is easy to trace. And so, by treating those two contributions differently, women end up poor at the end of marriages. They leave

marriages without property.”

14. Learned counsel for the appellant blamed the learned Judge for not being alive to these issues, and asked that we agree with the appellant by overturning the judgment and granting the orders in the petition.
15. On behalf of the Amicus Curiae, learned counsel Ms. Njogu submitted that the distribution of matrimonial property was extremely emotive and divisive. It was both a legal and a political issue, one that was quite resistant to law reform. Learned counsel pointed out to us that courts, and even legal scholars, had given different interpretation to the issue of division of matrimonial property when applying **section 7** of the **Matrimonial Property Act** when seen in light of the **Article 45(3)**.
16. Learned counsel asked us to consider that the issue at hand was a highly gendered one; that there was an inherent problem when the learned Judge found that, because the law applies the same to both men and women, that it was therefore equal. However, it was submitted, there was an inherent problem with this approach. This was because gender blindness can lead to discrimination since it fails to acknowledge how proving contribution can disproportionately affect women and therefore compounds the forms of discrimination that they face.

17. Learned counsel took us through the African Charter on Human and People's Rights and the Maputo Protocol and the Convention on the Elimination of Discrimination Against Women, and asked us to consider that Kenya, as a Member State to these instruments, was required to eliminate all forms of discrimination, including indirect discrimination. In the context of dissolution of a marriage and the property rights of women, we were asked to acknowledge that there is generally more weight than is placed on actual financial contribution because it is easily quantifiable, and that, in our decision, we are to make sure that there is actual weight placed on both forms of contribution, whether financial or non-financial. We were asked to consider that State Parties are to ensure that there is both formal and substantive approach to equality, and that substantive equality can only be achieved by providing value for non-financial contribution.
18. Learned counsel pointed out that, in the African context, we need to recognize the differences between men and women by understanding the political, cultural and historical factors that affect women and how, therefore, they are able to contribute towards the sustenance of marriages and family needs structures; that we should appreciate that women, just by virtue of their gender, have been significantly impacted when it comes to their economic capacity. The court has to be alive to the fact that a

violation of women's property rights is a precursor for poverty and destitution. And in the context of

matrimonial property, the lack of clarity around how to value women's indirect contribution leads to their discrimination because such contribution is undermined. This was why a substantive equality approach was recommended in interpreting and deciding what is due to women at the dissolution of a marriage.

19. Learned counsel urged us to consider that the **section 7** was an example of formal equality, that proceeds on the basis that a marriage is a partnership of equals and therefore that it was easy to prove all forms of contribution. However, there was a power dynamic between a man and woman in a marriage. Secondly, it was very difficult to actually prove non-financial contribution as there was no matrix for it. This leads to situations where the financial contribution is proved first before resorting to non-financial contribution. Several decisions were referred to.
20. Learned counsel Ms. Njogu addressed us on the comparative developments of the law in regard to contribution of matrimonial property and how the harmful effects in regard to contribution have been ameliorated. For instance, in England, there have been consistent reforms over time which have led to the use of the principle of fairness and non-discrimination in the division of matrimonial property; the yardstick of equality being embraced, and the courts stating that where parties have

committed to sharing their lives then it should of

necessity be entitled to an equal share of matrimonial property. A similar approach was mentioned in regard to Ghana.

21. Lastly, the learned counsel took us through leading decisions on division of matrimonial property in this Country, both before and after the **Act** and **Constitution**. It was pointed out that none of these decisions were asked to deal with the constitutionality of **section 7** of the **Matrimonial Property Act**.

22. We asked learned counsel Ms. Kemunto for the appellant, to tell us what the ideal legal position her client would wish in place of **section 7**. She told us that the appellant would wish the provision to be as follows:-

“The ownership of matrimonial property vests in the spouses in equal shares, irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce, or their marriage is otherwise dissolved.”

23. The mandate of this court on first appeal was aptly captured in **Gitobu Imanyara & 2 Others -vs- Attorney General [2016] KECA 557 (KLR)** in the following terms:

“ ... this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles

upon which this

Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.””

24. Having reviewed the record, and considered the appeal and the rival submissions, we are called upon to determine whether the learned Judge was right in deciding that **section 7** of the **Matrimonial Property Act** does not

contradict and or

contravene and or violate the provisions of **Article 45(3)** of the

Constitution.

25. Before dealing with the issue that we have identified, some background observations are necessary. As early as the Old Testament, women were referred to as “hewers of wood and drawers of water.” Society had condemned women to performing domestic drudgery and occupying a subordinate social position. The phrase was subsequently applied to highlight gender inequality in labour, which meant disparity in the value placed on traditionally male and female-dominated work. Women were relegated to lower status or less recognized roles despite performing essential tasks. They were persistently expected to do domestic responsibilities and caregiving, both of which were considered inferior to what the male gender had assigned himself.
26. For centuries, many societies, including Kenya, subjected women to this history of inequality. The societies were structured in ways that privileged men in education, property ownership, inheritance, political participation and family law. The Universal Declaration of Human Rights, the Convention on the Elimination of Discrimination Against Women and the African Charter on Human and People’s Rights, to name a few international instruments, all came to emphasize that equality is the cornerstone of modern

human rights framework, and pointed out that discrimination on the basis of sex undermines

human dignity and fairness. Empowering both men and women boosts economic growth, health, education outcomes, and governance. Social harmony is achieved when there is gender equality. This is because, with gender equality, domestic violence is reduced, there will be no child marriage or other cultural harmful practices.

27. In short, gender equality is relevant because it addresses a long history of imbalance and is essential for justice, dignity and development.
28. During the discussions of the Constitution of Kenya Review Commission at Bomas, the place of women in a marriage, her right to property, especially land, and her protection against discrimination were important subjects that eventually found their place in the Constitution. The Constitution made it categorically clear that “every person” (whether man or woman) had inherent dignity and to have that dignity respected and protected, and “every person” is entitled to all human rights and fundamental freedoms in the Constitution. **Article 27** of the **Constitution** provides that:-

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal

opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

29. In relation to marriage, **Article 45(3)** of the **Constitution** provides that:-

"(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."

Article 45 of the **Constitution** deals with the “Family” which

is recognized as –

“the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”

30. Following the promulgation of the Constitution, parliament enacted the **Matrimonial Property Act** to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. This is the law that replaced the **English Married Women’s Property Act of 1882** that had applied in Kenya for many years. See for instance ***Kivuitu -vs- Kivuitu (1991) 2KLR 241*** and ***Echaria, Peter Mburu -vs- Priscilla Njeri Echaria, Civil Appeal No.***

75 of 2001 [2007] KECA 504 (KLR). **Section 7** of the **Matrimonial Property Act** provides that –

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

31. “Contribution” is defined under **section 2** of the **Act** to mean monetary and non-monetary contribution and includes –

“(a) domestic work and management of the matrimonial home;
(b) child care;

***(c) companionship;
(d) management of family business or
property; and***

(e) farm work.”

32. According to the appellant, **section 7** of the **Matrimonial Properties Act** contradicts, and is repugnant to, **Article 45(3)** of the **Constitution** and the international laws and treaties that Kenya has ratified pursuant to **Article 2(5)** and **(6)** of the **Constitution**. Kenya is a signatory to the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Marital Rights and the African Charter of Human and People’s Rights and the Additional Protocol to the African Charter on the Rights of Women in African (Maputo Protocol), all of which espouse the established international principle of equal rights of parties at the time of the marriage, during the marriage and at the dissolution of the marriage. It was further argued that **section 7** was in contradiction to **section 10** to the same **Act** which establishes that parties to a marriage shall share equally any liability incurred during the subsistence of the marriage for the benefit of the marriage. We consider that in the grounds of appeal there was no reference to, or complaint about, **Article 27** of the **Constitution**.
33. In dealing with the question whether or not **section 7** of the **Matrimonial Property Act** contravenes **Article 45 (3)** of the **Constitution**, we bear in mind the presumption

of constitutionality principle. Any legislation passed by

parliament is presumed to be constitutional. The person who challenges the constitutionality of any legislation has the primary responsibility of demonstrating that the legislation is either inconsistent with, or contravenes, the constitution (see **National Assembly & Another -vs- Okiya Omtatah Okoiti & 55 Others [2014] KECA 876 (KLR)**). However, when challenging a limitation of a fundamental right, **Article 24** of the **Constitution** outlines specific conditions that the law must meet to be a valid limitation on such a right (see **Seventh Day Adventist Church East Africa Limited -vs- Minister of Education & 3 Others [2017] eKLR)**).

34. The learned Judge acknowledged that the appellant was interpreting **Article 45(3)** of the **Constitution** to mean that a party would enter a marriage, make no contribution at all to the acquisition of property in the marriage, and, at the end of the day, claim 50% of the value of the property. Indeed, that is the argument that learned counsel Ms. Kemunto for the appellant put forth to us. In our considered view, this is a misunderstanding of **Article 45(3)** when put alongside **section 7** of the **Matrimonial property Act**. **Article 45(3)** of the **Constitution** has made the parties to a marriage equal partners, each enjoying equal rights and obligations under the Bill of Rights. None of the parties can bring into the marriage the oppressive economic, cultural or societal values that, before the promulgation of the

Constitution, defined marriage relationships. The gender inequality values were being

discarded, courtesy of the **Article**. It meant that courts have to dignify and value every effort and work that goes into the acquisition and development of the matrimonial property. Such effort and work include the creation and subsistence of the environment that enables the creation and development of matrimonial property.

35. The Supreme Court in **J.O.O. -vs-. M.B.O.; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) Petition No. 11 of 2020 [2013] KESC 4 (KLR)** dealt with the apparent friction between **section 7** of the **Matrimonial Property Act** and **Article 45(3)** of the **Constitution**. The court was substantially addressed by the appellant herein who was an *Amicus Curiae*. The appellant made reference to international instruments and submitted on the comparative jurisprudence on the question of matrimonial property and on similar provisions in the jurisdictions under reference. The Supreme Court came to the conclusion that **Article 45(3)** deals with equality of fundamental rights of spouses before, during and at the conclusion of a marriage, which does not mean the redistribution of property rights at the dissolution of the marriage. The **Article** did not mean that either party was automatically entitled to a 50% share by the fact of being married. In that regard, the Supreme Court stated:

“93. Article 45(3) of the

***Constitution underscores the concept
of equality as one***

that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party."

36. The Supreme Court went on to state that:

"94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property."

37. To our mind, **section 7** of the **Matrimonial Property Act** is an empowering provision which gives meaning to **Article 45(3)** of the **Constitution**. It makes sure that whatever

contribution each spouse brings to the marriage by way of effort and work, whether it be in monetary form or in non-monetary form, is

dignifying, and ultimately counts when the marriage ends. If the courts may have, sometimes, not favorably recognized, and properly assessed, the non-monetary contribution of the women in the marriage, that does not mean that **section 7** of the **Matrimonial Property Act** is either inconsistent or contradicts **Article 45(3)** of the **Constitution**.

38. In **Joseph Ombogi Ogentoto -vs- Martha Bosibori Ogentoto [2023] eKLR**, for instance, the Supreme Court clarified that **Article 45(3)** of the **Constitution** establishes spousal equality but does not guarantee a 50% share of matrimonial Property. The Court ruled that the property division must be based on proven contribution, aligning with **section 7** of the **Matrimonial Property Act**, and emphasizing equity over strict equality. In **J.O.O. -vs- M.B.O.** (supra), the Supreme Court, after reviewing several decisions by this and other courts, some beyond our jurisdiction, stated as follows:-

“99. We find the above opinions and findings persuasive and it is our finding that the stated equality under Article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no

party is unfairly given more than what he or she contributed.”

39. The express inclusion in the **Matrimonial Property Act** of non-monetary contributions for purpose of division of matrimonial property was evidently a response to the historical and judicial invalidation of non-monetary contributions. The noble intention was to ensure that division of matrimonial property is fair and equitable. As we understand it, the practical challenge which the appellant says has a discriminatory effect is that while, for instance, it may be easier to produce bank statements and other documentary evidence to establish financial or monetary contribution, it may not be so regarding non-monetary contributions such as provision of household management and childcare. However, at the end of the day, it is a question of evidence and courts are equipped to assess the weight and credibility or otherwise of the evidence presented, whether documentary or non- documentary, by the parties with a view to determining whether the spouse claiming contribution has discharged his/her burden of proof in that regard. As pronounced by the Supreme Court, the function of any court, in the event that a marriage breaks down, is to “make a fair and equitable division of the acquired matrimonial property guided by the provisions of **Article 45(3)** of the **Constitution.**”

40. At the end of the day, therefore, we do not agree with either the appellant or the Amicus Curiae when they complained that the learned Judge fell into error when he

determined that **section 7** of the **Matrimonial Property Act** was not contrary

to, or inconsistent with, **Article 45(3)** of the **Constitution**. **Section 7** of the **Matrimonial Property Act** neither violated nor contradicted **Article 45(3)** of the **Constitution**.

41. The result is that, we find the appeal not merited and dismiss it.
42. Given the public interest in the issues raised by the appeal, we direct that each party shall bear own costs.
- 43.** Following the untimely death of the Hon. Mr. Justice Fred Ochieng prior to delivery of this judgment, and there being concurrence by the remaining members of the bench, this judgment is delivered under **Rule 34(4)** of the **Court of Appeal Rules**.

Dated and delivered at Nairobi this 3rd day of October 2025.

S. GATEMBU KAIRU, C.Arb, FCIArb.

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.