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THE MATRIMONIAL PROPERTY ACT 2013 IN ACTION: EMPIRICAL ANALYSIS OF A DECADE OF DECIDED COURT CASES

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Abstract

The enactment of the Matrimonial Properties Act in 2013 provided a framework for determining the ownership and division of matrimonial property between spouses in Kenya. Kenyan courts have had over a decade of resolving matrimonial disputes and interpreting various provisions of the Act. The paper analysed decisions from the High Court, the Court of Appeal, and the Supreme Court relating to the division of matrimonial property for the period 2013-2024. 94 cases sourced from the Kenya Law Website were analysed to identify patterns relating to the average duration of proceedings; length from decree to the filing of claim; average duration of marriage; registered owner of matrimonial property and division ratios relative to nature of proved contribution. The findings serve as a foundation for further socio-cultural research into gender and property ownership, the dynamics of property rights within marriage and gendered constructions of financial and non-financial contributions.

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I. Introduction

The task of dividing property between previously married parties has long been described as a complex and challenging responsibility. The difficulty first stems from the psychological, financial, and health imprints of the divorce process on the parties, alongside the newly dawning adjustments associated with an ended marriage.¹ The High Court in *RND v RSA*² observed the obscuring effect that the resultant feelings of betrayal, anger, and loss have on the objectivity required to reach a fair division of property. Secondly, the setup of the marriage institution, within which the property was accumulated, is often one of trust.³ On this foundation, couples unsparingly devote their resources and efforts towards the success of their union and home.⁴ Seldom do they keep a record of their contribution to the welfare of the household, which proof of contribution now forms the very basis for the division of matrimonial property.⁵ In any event, given the longevity of the marriage in question, with some cases analysed spanning durations above 50 years,⁶ most details have been forgotten, properties acquired and disposed of and the nature of contribution changed throughout marriage. It is also not helpful that no two cases are identical, meaning that courts are called upon to assess the unique circumstances of each case and calibrate the measure of fairness afresh every time.⁷ Given these hurdles, it is little wonder that courts have characterized the business of dividing matrimonial property as sad and awful,⁸ painstaking⁹ and difficult.¹⁰ Even then, the reality of divorce and the requirement to determine property rights between the separating parties necessitates the conduct of the unpleasant business.

The law providing the framework within which matrimonial property is to be divided in Kenya is the Matrimonial Property Act, Cap 152 (The Act), which commenced on 16th January 2014. The Act operationalizes the property rights attached to married persons provided for under Article 45(3) of the Constitution, which decrees equality of the parties at the time of entering into marriage, during marriage and at the point of dissolution of the marriage. In recognition of the decade-long implementation of The Act, this paper examines the cases adjudicated in its implementation, taking note of emergent patterns in judicial decisions flowing from the High Court, Court of Appeal, and Supreme Court of Kenya. The period under examination stretches from the commencement of The Matrimonial Property Act on 16th January 2014 to the research cut-off date of 30th August 2024.

- 1 Başak Cabilar and Adviye Yılmaz, 'Divorce and Post-divorce adjustment: Definitions, models and assessment of adjustment' (2022) 14(1) *Current Approaches in Psychiatry* <<https://doi.org/10.18863/pgy.910766>> accessed 05 June 2025.
- 2 [2022] KEHC 13745 (KLR).
- 3 *ENK v JNK* [2015] eKLR; *PNN v ZWN* [2017] KECA 753 (KLR).
- 4 *Ibid*.
- 5 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).
- 6 *EWM v MOM, ANM & JTM* [2018] KEHC 3201 (KLR).
- 7 *Muthembwa v Muthembwa* [2002] 1 KLR; *Francis Njoroge v Virginia Wanjiku Njoroge* [2013] eKLR.
- 8 *PNN v ZWN* (n 3).
- 9 *JKO v CKO* [2023] KECA 115 (KLR).
- 10 *EJ v JKN* [2024] KEHC 9166 (KLR).

This article is divided into five sections. The first section offers a concise overview of the legal provisions governing the division of matrimonial property. It outlines the prerequisites for such division, defines the constituents of matrimonial property, explores the factors determining division, and highlights the appropriate forum for adjudication of matrimonial property disputes.

The second section sets out the research framework employed in analyzing 94 court decisions involving the division of matrimonial property for the research period. The third section builds a profile of the 94 cases by presenting an analysis of the duration of court proceedings from filing to judgment; the length of time from divorce to filing for division of matrimonial property; identifies the party that files the dispute most frequently; enumerates the most common types of matrimonial property and the party in whose name they are usually registered; assesses the nature of proven contribution by gender and reports on the ratios in which property is distributed. The penultimate section of the article analyses the findings, using the law as a diagnostic tool for inviting multidisciplinary interventions toward equitable outcomes in the division of matrimonial property. Conclusions and areas for further study occupy the last section of the paper.

II. Legal Prerequisites For The Division Of Matrimonial Property

Courts have consistently held that their intervention in dividing matrimonial property can only be sought once the applicant can demonstrate that three essential prerequisites have been met.¹¹ The same are discussed hereunder.

A. Parties Were Legally Married

First, the applicant is required to prove to the court that the parties were legally married at the time of acquiring the property. Parties have usually met this condition by annexing a copy of their marriage certificate as proof of the existence of a marriage recognizable in Kenya. The key legislation governing marriages in Kenya, the Marriage Act, recognizes five systems of marriage: Christian, Civil, Customary, Hindu, and Islamic marriages.¹² All marriages must be registered with the Registrar of Marriages in line with the specific procedures applicable to each form of marriage.

Sometimes, parties who have yet to formalize their union through the recognized marriage registration systems seek the court's indulgence in presuming the existence of their marriage based on long cohabitation and public reputation as husband and wife. The Supreme Court's decision in *MNK v POM*¹³ clarified the strict parameters within which a presumption of marriage arises. The Apex court was of the view that the presumption should only be extended where the parties evidently and overtly

11 *POM v MNK* (2017) eKLR; *ENN v SNK* (2021) eKLR.

12 The Marriage Act 2014 (Cap 150. Laws of Kenya), s 6.

13 *MNK v POM*; *Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* [2023] KESC 2 (KLR).

intended for their union to amount to a marriage, noting the evolving landscape of amorous relationships, some of which are specifically designed not to translate into marriage. Even then, and relying on a long line of previous decisions,¹⁴ for the presumption to stand, the parties must have had the capacity to enter into marriage, have given consent to the marriage, cohabited for a long time and represented themselves to their family, friends and society as husband and wife.

The Supreme Court's decision ventured further to provide a way forward in determining property rights as between cohabitees who were unable to meet the threshold for presumption of marriage.¹⁵ In such cases, the court was of the view that questions regarding property rights could not be determined under the Matrimonial Property Act, but with reference to the ordinary law relating to property as would be applicable in the case of business partners.¹⁶

B. The Marriage Between The Parties Has Been Dissolved

Next, the applicant must satisfy the court that they are divorced or that the marriage has otherwise been dissolved.¹⁷ It has been held, time and again, that where a decree absolute is yet to issue, the question of division of matrimonial property is premature.¹⁸ Although it has traditionally been the position that a decree of divorce is typically issued through a court process, the Court of Appeal in *TSJ v SHSR*¹⁹ found that an order of divorce is awardable through arbitration proceedings. In making this determination, the court took the view that Kenya's Arbitration Act²⁰ in no way barred the applicability of arbitration to disputes of a personal nature. Even then, it emphasized the need for specific rules to guide the enforcement of such awards.

Even though the division of matrimonial property necessarily follows the dissolution of marriage, Section 17 of the Matrimonial Property Act allows parties to approach the court for declaratory orders regarding contested property rights, notwithstanding the subsistence of marriage.²¹ This provision is usually employed during the pendency of divorce proceedings, where one party is apprehensive of the potential disposal of matrimonial property before its division.²² In these cases, courts merely make a finding as to the nature of proprietary or pecuniary interest vesting in the parties, leaving the order for the division of property for a later date when the marriage is dissolved.²³

14 *Hortensia Wanjiku Yawe v The Public Trustee Nairobi* [1976] eKLR; *Mary Njoki v John Kinyanjui Muthuru & 3 Others*, [1985] eKLR; *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR; *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR ; *CWN v DK* (2021)eKLR.

15 *MNK v POM* (n 13).

16 *Walker v Hall* (1984) FLR 126.

17 Matrimonial Property Act 2013, (cap 152 Laws of Kenya) s 7.

18 *POM vs. MNK* (n 11); *SMN v TCW* (2022) KECA 715 (KLR); *VJC v BSW* [2024] KEHC 10905 (KLR).

19 [2019] KECA 170 (KLR).

20 Arbitration Act, (Cap 49 Laws of Kenya).

21 *AKK v PKW* (2020) KECA 335 (KLR).

22 *PNN v ZWN* (n 3) [34]-[35].

23 *Ibid.*

C. Matrimonial Property Was Acquired During Marriage

1. *What property falls within the realm of matrimonial property?*

Section 6 of the Matrimonial Property Act defines matrimonial property as that property which is jointly owned or acquired during the subsistence of marriage, including the family home or homes of the former spouses and the household goods comprised in the said family home.²⁴ An analysis of decided cases over the 10-year implementation of the Act gives flesh to this provision in indicating the specific types of properties that have been held to constitute matrimonial property.

The family home of the spouses referred to as the matrimonial home, has consistently been categorized as matrimonial property, even where the court has sometimes decided that only the house, and not the land on which the house is built, can be so categorized.²⁵ Other properties include vehicles²⁶, bank account funds,²⁷ landed properties, rental units,²⁸ money market funds,²⁹ shops³⁰ and market stalls.³¹

The question as to whether inherited property qualifies as matrimonial property has been the subject of extensive legal examination. Basing their argument on the express provision under Section 5 which excludes property inherited before marriage from forming part of matrimonial property, courts have argued that as a corollary, property inherited after marriage does constitute matrimonial property.³² It has further been decided that even where property is inherited prior to marriage, it would qualify as matrimonial property in instances where the other spouse made developments on or improved the inherited property in some way.³³

2. *What property does not fall within the realm of matrimonial property?*

In delineating matrimonial property, Section 5 of the Act specifically excludes property inherited or acquired before marriage, while Section 6(2) removes from inclusion property held in trust for other beneficiaries, including under customary law. Legal developments in this area have admitted a longer list of excluded properties including the salary paid to a spouse,³⁴ pension benefits,³⁵ and shares held in a company.³⁶ While courts have not provided detailed reasoning on why salary and pension benefits are excluded from matrimonial property, the most

24 Matrimonial Property Act 2013 (Cap 152 Laws of Kenya) s 6.

25 *AKM v NNN* (2019) KEHC 7687 (KLR).

26 *MO v AJA* (2023) KEHC 21343 (KLR).

27 *NGV v CNV also known as CHM* [2022] KEHC 16645 (KLR).

28 *GWM v SMN* (2023) KEHC 18483 (KLR).

29 *SS v APB* (2024) KEHC 3252 (KLR).

30 *JNK v RMN* (2023) KEHC 19347 (KLR).

31 *TNI v AN* (2024) KEHC 8540 (KLR).

32 *ENK v JNK* (2015) KEHC 2041 (KLR); *SN v FM* (2019) KEHC 6924 (KLR); *AMM v SMN* (2022) KEHC 367 (KLR).

33 *AMM v SMN* (n 32); *NGV v CNV also known as CHM* (n 27).

34 *NGV v CNV also known as CHM* (n 27) [58].

35 *JKO v CKO* [2023] KECA 115 (KLR) [34].

36 *NGV v CNV also known as CHM* [2022] KEHC 16645 (KLR); *SNK v MSK & 5 others* [2015] KECA 1010 (KLR).

likely explanation is the narrow definition within which matrimonial property is couched. This view would hold every other property incapable of being considered matrimonial property other than the three admitted categories: the matrimonial home; household goods within the matrimonial home, and property jointly owned and acquired during the subsistence of marriage. In light of this definition, an individual's salary and pension benefits are typically personal in nature and not granted with consideration of the recipient's marital status. Because they are intended for individual use, they do not readily fit within the legal framework of matrimonial property. Company property, on the other hand, is excluded based on the company's distinct legal personhood. Any claims relating to assets held by a company can only be ventilated before the commercial courts.³⁷ Even then, the Court of Appeal in *PWK v JKG*³⁸ was of the view that the strict inapplicability of property held in a company to consideration as matrimonial property could be set aside in instances where the matrimonial property is commingled with company property, especially where the parties to the marriage are the sole shareholders. In that case, the property in dispute was previously matrimonial property which was later transferred to the ownership of a company in circumstances that were designed to defeat justice.

D. The Basis for the Division of Matrimonial Property

Once an applicant has proved dissolution of marriage, and that the property in question qualifies as matrimonial property, they are next required to prove that they contributed to the acquisition of the identified property.³⁹ Over the ten-year existence of the Act, the assumption that the mere fact of marriage entitles a party thereto to a share of matrimonial property has been unequivocally dispelled.⁴⁰ In fact, such a position has been held to be an affront to the constitutional principle protecting the right to property and equality of parties to a marriage.⁴¹ Courts have been categorical in their stand that a party claiming a share of matrimonial property must adduce evidence on the nature and extent of their contribution towards the acquisition of matrimonial property.⁴² In upholding this position, courts have consistently declined the invitation to speculate on the contributions made by a party or to rely on unproven assertions.⁴³

Even then, courts are alive to the fact that spouses typically acquire property during marriage with no expectation of divorce or dissolution of marriage. It is therefore not usual for couples to keep records of each spouse's contribution.⁴⁴ Again, as

³⁷ *NGV v CNV* (n 27) [52].

³⁸ [2015] KECA 535 (KLR).

³⁹ Matrimonial Property Act 2013 (Cap 152), s 7.

⁴⁰ *PNN v ZWN* [2017] KECA 753 (KLR); *EGM v BMM* [2020] KECA 188 (KLR); *JOO v MBO*; *Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).

⁴¹ *Ibid*; See also *JOO v MBO* (n 5).

⁴² *AWN v FMN* [2018] KEHC 4830 (KLR).

⁴³ *Ibid*.

⁴⁴ *NWK v BKG* [2024] KEHC 163 (KLR).

observed earlier, the period of marriage could be decades long, so that even those records that previously existed have been forgotten or misplaced. The court's work in these cases is to piece together the patchwork of presented evidence in calibrating each party's contribution as fairly as possible.⁴⁵

The Act categorises the nature of contribution into two forms; monetary and non-monetary contribution.⁴⁶ The definition of monetary contribution is not afforded in the Act nor in the reviewed cases, perhaps because it is self-explanatory, that is, contribution made in terms of money. Non-monetary contribution on the other hand has been widely discussed. The Act itemizes certain contributions that would fall within the non-monetary domain, including farm work, child-care, management of the family home, management of the family's business and providing companionship.⁴⁷ The vast majority of matrimonial property cases devote their efforts to assessing each spouse's contribution and assigning a corresponding share of the property.

Certain inherent distinctions arise between the two forms of contribution. First, it is much easier to prove monetary contribution compared to non-monetary contribution. This is because of the paper or digital trail usually accompanying money transactions. Technological developments have pushed this advantage further by making it possible to immutably preserve associated money transactions over years.⁴⁸ So, even when the memory of the parties fades, the financial record remains. Proof of companionship, childcare and farmwork do not quite lend themselves to similar evidential preservation and may sometimes require the corroboration of the other spouse, at a time when they are not in a very cooperative or appreciative mood. In any event, after the lapse of time, say when children are adults, the specifics of childcare seem remote and unimportant, their link to subsequent property acquisition tenuous at best.⁴⁹

Apart from the question of proof, the issue of the weight attributable to the specific nature of contribution differs from one type to the next. Monetary contributions already come with an attached numerical weight. It is therefore relatively easy to assess the monetary contribution against the value of matrimonial property. The assessment of the value of companionship, domestic work, farm work or childcare is an inherently complex undertaking. Part of the complexity stems from the

45 *Francis Njoroge V. Virginia Wanjiku Njoroge* (n 7) ; *PNN v ZWN* (n 3) [2017] .

46 Matrimonial Property Act 2013 (Cap 152 Laws of Kenya), s 2.

47 *Ibid.*

48 Natalia Dashkevich, Steve Counsell, Giuseppe Destefanis, 'Blockchain financial statements: Innovating financial reporting, accounting and liquidity management' (2024) 16(7) *Future Internet* <<https://www.mdpi.com/1999-5903/16/7/244> > accessed 20 June 2025.

49 *JKO v CKO* [2023] KECA 115 (KLR) [37]-[38].

subjective lenses of culture,⁵⁰ gender,⁵¹ and religion⁵² through which these tasks are viewed. Research on domestic and care work in sub-Saharan indicates that women spend 3 to 3.4 times as much time on these responsibilities as men.⁵³ Oxfam's 2019 Household Survey, conducted in five informal settlements around Nairobi found that women spent more than 11 hours a day involved in care work, compared to under three hours for men.⁵⁴ Beyond the court, and especially in the wake of the COVID-19 pandemic, there is a global push towards greater recognition and valuing of domestic work and childcare.⁵⁵

Regarding the weight attributable to non-monetary contribution, courts have repeatedly affirmed that this form of contribution is not inferior to its monetary counterpart, because it forms the supportive foundation necessary to allow for monetary contribution.⁵⁶ Courts have also noted that the forms of non-monetary contributions mentioned in the Act are not exhaustive. Indeed, reviewed cases reveal additional components found under this heading, including caring for aging parents, paying fees for the spouse's siblings, identification and negotiation of prices for assets subsequently forming matrimonial property.⁵⁷

The Marriage Act, 2014 allows for parties to enter into a prenuptial agreement, detailing the manner in which property ought to be divided after divorce. None of the analysed cases had a prenuptial agreement in place, although in two instances,⁵⁸ parties entered into a post-nuptial agreement but pending the outcome of divorce proceedings (so it was more of a divorce settlement). The courts in these two cases found the agreement to be valid and gave effect to the expressed wishes of the parties.

E. Forum For The Adjudication Of Matrimonial Property Disputes

Rule 6 of the Matrimonial Property Rules, 2022 provides the appropriate forum for the resolution of claims relating to matrimonial property. In instances where the

50 Mehjabeen Alarakhia, Zahra Ahmed and Tamina Tamina, 'Gender inequality and care work: Valuing and investing in care' in Lisa Kolovich, Monique Newiak (eds) *Gender equality and economic development in sub-Saharan Africa* (International Monetary Fund, 2024).

51 Mariano Pinho and Ruth Gaunt, 'Biological essentialism, gender ideologies, and the division of housework and childcare: Comparing male carer/female breadwinner and traditional families' (2021) 164(1) *The Journal of Social Psychology* <<https://doi.org/10.1080/00224545.2021.1983508>> accessed 05 June 2025.

52 Bethany Gull and Claudia Geist, 'Godly husbands and housework: A global examination of the association between religion and men's housework participation' (2020) 27(3) *Social Compass* <<https://doi.org/10.1177/0037768620907566>> accessed 05 June 2025.

53 Mehjabeen Alarakhia, Zahra Ahmed and Tamina Tamina, (n 50).

54 Lucy Maina, Elishba Kimani and others, 'Gendered Patterns of Unpaid Care and Domestic Work in the Urban Informal Settlements of Nairobi, Kenya: Findings from a Household Care Survey – 2019' (2019) Oxfam International <<https://doi.org/10.21201/2019.5068>> accessed 20 June 2025.

55 Alice Margaria, 'Fathers, childcare and Covid-19' (2021) 29 *Feminist Legal Studies* <<https://doi.org/10.1007/s10691-021-09454-6>> accessed 04 June 2025; Man-Yee Kan, 'Housework participation measurement' in Filomena Maggino (ed) *Encyclopedia of quality of life and well-being research* (Springer Nature, 2023) <<https://doi.org/10.1007/978-3-031-17299-1>> accessed 20 June 2025.

56 *HNM v FTS* [2021] KEHC 5370 (KLR); *JCL v JMN*; *RNN (Interested Party)* [2024] KEHC 1843 (KLR).

57 *JOO v MBO*; *Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).

58 *DNK v KM* [2021] eKLR; *QMAO v DAW* [2024] KEHC 4952 (KLR).

monetary value of the matrimonial property exceeds 20 million,⁵⁹ the claim ought to be referred to the High Court. Where the monetary value is below this amount, the Magistrate courts are designated as the appropriate forum. Where parties profess the Muslim faith, the court where the matter is heard can, on request of the parties apply Islamic law. In addition, the Kadhi's court is empowered to hear and determine questions involving the division of matrimonial property.⁶⁰

Where a claim is lodged with the relevant court, the court has a wide array of potential orders it can issue in resolving the case, with up to 18 different types of orders outlined under Rule 30. These include the sale of the matrimonial property and division of proceeds, the transfer of matrimonial property from one spouse to the other, an occupation order for staying at the matrimonial home, the reimbursement of money, an order for the partition of matrimonial property among others. The latitude allows the court to reach a fair determination. This flexibility across the diverse range of circumstances involving matrimonial property.

III. Research Objective

The research conducted for this article analysed reported court cases involving the division of matrimonial property in Kenya for the period between the commencement of the Act on 16th January 2014 to the research cut-off date of 30th August 2024. The analysis used the following seven questions to deduce trends in matrimonial property disputes:

- i. Which party files for the division of matrimonial property?
- ii. What is the duration of marriage in cases involving the division of matrimonial property?
- iii. How long after divorce is the claim for division of matrimonial property instituted?
- iv. What is the duration of resolving matrimonial property disputes from filing to judgment?
- v. In whose name is the matrimonial property usually registered?
- vi. What is the nature of proven contribution, by gender?
- vii. What are the division ratios for matrimonial property relative to proven contribution?

IV. Research Methodology

The study analysed 94 cases involving the division of matrimonial property decided at the Court of Appeal and High Court in Kenya for the period between the commencement of the Act on 16th January 2014 to the research cut-off date

59 Magistrate Courts Act (Cap 10 Laws of Kenya), s 7.

60 *AWA v HDD* [2018] KEHC 645 (KLR).

of 30th August 2024. These cases were sourced from the Kenya Law Reporting website.⁶¹ Reference was made to both the new and old website because the case migration to the new website was still underway at the time of the study. Using the advanced case search functions in both the old and new websites, cases whose subject involved the division of matrimonial property in the High Court and Court of Appeal yielded 199 cases on the new website and 537 cases on the old website. The cases were initially narrowed down to those with a final judgment issued. Consequently, cases involving the division of matrimonial property, where only interim rulings had been made were excluded, as rulings do not fully dispose of a matter. The remaining cases were narrowed down to the ones in which the court found the existence of matrimonial property and made orders for how the property was to be divided. Most of the cases that fell off at this stage were the ones in which declaratory orders under Section 17 (rather than orders for division) were issued. As discussed above, declaratory orders relating to contested property between spouses or former spouses can be sought even during the subsistence of marriage. Another category of excluded cases was where the judgment found that the contested property did not answer to the definition of matrimonial property or where the plaintiff failed to prove any contribution to the matrimonial property. A smaller category of excluded cases, predominantly housed under the old website involved cases filed before the commencement of the Matrimonial Property Act in 2014, but which were erroneously determined using the provisions of the Act. The Supreme Court in *JOO v MBO* was categorical that the Matrimonial Property Act was never intended to have retrospective application and that cases filed before 16th January 2014 could only be determined under the Married Women Property Act of 1882.⁶²

At the end of the distillation process, the analysis yielded 94 cases, which then form a population sample for the 10-year period. Arising from these cases, courts identified 267 matrimonial properties. The data gathered was analysed to yield comprehensive patterns. Descriptive statistics including frequency and mean were utilized to generate the average duration of proceedings, length from decree to the filing of claim, average duration of marriage, registered owner of matrimonial property and division ratios relative to nature of proved contribution. The data was verified through cross-checking against the reported decisions and was represented through excel charts.

⁶¹ <https://kenyalaw.org/caselaw/>.

⁶² *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).

V. Research Findings

A. Party Initiating Suit For The Division Of Matrimonial Property

Party filing the summons for division of matrimonial property

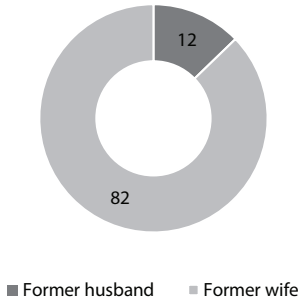


Figure 1: Party initiating suit for the division of matrimonial property

Out of the 94 reviewed cases, the former wife was the primary initiator of the suit for the division of matrimonial property in 82 instances. Former husbands initiated the suit in only 12 cases, accounting for only 13% of the total.

B. Duration Of Marriage In Cases Involving The Division Of Matrimonial

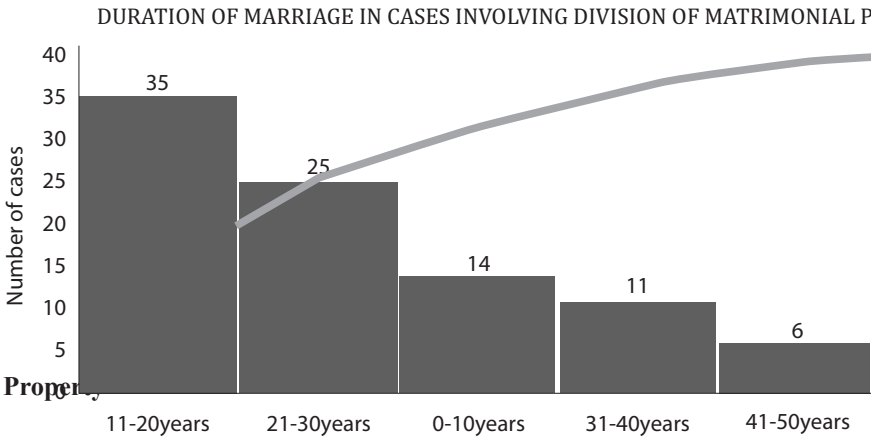


Figure 2:

Duration of marriage in cases involving the division of matrimonial property

Most of the parties to a suit for the division of matrimonial property had been married for between 11 and 20 years. The average duration of marriage in these cases was 21 years. The longest duration of marriage in the reviewed cases was 53 years,⁶³ while the shortest was 2 years.⁶⁴

⁶³ *EW M v M O M, A N M & J T M* [2018] eKLR.

⁶⁴ *MMK v JON* [2023] KEHC 23597 (KLR).

C. Duration Between Obtaining A Decree Of Divorce And Filing Of Summons For The Division Of Matrimonial Property

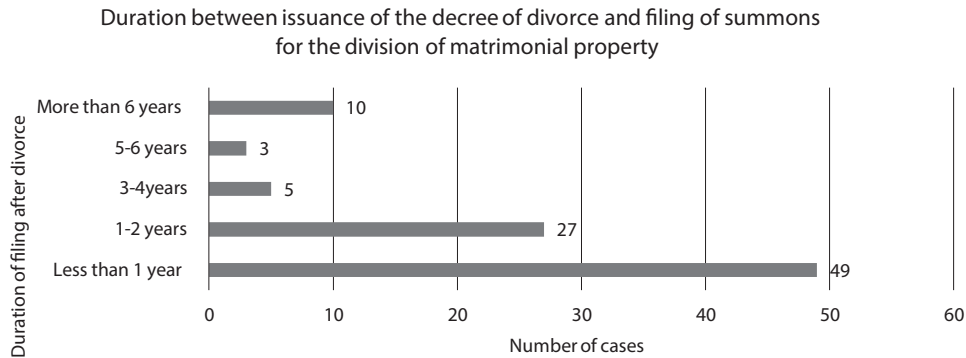


Figure 3: Duration between obtaining a decree of divorce and filing of summons for the division of matrimonial property

Most Applicants seeking the division of matrimonial property moved to court within the year of issuance of a decree absolute consequent to an order for divorce. The average duration between issuance of the decree absolute and filing of summons for division of matrimonial property was one and a half years.

D. Duration Of Proceedings Relating To The Division Of Matrimonial Property In Kenya

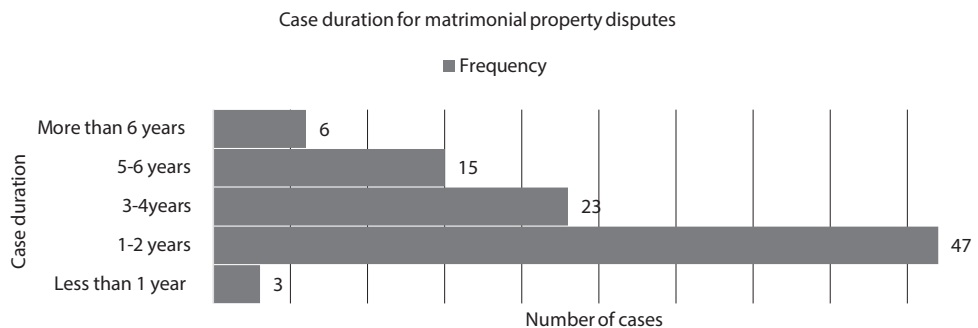


Figure 4: Duration of proceedings relating to the division of matrimonial property in Kenya

The average duration of proceedings relating to the division of matrimonial property from filing to judgment is 3 years. The longest duration observed in the reviewed cases was 22 years,⁶⁵ while the shortest duration was less than a year.⁶⁶

⁶⁵ *RWW v EW* [2019] eKLR.

⁶⁶ *HNM v FTS* [2021] eKLR; *EKTM v ECC* [2021] eKLR.

E. Registered Owner Of Matrimonial Property

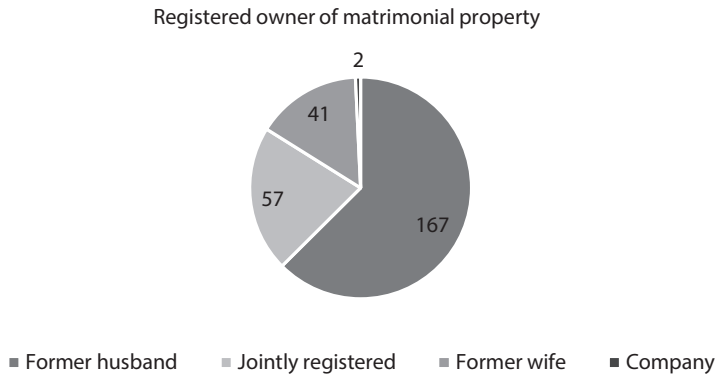


Figure 5: Registered owner of matrimonial property

In the reviewed cases, the registered owner of the property determined by the court to constitute matrimonial property was identified for 267 properties. Of these, 63% of the properties were registered in the name of the former husband, 21% were jointly registered and only 15% were in the name of the former wife. In *PWK v. JKG* [2015] eKLR, the Court of Appeal ruled that property held in the name of a company, where the shareholders were exclusively the former husband and wife, and which was inseparably mixed with matrimonial property, could be treated and divided as matrimonial property. This decision accounts for the 2 properties registered in a company's name and distributed as matrimonial property.

F. Nature Of Proven Contribution To The Acquisition Of Matrimonial Property

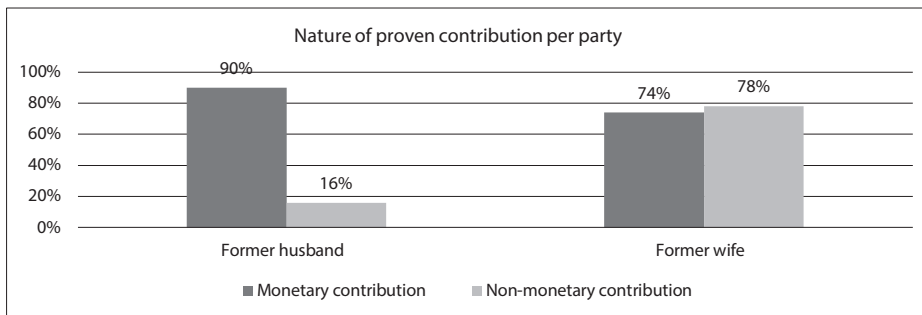


Figure 6: Nature of proven contribution to the acquisition of matrimonial property

Former husbands were able to prove monetary contribution in the acquisition of matrimonial property in 90% of reviewed cases. Former wives proved their contribution under this category in 74% of the cases. With respect to non-monetary contribution, former wives proved contribution in 78% of the cases while former husbands did so in only 16% of the cases.

G. Division Of Matrimonial Property On The Basis Of Contribution

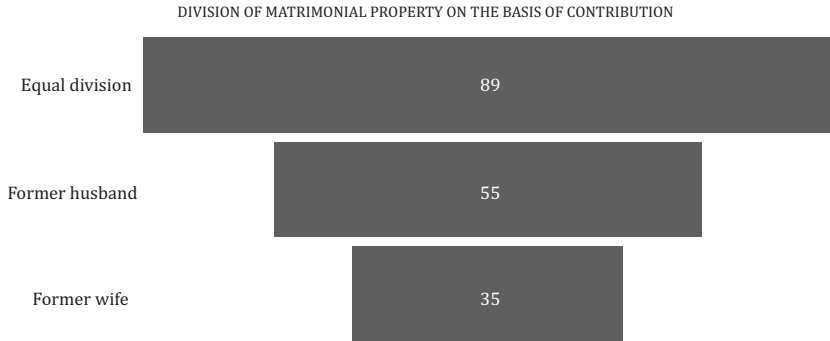


Figure 7: Division of matrimonial property on the basis of contribution

Courts stipulated a division ratio for matrimonial property based on the parties' contributions in relation to 179 of the 267 properties. In the majority of cases the courts ordered a 50-50 split. In 55 properties, the court awarded a higher proportion to the former husband, while in 35 a larger share was granted to the former wife.

VI. Analysis

This section discusses the seven findings in the preceding portion of the paper.

A. The Relationship Between The Party Instituting Claim And The Registered Owner Of Matrimonial Property

It was observed that women are the predominant claimants in suits for the division of matrimonial property. It is suggested that this position could be linked to the observation that most of the matrimonial property, at 63% is registered in the name of the former husband. Socio-cultural realities in Kenya, the chief of which is an entrenched history of traditional inheritance practices that favored men over women, place the most contested property, the land on which the matrimonial home is built predominantly in the name of the former husband.⁶⁷ This situation is compounded by lower levels of education and limited financial independence among women, further limiting their access and control of property.⁶⁸ Because divorce has been observed to disproportionately affect the financial standing of

⁶⁷ Agnes Djurfeldt, 'Gendered land rights, legal reform and social norms in the context of land fragmentation-A review of the literature from Kenya, Rwanda and Uganda' (2020) 90 Land Use Policy <<https://doi.org/10.1016/j.landusepol.2019.104305>> accessed 05 June 2025.

⁶⁸ Romy Santpoort and others., 'The land is ours; Bottom-up strategies to secure rural women's access, control and rights to land in Kenya, Mozambique, Senegal and Malawi' (2021) 5 Frontiers in Sustainable Food Systems <<https://doi.org/10.3389/fsufs.2021.697314>> accessed 05 June 2025.

women who in most cases are granted primary child custody,⁶⁹ the impetus to file for division of matrimonial property could be a mechanism to claw back the much-needed financial support. Interestingly, in certain instances where educated women had single-handedly purchased matrimonial property, they chose to have this property registered solely in their husband's name. Such was the case in *MO v AJA*⁷⁰ where the Plaintiff had singularly constructed the matrimonial home, a 5-bedroom mansion, purchased land for cultivation and livestock rearing, and erected commercial residential units. The respondent, her husband made no monetary contribution but was the registered owner of all the properties. In *MTH v MAM*,⁷¹ it was the Respondent, the former wife, who while working in Germany sent money to her husband to purchase the matrimonial property, eventually registered solely in the former husband's name. In *BWN v ANW*,⁷² the former wife contributed Ksh. 2,315,000 towards the acquisition of landed properties worth Ksh. 2,650,000. She had the properties jointly registered even though the former husband's contribution was only Ksh. 335,000. This observation points to a poignant but underexplored area of how the institution of marriage shapes and influences property rights, reflecting deeper cultural and societal norms that impact how ownership and control are perceived within relationships. Empirical studies will go a long way in unearthing the particular beliefs and assumptions at play. A brief survey reported in the Nation Newspaper concluded that property ownership by men carries a deeper symbolic meaning beyond the property's material value, as it tends to conflate ownership with identity and societal expectations of masculinity. The ownership of property in a family setup serves an affirming function of the man's role as the head and protector of his home.⁷³ Even then, the presumption under Section 14 of the Matrimonial Property Act, that property acquired during marriage and registered in the name of one of the spouses is held in trust for the other serves the redemptive function of having these properties distributed to the party able to prove contribution to acquisition, over the registered owner of the property. In addition, with the Constitutional backing allowing women to inherit property on the same footing as men⁷⁴, coupled with the court's due diligence in ascertaining the implementation of this provision, women are now able to enjoy

69 Terry Arendell, *Mothers and Divorce: Legal, Economic and Social Dilemmas* (University of California Press, 1986, <https://doi.org/10.2307/jj.2430428>); Nicole Kapelle, Janeen Baxter, 'Marital dissolution and personal wealth: Examining gendered trends across the dissolution process' (2021) 83 *Journal of Marriage and Family* <<https://doi.org/10.1111/jomf.12707>> accessed 05 June 2025.

70 *MO V AJA* [2023] KEHC 21343 (KLR); See also *LNN v PKN* [2020] KEHC 4146 (KLR).

71 *MTH v MAM* [2023] KEHC 17473 (KLR); See also *MNM v PPK* [2019] KEHC 7978 (KLR).

72 *BWN v ANW* [2023] KEHC 22763 (KLR); See also *MWG v DGW* [2023] KEHC 3636 (KLR) where the wife fully financed the purchase of the 12,500,000 matrimonial home, registered jointly and in which her former husband evicted her and brought in a new wife. At the time of the eviction and thereafter she continued to service the mortgage.

73 Simon Mburu, 'Kenyan men: This is why we do not jointly own property with our wives' *Nation Newspaper*, (Nairobi, 06 February 2023) <https://nation.africa/kenya/life-and-style/lifestyle/kenyan-men-this-is-why-we-don-t-jointly-own-property-with-our-wives-4110926> accessed 05 June 2025.

74 The Constitution of Kenya 2010, Art 60 1(f).

ownership of inherited property. Even then, ignorance of the law and a continuation of restrictive cultural practices hinder the full exercise of these rights.⁷⁵

C. Duration Of Marriage In Cases Involving The Division Of Matrimonial Property

Working with 21 years as the median age at first marriage,⁷⁶ and 21 years as the observed average duration of marriage from the reviewed cases, it appears that divorce tends to happen later in life, when a couple are in their early 40s, and the children of the marriage have just entered adulthood. This trend seems to accord with the increasingly observable phenomenon of gray divorce, where marriage fragility is increasing later in life.⁷⁷ The reviewed dataset had 3 cases of divorce after 50 years of marriage, placing the respective parties in the neighbourhood of 70 years of age. This finding underscores the complexity facing courts in distributing property acquired over a long course of time, especially with little to no records of contributions, faded memories, and intense emotions associated with the separation of previously shared.

D. Duration Between Obtaining A Decree Of Divorce And Filing Of Summons For The Division Of Matrimonial Property

It was found that most applicants instituting a claim for share of matrimonial property did so within the year of issuance of the decree absolute. Although the timeframe for the institution of these suits had not been clarified in the Act, Rule 5 of the Matrimonial Property Rules 2022 now obliges parties to file within a year of obtaining the decree. It would appear that this rule will in most cases be complied with, even though some latitude is given to non-confirming applicants to seek an extension from the court if they are able to show good cause for the delay. Despite the fact that divorce proceedings are heard separately from the division of matrimonial property cases, and sometimes depending on the value of assets, in the subordinate and high court, the relatively short period could indicate the need for closure and the desire to move on with life post-divorce. At the same time, because the overwhelming majority of applicants are women, the short duration could indicate the desire to have the question of property ownership resolved, especially where it

75 Federation of Women Lawyers, 'Women's land and property rights in Kenya: Training handbook' 2-3 <<https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file>> accessed 05 June 2025.

76 Kenya National Bureau of Statistics, 'Kenya Demographic and Health Survey, 2022' (KNBS 2023) <<https://www.knbs.or.ke/wp-content/uploads/2023/08/Kenya-Demographic-and-Health-Survey-KDHS-2022-Summary-Report.pdf>> accessed 05 June 2025.

77 Susan Brown and Matthew Wright, 'Marriage, cohabitation and divorce in later life' (2017) 1(2) *Innovation in Aging* igx015 <<https://doi.org/10.1093/geroni/igx015>> accessed 05 June 2025 Susan Brown, I-Fen Lin, 'The graying of divorce: A half century of change' (2022) 77(9) *The Journals of Gerontology* 1718 <<https://doi.org/10.1093/geronb/gbac057>> accessed 05 June 2025; The study of this phenomenon within our jurisdiction would uncover the undercurrents at play and help to identify interventions that could avert the rising splintering of marriage for older couples. At the same time, children of later life divorce are emerging adults in institutions of higher education or recent entrants into the job market. At this time, they are at a critical stage of crafting their self-identify and making important career and relationship choices. The impact of divorce for this cohort is less studied even though it bears crucial insights into undergraduate graduation rates and future relationship outcomes.

relates to the matrimonial home, most likely in the interest of family stability and continuity for themselves and their children.

D. Duration Of Proceedings Relating To The Division Of Matrimonial Property In Kenya

The average duration of proceedings was found to be 3 years. A 2023 study analyzing a decade of divorce cases in Kenya found the average duration of divorce proceedings to be 3 years.⁷⁸ In total, the dissolution of marriage, followed by the division of matrimonial property in Kenya takes a cumulative period of six years on average. Along this timeline, parties incur legal costs, set aside time to attend court hearings and are at the same time dealing with the emotional and psychological strain accruing from the divorce and property settlement process. Where the parties have children under 18 years, they are concurrently negotiating custody and maintenance either out of court or through yet another court process before the Children's Court. The need to have the three proceedings in different courts can be justified by the distinct issues obtaining in each proceeding. Additionally, because custody matters involve children, they are required to be conducted in the child-friendly environment of the Children's Court. Perhaps there is also some apprehension that the findings of the divorce process could have some impact on how property is eventually distributed. That said, nothing stops parties from subjecting their disputes to alternative dispute resolution processes for faster resolution.⁷⁹ As already observed, the Court of Appeal's decision in *TSJ v SHSR*⁸⁰ found that an order of divorce is awardable through arbitration proceedings. Section 6(3) of the Matrimonial Property Act on the other hand makes provision for pre-nuptial agreements in which parties can dictate, prior to marriage, how they would wish for their property to be shared upon dissolution of the same.

E. The Relationship Between The Nature Of Proven Contribution And The Division Of Matrimonial Property

The variance in the two forms of contribution between former husbands and wives is perhaps the most surprising discovery in the analysis. As seen, former husbands proved their monetary contribution in 90 of the 94 cases under review. Women's monetary contribution was lower, but still decent, at 74 of 94 cases. This finding would dislodge the proposition that women are manifestly disadvantaged in making financial contributions in acquiring matrimonial property. Even then, it must be noted that the amount of monetary contribution differed from men to women, with women in general making a less significant quantum of contribution. At the same time, it was intriguing to observe that women kept a record of their monetary

78 Sussie Mutahi and Elvira Akech, 'Insights from a decade of divorce cases in Kenya: An invitation toward multidisciplinary collaboration for marriage enhancement' (2025) Family Transitions <<https://doi.org/10.1080/28375300.2025.2457173>>.

79 Kariuki Muigua, 'Entrenching family mediation in the Law in Kenya' (Unpublished paper 2018) <<http://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7th-July-2018.pdf>> accessed 05 June 2025.

80 [2019] KECA 170 (KLR).

contributions or recalled the same, even when those contributions were very dismal in the broader context of the property value. In *ZWO v GVB*, the Plaintiff, a former wife, was able to convince the Court that she made some financial contributions from her monthly salary of Ksh. 12,500 towards the purchase and development of the Ksh.7,000,000 matrimonial home, built over two years.⁸¹

The real surprise came in the non-monetary category, where former husbands proved their contribution in a paltry 16 cases. On the other hand, women excelled in this category in 78 of the 94 cases. Men's non-monetary contribution was majorly related to the domains of management of family business and farmwork. Childcare was mentioned in a few cases where it was asserted that former husbands took over the role when their spouses were taking evening classes, working night shifts or working abroad. In contrast, when former wives related their non-monetary contribution, it was often a cocktail of three or four of the five domains. What comes out is that women are the ones who carry out activities amounting to non-monetary contribution while men do not or do so very rarely. Is this a true representation of the goings-on at home? In the alternative, could it be that men do take part in childcare, provision of companionship and domestic work, but they fail to bring up this fact during the proceedings for fear of the associated stigma? Or even yet, could it be that the domains specified in the MPA were molded around women's already existing contributions in the domestic front, without considering what non-monetary contributions men make in the home? It might also be that because property is typically registered in the man's name, his role in the property division suit is largely defensive rather than offensive. Consequently, men may feel less inclined to exert significant effort in proving their non-monetary contribution. These hypotheses fall outside the scope of the present study but would make worthwhile areas of further research.

Most certainly, there is no clarity on what the terms companionship, child-care, domestic work, and management of matrimonial home entail, even though they are made to appear self-evident. Can a spouse be found to have afforded companionship to their partner when a similar position does not obtain for the accompanied spouse? Isn't companionship an activity in concert? What does child-care mean in the life course context? Indeed, mothers might play a more dominant role in infancy, but how do children's needs morph as they grow older? Does the space for engaged parenting from both parents increase with age? These questions take us deeper into the social-cultural construction of roles within the home and would be the subject of interesting studies, especially within an African context.

Be that as it may, it appears that the cumulative contribution of former wives (taking into account both monetary and non-monetary contribution) would be higher than that of former husbands, which would logically suggest that women get a larger share of the matrimonial property. Not the case. The cases analysed showed that

81 *ZWO v GVB* [2024] KEHC 5281 (KLR).

the most frequent division outcome is a 50-50 share of matrimonial property. This finding does not at all endorse the idea that the fact of marriage on its own entitles parties to a halfway split of the property. Decisions to the contrary abound on this point. Even then, it is evident that after parties have proved their contribution, which proof has already been pointed out to be a painstaking process, the decision best commending itself to the court in a majority of decisions is that the matrimonial property ought to be shared equally. This is an interesting discovery in light of the disproportionate ownership of property by former husbands, their superior monetary contribution and inferior non-monetary contribution.

Even then, in cases that do not result in a 50:50 split, the division is more likely to favour former husbands rather than former wives. As observed in figure 7, in the 90 instances where courts did not award a 50-50 division of property, the results favoured men 55 times and women 35 times. This is no doubt related to the weight attached to monetary contribution, which favours men since they almost always rely on monetary contribution which is relatively easier to prove. The reviewed cases also indicate instances where, in spite of their higher contribution across the board, former wives request the court to share property equally. Because every case is uniquely different, it is near impossible to devise a mathematical formula applicable in the division of matrimonial property. That said, the paper associates itself with the recommendation made by the Court of Appeal in *JKO v CKO*.⁸² The court took the position that in the first instance, a court ought to determine the percentage of contribution under the monetary category and then the non-monetary category for each of the parties, and then draw an average contribution to determine each spouse's eventual share in the property.

VII. Conclusion and Areas for Further Study

The study sought to report on the developments in cases involving the division of matrimonial property in Kenya since the enactment of the Matrimonial Property Act in 2014. 94 court decisions decided at the High Court and Court of Appeal revealed interesting patterns relating to the way property is held, claims instituted, contributions proven and property eventually divided. On the whole, the analysis finds that the Courts' interpretation of the Act has been fairly successful in equitably dividing matrimonial property. The 50-50 division of property in a majority of the cases is a testament to the fact that courts do in fact value the non-monetary contributions predominantly made by women in the marriage, especially in a context where men are able to prove more instances of monetary contributions and a majority of the properties are registered in men's names.

The disproportionate non-financial contribution made by women calls for clarity in defining the nature and scope of childcare, domestic work, companionship and other

82 [2023] KECA 115 (KLR).

forms of unpaid care work, to help parties measure and report on their contribution. Further empirical research on the non-financial contribution of men in the domestic setup over the life course of a family could help make the law more robust.

Further civic education on the provisions of the law, including the right of property ownership by women, the benefits of joint property ownership, provision for pre-nuptial agreements, and existence of avenues for alternative dispute settlement in family matters will go a long way in enabling the purposes of the Act to be fulfilled.

The paper makes a mark in using the law as a diagnostic tool to draw attention to questions that call for deeper social and cultural reflection. Some of these questions which are recommended as areas of further research include the phenomenon of 'grey' divorce (involving couples married for at least two decades), the impact of this type of divorce on the parties involved and especially the adult children of divorce, the socio-cultural and religious persuasions shaping the way property is held in marriage and most importantly understanding the dynamic norms that inform division of roles within the home based on intersecting factors, of which gender is key.

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