



PROPERTY SETTLEMENT IN A MATRIMONIAL PROCEEDING UNDER THE MATRIMONIAL CAUSES ACT 1970 OF NIGERIA

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ABSTRACT

Settlement of property is the transfer of property or part of a property which may be jointly owned to the other spouse. Like maintenance and custody, it is an auxiliary relief granted during divorce proceedings. The power of the court to settle property is provided in Section 72(1) of the Matrimonial Causes Act 1970 with respect to statutory marriage. In addition to maintenance payments, custody and access rights, marital property is one of the matters over which angry divorcing spouses disagree and quarrel over. Either party to a marriage seeking a divorce can apply to the court alongside with the divorce petition for the settlement of properties. The Matrimonial Causes Act gives Nigerian courts discretion to achieve fairness in marital property settlement. In a plethora of cases relating to the dissolution of statutory marriage in Nigeria, the courts very often consider the issue of settlement of property strictly based on the financial contribution of parties to the acquisition of the property or properties in question. The Petitioner and or the Respondent are usually expected to lead evidence in proof of such contribution before proprietary interest before the family assets can be granted to him or her. It is settled law that a person who claims to be the joint owner of a property must be able to quantify his contribution. This rule of law the article argued should not be applied in a matrimonial proceeding wherein settlement of property is involved. The article argued that application of proof of financial contribution is unfair unjust and inequitable considering that there is an existing relationship between the husband and the wife and that there is a presumption of joint ownership of any property acquired while the marriage is subsisting. The article suggested therefore inter alia that that presumption should be applied strictly for the benefit of the spouses.

KEYWORDS: Marriage, Matrimonial Property, Settlement of Property, Matrimonial Proceedings

1. INTRODUCTION

According to Black's Law Dictionary,¹ Property Settlement is "a judgment in a divorce case determining the distribution of the marital property between the divorcing parties". It also includes the division of the marital debts as well as assets. Marital property besides custody, maintenance payments and access rights is one of the matters over which angry divorcing spouses disagree.² Historically, since the passage of laws permitting women to acquire and own property, scholars have always had a keen interest in the law relating to matrimonial

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¹ B. A. Garner (ed) *Black's Law Dictionary* (West A. Thompson Reuters 9th edn. 2009) 1338.

² R J Levy 'Custody investigations in divorce-custody litigation' (2010) (12) *Journal of Law & Family Studies* 431.



property or family assets, both in common and civil law countries.³ Nigerian family law is founded on the English common law tradition which forms a significant part of Nigerian law.⁴ Consequently, whenever there is a dispute between spouses over property at divorce, the courts have recourse to the ordinary rules of property law.⁵ Nigerian courts have generally failed to appreciate the extent of the statutory discretion accorded to them.⁶

The discretion given to the Nigerian courts to make orders to settle matrimonial property is provided for by section 72 of the Matrimonial Causes Act.⁷ This is because the section does not provide specific rules or guidelines as to how the courts should settle properties between parties in divorce proceedings. Section 72 of the Matrimonial Causes Act gives courts discretion to achieve fairness in marital property actions.⁸ The court is required to be equitable in benefitting all the parties involved and is bestowed with a wide discretion in doing so.⁹ The jurisdiction covers all properties of the parties, whether jointly or separately owned.¹⁰ While this jurisdiction of the courts is well defined, the problem that they have faced over time is how to exercise this jurisdiction.¹¹ The courts' puzzling approach has generally been to exclude from their equity jurisdiction property over which formal title is shown.¹² Instead of an adjustive jurisdiction, the court usually proceeds to locate title using evidence based tools, principally legal or formal title, but also the adversarial technicalities of pleadings and proof.¹³

Settlement of property usually comes as an ancillary relief granted during divorce proceedings. Settlement of property must be contained in a divorce petition or answer and should not be an afterthought. Under the customary law, both the man and the woman can acquire property either before or during the marriage. The woman is not barred from holding or acquiring her own property. Also, when the man acquires a property, he has sole interest or

³ M. I. Attah 'Divorcing marriage from marital assets: why equity and Women fail in property readjustment actions in Nigeria' (62) (3) (2018) *Journal of African Law*, 427—446 © SOAS, University of London.

⁴ A. O. Abdulmumini, Religious and Customary Laws in Nigeria' (2011) *Emory International law Review*, 881-895.

⁵ B. E, Umukoro, 'Settlement of Matrimonial Property upon Divorce: Challenges and Need for Reform in Nigeria and some other common wealth countries in Africa' (2006) *Commercial and Property Law Journal*, 116-118.

⁶ Matrimonial Causes Act 1970 (MCA) Cap M7 Laws of the Federation of Nigeria (LFN) 2004, s 72.

⁷ *Ibid.*

⁸ Attah (n3).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*



right over the property. When a marriage under the customary law is been dissolved, the woman has no right to claim for settlement of property even if she contributed to the acquisition of such property. She cannot through a court order compel her husband to share the property with her. This principle of law appears to be harsh and unfair to the woman.

However, under the statutory marriage (marriage under the Act) either of the parties can apply to the court alongside with the divorce petition for the settlement of properties within the provision of section 72 of the Matrimonial Causes Act.¹⁴ In other words, settlement of matrimonial property under section 72 of the Matrimonial Causes Act¹⁵ only applies to statutory marriage in Nigeria. The property to be settled must belong to either of the parties to the marriage or jointly to both parties. The court cannot share a property that belongs to neither of the parties. The property can either be real or personal property.

This article discussed the settlement of Properties within the ambit of section 72 of the Matrimonial Causes Act, and the Approach of Nigerian Courts in making orders for the settlement of properties in divorce proceedings. This article is divided into six (6) sections. Section 1 is the Introduction, Section 2 discusses Statutory Marriage, section 3 discusses the Concept of Matrimonial Property, section 4 discusses the Power of Court with respect to settlement of property proceedings in a Statutory Marriage, section 5 discusses the Judicial Approach to Settlement of Property Under Section 72 of the Matrimonial Causes Act 1970 and section 6 is the Conclusions and Recommendations.

2. STATUTORY MARRIAGE

Marriage is another important social institution. Marriage and family are two aspects of the same social reality i.e. the bio-psychic and social instincts of man. Marriage is one of the most ancient, important, universal and indispensable social institutions which has been in existence since the inception of human civilization. Marriage is the oldest social institution recognized by secular and religious authorities. It was instituted by God in the bible.

In Nigeria, “a marriage is a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any)”.¹⁶ Without marriage there is no family, without family there is no society.

¹⁴ (n6).

¹⁵ *Ibid.*

¹⁶ The editors of encyclopaedia Britannica .



In Nigeria there are two types of marriages, marriage under the Act and Traditional/Customary Marriage.¹⁷ Traditional marriage is a marriage ceremony that is conducted in accordance with the customs of the bride and groom's families. In Nigeria, this involves the paying of bride price, giving gifts, while marriage under the Act or statutory marriage is a marriage that is in accordance with the provisions of the Marriage Act. The first step to make a marriage in compliance with the Marriage Act is to give notice of the impending marriage to the registrar of the marriage in the Marriage Registry where the marriage will be conducted.

In *Amobi v Ezegwu & Ors*,¹⁸ the court defined a Statutory Marriage as the voluntary union for life of one man and one woman to the exclusion of all others. The English version of the Nigerian Statutory marriage was defined by Lord Penzance in *Hyde v Hyde*¹⁹ As the voluntary union for life of one man and one woman to the exclusion of all others. This article will concentrate on marriage under the Act also called Statutory Marriages.

A valid Statutory Marriage can be celebrated in the following forms as recognized by the Marriage Act²⁰

- (i) By the Registrar in the Marriage Registry under Section 27 of the Marriage Act.²¹
- (ii) By a minister of a religious denomination in a licensed place of worship under Section 18 of the Marriage Act.²²
- (iii) By special license under the hand of Minister of Internal Affairs under Section 13 Marriage Act.²³
- (iv) By celebration abroad in a Nigerian Diplomatic Mission under Section 50 of the Marriage Act.²⁴

In a Statutory Marriage, the Registrar or official minister that is conducting the ceremony is called a Celebrant.²⁵

It is important to note that any person who is married under the Marriage Act shall be incapable during the continuance of such marriage, of contracting a valid marriage under customary law but nothing in the Act shall affect the validity of any marriage contracted

¹⁷ *Chinweze & Anor v. Masi & Anor* (1989) LPELR-851 (SC).

¹⁸ (2013) LPELR- 21863 (SC).

¹⁹ 1860 L.R. I PD: 130.

²⁰ The Marriage Act (MA) 1914, CAP M6, LFN 2004.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Omotoyosi Salihu how to become legally married in Nigeria 'what to know about statutory marriages March 7, 2018 .



under or in accordance with any customary law, or in any manner apply to marriages so contracted²⁶ What the Marriage Act means by this provision is that the only condition that can invalidate an otherwise proper marriage conducted in accordance with Customary law is when one of the parties to the customary marriage was at the time when the customary marriage was conducted, married to another person under the Marriage Act and the marriage was still subsisting.²⁷

3. CONCEPT OF MATRIMONIAL PROPERTIES

In Nigeria, the concept of matrimonial property is not in existence or defined anywhere.²⁸ The term “matrimonial property” implies property (immovable or movable) acquired by either or both spouses during the marriage other than that acquired by gift, inheritance or bequest except otherwise agreed upon by the spouses.²⁹ It is however, strongly submitted or presumed that any property acquired by the parties to a marriage while the marriage is subsisting is presumed to be a matrimonial property although, courts in Nigeria sometimes have given strict interpretation to the concept of matrimonial property to mean property where both parties made financial contribution in concrete terms. This work would focus majorly on immovable property like land or interest in land. At the breakdown of marriage, Nigerian courts do not redistribute the property of spouses³⁰ and neither does the extant law contain any guidelines for doing so.³¹ However, section 72 of the Matrimonial Causes Act of 1970³² grants the court the power to make a property settlement order, it is submitted that the inability of a statutory wife to lay claims for a beneficial entitlement to property (by way of a redistribution order)³³ without proof of a financial contribution upon civil marriage

²⁶ MA, s 33.

²⁷ *Mgboduv. Mghodu* (2018) LPELR-43770(CA).

²⁸ K M Adekile ‘Property Rights of Women in Nigeria as Impediments to Full Realization of Economic and Social Rights’, (2010) <<http://ssrn.com/abstract=1616270>> accessed 18 June 2022.

²⁹ This will include, amongst other things, the income of spouses, whether derived from earnings or property, and assets which are acquired by means of either spouse’ income or gains. It will, however, exclude personal property (that is, property which is personal in nature, gifts, inheritances and bequests acquired before or during the subsistence of the marriage).

³⁰ Unlike Australian and English courts, Nigerian courts do not have the power to redistribute property on divorce. The law provides only for a property settlement order pursuant to s 72 of the MCA.

³¹ Etomi E and Asia E ‘Family Law in Nigeria’ (2015) <<http://global.practicallaw.com/6-613-4665>> accessed 18 June 2022, 4.

³² (n6).

³³ Etomi and Asia (n31); Efe CJ & Eberechi OE ‘Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order’ [2020] (23) *PERPELJ*, 5.



breakdown is akin to the position of a customary law wife in Nigeria,³⁴ who is deprived of her property rights on the basis of gender discrimination.³⁵

4. POWER OF COURT WITH RESPECT TO SETTLEMENT OF PROPERTY PROCEEDINGS IN A STATUTORY MARRIAGE

Section 72 of the Matrimonial Causes Act³⁶ provides for the powers of court in proceedings with respect to settlement of property between parties to the divorce proceedings when a prayer for an order of the court to settle property accompanies a divorce petition or a cross petition as the case may be. Section 72 Subsection (1) of the Matrimonial Causes Act³⁷ provides as follows:

The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

Section 72 Subsection (2)³⁸

The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

Section 72 Subsection (3)³⁹

The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

³⁴ It is widely noted that a woman married under customary law cannot approach the court for an order to either compel her divorced husband to settle part of his property on her as it is the case under civil marriage; or for an order to transfer the husband's property or a part of it to her upon the breakdown of the customary marriage.

³⁵ *Dawodu v Danmole* (1962) 2 SCNLR 215; *Onyibor Anekwe & Anor v Mrs Maria Nweke* (2014) 9 NWLR (Pt. 1412) 393.

³⁶ (n6).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*



It appears from the provisions of the Matrimonial Causes Act cited above, property covers both jointly and separately owned by the parties. Attah has argued that properties to be settled also include properties covered by both pre-nuptial and post-nuptial settlements and that the court should have the power to evaluate the arrangement and order a resettlement of already settled property. It appears that the settlement” includes arrangements effected by third parties on the parties to the marriage, as well as those by one party on the other. Thus, the sub-section is principally intended to bring all properties to which the parties may be entitled, either jointly or separately, within the court’s equity jurisdiction. The tenor of the section indicates that even properties covered by a prenuptial agreement can be called into the court’s jurisdiction.⁴⁰

It is significant that the court’s discretion and equity (fairness) jurisdiction under the statutes is wide. In *Acquah v Acquah*,⁴¹ it was held that the court can exercise the powers under section 72 on its own motion. In *Oghoyone v. Oghoyone*,⁴² the Court of Appeal held that section 72 could apply in a situation where the marriage is void. This agrees with section 69 of the Matrimonial Causes Act, which expressly provides that a void marriage can ignite the court’s equity jurisdiction. In *Kafi v Kafi*⁴³ it was held that “the main limitation in making [a section 72] order must be ‘as the court considers just and equitable’

As to the scope, intention, or objective of section 72, Nwogugu, citing *Cartwright v Cartwright*,⁴⁴ explains that an order under the section will relate to the whole or part of the property involved and that the court is empowered to enable it to make proper provisions for the spouses and their children.⁴⁵ By the provisions of section 72,⁴⁶ the court is enjoined to make a just and equitable order based on the circumstances of each case before it. This equitable order is in relation to the settlement and not redistribution of property. It does not imply a transfer of the ownership of the property from one spouse to the other except in cases where the court makes an order of sale for the purposes of discharging a maintenance order.⁴⁷

⁴⁰ M. Attah Prenuptial agreements as enforceable contracts in Nigeria: How far-reaching is *Oghoyone*?” (2013) (1) (1) *ABSU Property and Comparative Law Journal* 147,159.

⁴¹ [1985] HCCLR 35 at 40 per Adeyemi J.

⁴² [2010] 3 NWLR (Pt. 1182) 564,

⁴³ [1987] 3 NWLR (pt 27) 175.

⁴⁴ [1982] 12 Family Law 252.

⁴⁵ E.I. Nwogugu *Family Law in Nigeria* (3rd ed, 2014, HEBN) 272.

⁴⁶ (n6).

⁴⁷ Efeand Eberechi (n33).



The court's powers under section 72 cannot be limited, save as provided under the section itself. The ambit of the court's discretion is absolute and the range of the parties' properties over which the court can exercise its jurisdiction seems unlimited. The consequence should be that the jurisdiction should focus on the readjustment of proprietary interests and nothing else. Therefore, between the parties alone, there is no basis for the court to adjudicate over titular rights, unless such an exercise is necessary to ascertain or determine the extent of, or title quality, of the parties' assets.⁴⁸ Title determination in general court business is necessary when litigants dispute the ownership of property. This is not the case under section 72. Indeed, the section applies regardless of where title lies. The important element is that the property does not belong to a third party. Thus, the court's obligation should be limited to readjustment unless there is no basis for doing so (such as where the court concludes that the distribution of interests or concessions made by the parties is already equitable).⁴⁹ The implication of this position is that all property belonging to the parties is to be regarded as marital, a result that the court may then choose to readjust.⁵⁰ However, in some cases, this conclusion is not applied by some courts because of adherence to the principle of proof of financial contribution which is unjust and unfair especially to the parties who have lived as husband and wife for a fairly long time.

Thus, the purpose of the readjustment is to be fair to all parties in the family. As noted above, where the court estimates that the demarcation or distribution of interests is fair, there will be no basis for it to exercise any discretion to readjust further.⁵¹ Conversely, where the court's exercise of this jurisdiction focuses on making a finding as to who, between the parties, has title to a particular property so as to declare exclusive ownership on that party, the court's discretion will be fettered. Such an exercise would also run counter to the welfare (benefit) principle that supports the jurisdiction. First, that property would be excluded from the court's adjustive jurisdiction, thereby reducing the range of property that the court can readjust. This would be against the express provisions of section 72 of the Matrimonial Causes Act. Secondly, the exercise may prevent the benefit that the other party, as well as the children of the marriage, should procure from a proper exercise of an adjustive jurisdiction. It

⁴⁸ Attah (n3).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*



is interesting that the court's jurisdiction can be exercised in favour of children of the marriage, both below and above the age of 21 years.⁵²

5. JUDICIAL APPROACH TO SETTLEMENT OF PROPERTY UNDER SECTION 72 OF THE MATRIMONIAL CAUSES ACT

In the exercise of jurisdiction for settlement for property under section 72 of the Matrimonial Causes Act 1970, the courts in Nigeria have adopted two major approaches in the settlement of property. These approaches are: The strict property rights approach and the equity based approach. For purposes of this article, it would be necessary to discuss them seriatim.

5.1.1 THE STRICT PROPERTY RIGHTS APPROACH

In most divorce proceedings brought before the courts in Nigeria, where settlement of property is sought for, the courts have predominantly adopted the strict property rights approach in the determination of entitlement to property.⁵³ M. Attah stated that Nigerian courts have generally failed to appreciate the extent of the statutory discretion accorded to them. Instead of an adjustive jurisdiction, the court usually proceeds to locate title using evidence-based tools, principally legal or formal title, but also the adversarial technicalities of pleadings and proof. With regard to title, whoever has legal title for which there is documentary evidence retains separate ownership. The courts treat property over which there is formal title as if it were excluded from the court's adjustive jurisdiction, even in divorce situations.⁵⁴

The strict property right approach requires a court to determine legal ownership by way of documentary evidence.⁵⁵ In order to sustain a claim for beneficial interest in property, where legal title to the property is in the name of one of the spouses, this approach requires the claimant to provide evidence of a direct financial contribution to the acquisition of the property. Under this approach, therefore, in the determination of the legal title to property or beneficial interest in property, the indirect financial or non-financial contributions of a spouse to the acquisition of the property are not taken into consideration by the court.⁵⁶

⁵² Attah (n3).

⁵³ Efeand Eberechi (n33).

⁵⁴ Attah (3).

⁵⁵ Efeand Eberechi (n33).

⁵⁶ Efeand Eberechi (n33).



In the decisions below there was a total failure of equity, as the properties involved were excluded from readjustment since, in accordance with the court's definition, they were separately owned.

In *Nwanyu v Nwanyu*,⁵⁷ the respondent wife claimed that she had contributed ₦6,000 to the building of a house that was in her husband's name. Her claim was dismissed as she was unable to substantiate it. On the vital issue of evidence, OlatawuraJCA said,

[i]f...the respondent has given a lump sum of N6,000 or any sum to her husband, she should have led evidence in support. if she bought building materials and gave them to her husband, she was duty bound to lead evidence in support. If her monetary contribution was by way of cheque, evidence ought to have been led also.⁵⁸

In *Amadi v Nwosu*,⁵⁹ the appellant's husband sold his house that served as the matrimonial home and moved to another part of the city. The appellant refused to vacate possession and the respondent purchaser sued her for declaration of title, damages for trespass and an injunction. The appellant could not provide evidence to support her contention that she had an interest in the house. She merely said that she paid for labour and sand and made no effort to substantiate her testimony; under cross-examination she testified that she did not know when the house was built. Her husband testified that she was not earning money when he built the house and his testimony that he built the house without any contribution from his wife was not challenged in cross examination. The Supreme Court dismissed the appellant's claim. KutigiJSC stated:

The appellant [argued] that she contributed to the building of the house. If it were so, then certainly when she came to testify in court, she ought to have explained the quality and quantity of her contribution. She also ought to have given details and particulars of the contributions which would have enabled the court to decide whether or not she owned the property with [her husband]. She did not, in addition, the appellant called no witnesses to prove that she contributed either labour or sand to the building.⁶⁰

In *Adebiyi v Adebiyi*,⁶¹ the court stated expressly that where a party alleges that the property sought to be settled is joint property, he should explain the quality and quantity of his or her

⁵⁷ [1987] 3 NWLR (pt 62) 697.

⁵⁸ *Ibid.*, 704; *Onwuchekwa v Onwuchekwa* [1995] 5 NWLR (pt 194) 739.

⁵⁹ [1992] 5 NWLR (Pt. 241) 273.

⁶⁰ *Ibid.* at page 280.

⁶¹ [2013] 2 OGSLR I at 12; also *Fribanic v Fribanic* (1957) 1.



contribution, details and particulars of contribution which will enable the court to decide whether or not they jointly owned the property. In *Onabolu v Onabolu*,⁶² the court held that a person who claim to be joint owner of a property must be able to quantify his contribution. He must give detailed particulars and support them where necessary with receipts of what he bought towards the building of the property.

In *Akinboni v Akinboni*,⁶³ the document of title to the matrimonial home was in the name of the petitioner husband. The respondent alleged in her cross-petition, upon which she gave evidence, that both parties owned the property jointly. She stated that she allowed the petitioner to obtain the title deed in his sole name to enable him to obtain a housing loan from his employers, who would not accept jointly owned property. There was no specific or express prayer that the building be partitioned or sold, and the proceeds shared. Despite this, the High Court ordered the partition of the property. The Court of Appeal indicated that it was willing to treat matrimonial causes liberally but allowed the technical rules to prevail in this case. It reasoned that,

... although matrimonial cause cases are treated as different from ordinary civil cases and matters and with liberal approach to the technical rules of pleadings, ... the assertion of the respondent on joint ownership of the family property has not ... been proved as required by law. It was a situation where the respondent adduced oral evidence to vary or contradict what was commonly accepted by the parties and admitted that the deeds or documents of title for the said property was [sic] in the name of the appellant. ... It is trite that oral or extrinsic evidence is not admissible to contradict or vary a written document or agreement except in fraud cases.⁶⁴

The property in dispute in *Essien v Essien*⁶⁵ was in the sole name of the respondent husband. The appellant wife's petition for dissolution ran concurrently with his suit. The divorce petition was concluded earlier than the husband's suit and declared that the parties were joint owners of the disputed property. The wife sought to introduce that judgment in her husband's suit as estoppel regarding the issue of ownership of the disputed property. She argued that her husband collected her salary as part of her contribution to the building and that her father provided lodging for the parties whenever they were in town where the building was situated. The trial court discounted the divorce judgment and held that the respondent was the sole

⁶² [2005] 2 SMC, 135.

⁶³ [2002] 5 NWLR (pt 761) 564.

⁶⁴ *Ibid.*, 579–580.

⁶⁵ [2009] 9 NWLR (Pt. 1146) 306.



owner of the property. The Court of Appeal held that the issue of estoppel could not arise since it had not been specifically pleaded. It further held that the trial court was right not to have inferred joint ownership of the property in issue in favour of the Plaintiff/Appellant, since the requirement that a direct financial contribution to the purchase price of the matrimonial home or to the repayment of the mortgage installments in respect of it was necessary before a joint interest could be inferred.⁶⁶

The formalistic attitude in these cases was to the disadvantage of the woman, who is often the party that applies to the court for readjustment.⁶⁷ This is a reality generally faced by African women due to cultural forces, a reality that the courts obviously ignore. A woman who has labored with the man and suffered to bear, nurse and manage the children and the home should not be denied her fair share of the matrimonial property as there is no greater financial contributions than these.

5.1.2 EQUITY BASED APPROACH

A critical look at section 72 of the Matrimonial Causes Act reveals the unlimited powers of the court in determining the fate of all properties of spouses, where there is a divorce. It does not focus on ownership of property, since undoubtedly, ownership rests on the marriage union and their participants. Rather it focuses on the management (sharing and settlement) of the property for the benefits of the participants of the marriage union.⁶⁸ The court may in matrimonial proceedings by order require the parties to the marriage, or either of them, to make settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

The settlement of the property is for the benefit of all or any of the parties to the marriage and the children of the marriage.⁶⁹ The object of Section 72 of the Act is benefit oriented. The operating words in this section are “Just and Equitable” This implies what is fair in the context of the marriage partnership in the event of a divorce. It has nothing to do with the

⁶⁶ [2009] 9 NWLR (pt 1146) 306 at page 330.

⁶⁷ *Gail v Paye* [2003] 8 NWLR (pt 823) 583; *Idrisu v Obafemi* [2004] 11 NWLR (pt 884) 396; *Okere v. Akaluka* (2014) LPELR 24287; *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065; *Imariagbe v Omo-Imariagbe* (2012) judgment of the High Court of Edo State, suit no B/423D12008; and *Uzokwe v Uzokwe* (2010) judgment of the High Court of Ebonyi State, Suit No: HAB/3D/2005. In all these cases, the courts adopted the title-finding approach.

⁶⁸ O. Umah, who takes over the family property after Divorce? Available at <https://learnnigerianlaws.com.who...> Accessed 18 June 2022.

⁶⁹ MCA, s 72 (1)



person in whom title to property or properties resides or who has made financial contributions in terms of physical cash.

In *Oghoyone v Oghoyone*,⁷⁰ the court of Appeal expressed the view that it would be unconscionable to allow a spouse to claim exclusive possession of a matrimonial property, especially where the court can by the conduct of spouses, either express or inferred, determine the shared intentions. Equally, the court in *Okere v Akuluka*,⁷¹ held that it would be most unconscionable to deprive a woman and her children of the right in a property to which she contributed substantially in regard to its acquisition and development. The court also expressed the view that the indirect contribution of wives to the matrimonial property should grant them a beneficial entitlement to the property on the basis that it was the performance of their functions as wives that enabled their husband to perform theirs.

5.2 A COMPARATIVE STUDY OF SETTLEMENT OF PROPERTY IN KENYA

In Kenya, the approach of most courts is to adopt the strict property rights approach. Some courts ask spouses to produce receipts as proof of contribution, an implausible request that may discriminate against some women whose principal contribution was non-monetary. Not to mention the difficulties in keeping receipts over the years. However, some courts recognise the women's unpaid care and domestic work but there is no guidance as to which cause to follow leaving the courts unsure how to proceed. It is important to note that in Kenya, "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."⁷² The above section shows how unclear the procedure to follow is as it does not state if the contributions should be financial or not.

6. CONCLUSION AND RECOMMENDATIONS.

The adoption of the strict property right approach as applied in *Essien v. Essien* and *Akinboni v. Akinboni* tends to exploit the women as it takes no notice of the cost of performing the role of the home maker. Without the woman at home making invisible, indirect, and unquantifiable contributions, the man cannot achieve anything. Though decisions by the courts in Nigeria adopting the equity based approach are relatively few, it is the right approach to adopt in the settlement of property in divorce proceedings.

⁷⁰ [2010]3 NWLR (Pt 1182) 564, 584.

⁷¹ [2014] LPELR 24287 (CA) 1.

⁷² Kenya's Matrimonial Property Act (2013).



From the Plethora of opinions and authorities it is obvious that the property to be settled need not be property owned jointly but must be owned either by the husband or the wife. If it is a joint property the approach of the court may be different as it is being settled but if it is owned by one of the parties it must also be settled but the consideration or approach may be different. Therefore the decision in *Essien v. Essien* should be reconsidered as it does not represent the fair, equitable and modern thinking in matrimonial matters; opinion is that what may be fair, equitable and just when the property is a joint matrimonial property may not be the same if it is a property owned by one of the parties and what may be fair, equitable and just when the property is owned by the husband may not be the same if it is a property solely owned by the wife.

This article therefore makes the following recommendations:

1. Considering the challenges posed by the inapt provisions of existing statutes and the general failure of the courts to insist on a definitive marriage-centered view of properties acquired during marriage, it is important that the statutes be amended.
2. It is strongly recommended also that any property acquired during the marriage or while the marriage was subsisting whether signed by both or just one of the parties should be strictly interpreted as a matrimonial property jointly acquired and owned by both parties and settled as such pending when the Matrimonial Causes Act will be amended to provide expressly for that.
3. That the courts in Nigeria should jettison the strict property law approach in the settlement of property in divorce proceedings and adopt the equity based approach as that is the intendment of section 72 of the Matrimonial Causes Act 1970 and it serves for better justice for both parties and the children of the marriage.