

# Equitably Assessing the Weight of Non-Monetary Contributions in Kenya

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## Abstract

*Article 45 of the Constitution of Kenya establishes the family as the natural and fundamental unit of the society. Marriage is one of the main ways of creating a family, and the spouses in such a marriage are deemed to have equal rights. Upon the dissolution of the marital union, the spouses are faced with the challenge of dividing the property they acquired during their union. In this division, courts have taken opposing stances. One faction advocates for the equal division of property based on the fact that the spouses have equal rights. Another faction claims that marital property should be distributed on the basis of contribution since equality of rights does not necessarily translate to equal division of property. Consequently, the value of monetary and non-monetary contributions becomes increasingly important when dividing matrimonial property. Unfortunately, non-monetary contributions have historically been left out until the enactment of the Matrimonial Property Act of 2014. Even then, in the eyes of judicial officers, non-monetary contribution appears to be a lesser consideration given the ease of proving monetary contributions. Using a doctrinal analysis, this paper argues that non-monetary contribution is not accorded the same consideration as monetary contributions, which goes against the constitutional standard of equity. It is suggested that an application of a mathematical formula can remedy this inequity by placing each of the contributions on the same footing when dividing matrimonial property.*

**Key Words:** *Matrimonial Property, Equitable Distribution, Monetary Contribution, Non-monetary Contribution, Mathematical Formula.*

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## I. Introduction

There is no more lovely, friendly, and charming relationship, communion, or company than a good marriage.<sup>1</sup> Yet, everything that has a beginning has an end,<sup>2</sup> even a marriage. Where a marital union meets its fate in divorce, matrimonial property is split between the spouses.<sup>3</sup> In Kenya, matrimonial property is defined as the matrimonial home or homes, household goods and effects in those homes, and any other movable or immovable property jointly owned and acquired by the spouses during the subsistence of the marriage.<sup>4</sup> The matrimonial home, on the other hand, refers to property that is owned or leased by either or both spouses and occupied or used by them as their family home.<sup>5</sup> Additionally, any other attached property to the matrimonial home forms part of such matrimonial property.<sup>6</sup>

In dividing the matrimonial property between the spouses, courts consider what each of them has contributed to the acquisition of the property.<sup>7</sup> The contribution may be monetary or non-monetary.<sup>8</sup> The non-monetary contribution encompasses domestic work and management of the matrimonial home; childcare; management of family business or property and farm work.<sup>9</sup> On the other hand, monetary contribution encompasses one spouse paying the deposit or installments towards purchasing the matrimonial home.<sup>10</sup> This form of contribution is labelled as a direct monetary contribution.<sup>11</sup> Monetary contributions also include paying household expenses which enable the other spouse to cover the costs of purchasing the matrimonial home.<sup>12</sup> When these contributions take this latter form, they are termed as indirect monetary contributions.<sup>13</sup> Nonetheless, this paper is dedicated to the distinction between monetary and non-monetary contributions.

<sup>1</sup> Luther M, *The Table Talk of Martin Luther*, Christian Classics Ethereal Library, Grand Rapids, 1569, 292.

<sup>2</sup> Kornfield J, *Buddha's Little Instruction Book*, Bantam Publishers, New York, 1994, 78.

<sup>3</sup> Section 7, *Matrimonial Property Act* (2013), *MNH v FHM* (2018), eKLR, p.6, *ENK v MNNN* (2021), eKLR, p.7 – 8, *EGM v BMM* (2020), eKLR, p.4.

<sup>4</sup> Section 6 (1), *Matrimonial Property Act* (2013).

<sup>5</sup> Section 2, *Matrimonial Property Act* (2013).

<sup>6</sup> Section 2, *Matrimonial Property Act* (2013).

<sup>7</sup> Section 7, *Matrimonial Property Act* (2013), *MWG v TKG* (2016), eKLR, p.8, *ENK v MNNN* (2021), eKLR, para. 25 – 40, *FS v EZ* (2016), eKLR, p. 4 – 5.

<sup>8</sup> Section 2, *Matrimonial Property Act* (2013), *Kivitu v Kivitu* (1991), KLR, p.252.

<sup>9</sup> Section 2, *Matrimonial Property Act* (2013), *MNH v FHM* (2018), eKLR, p.3.

<sup>10</sup> *Gissing v Gissing* (1970), The United Kingdom House of Lords, p. 1 – 3.

<sup>11</sup> *Gissing v Gissing* (1970), The United Kingdom House of Lords, p. 1 – 3.

<sup>12</sup> *Kivitu v Kivitu* (1991) KLR, p. 258.

<sup>13</sup> *Kivitu v Kivitu* (1991) KLR, p. 258.

Prior to the current constitutional dispensation, the courts were divided on a number of questions regarding contributions. The first debate questioned whether contributions to matrimonial property could confer an interest in matrimonial property. If yes, the second debate went ahead to consider which type of contributions mattered. If both monetary and non-monetary contributions mattered, then the final debate asks which type of contribution matters more. It is important to state that these debates are not framed as such in court literature, and thus, this framing of the debates only serves to understand the arguments posited in this paper.

Under the first debate, there were differing views as to whether contributions to matrimonial property could confer an interest in matrimonial property.<sup>14</sup> It is also worth mentioning that some courts did not consider the question of contributions because they believed that matrimonial property should be divided equally between the spouses.<sup>15</sup> This position was adopted in light of the principle of spousal equality under article 45.<sup>16</sup> In the end, Kenyan courts, including the Supreme Court of Kenya, affirmed that spouses could gain an interest in matrimonial property through their contributions.<sup>17</sup> This is also the current stance held by section 7 of the Matrimonial Property Act.<sup>18</sup> Further, this signified that the principle of spousal equality only operated to grant spouses interests that were equal to what they contributed to the matrimonial property.<sup>19</sup>

The second debate examined what types of contributions could confer an interest in the property, with one faction claiming that both monetary and non-monetary contributions mattered,<sup>20</sup> while another claimed that only monetary

<sup>14</sup> *Appleton v Appleton* (1964) Court of Appeal of England and Wales, *Hine v Hine* (1962) Court of Appeal of England and Wales; These cases argued that the court had a wide discretion under section 17 of the Married Women's Property Act to do what was just and fair in the circumstances, leading them to assign property rights to spouses who had a form of contribution towards the matrimonial property. *National Provincial Bank v Ainsworth* (1965) United Kingdom House of Lords; This case disagreed with the assertions made in *Appleton* and *Hine*, stating that the court only had the power to enforce property rights, not to vary them (in effect negating the assignment of property rights according to contributions).

<sup>15</sup> *EGM v BMM* (2020) eKLR, p.4; In this case, the trial court had directed that the property be divided in a 50-50 apportionment based on the term 'equal' in Article 45(3) of the Constitution. *MCN v AWM* (2013) eKLR,

<sup>16</sup> Article 45 (3), *Constitution of Kenya* (2010).

<sup>17</sup> *Pettit v Pettit* (1969), The United Kingdom House of Lords, *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki* (1998) eKLR, *PMM v SM* (2013), eKLR, *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

<sup>18</sup> Section 7, *Matrimonial Property Act* (2013).

<sup>19</sup> *UMM v IMM* (2014) eKLR, *PNN V ZWN* (2017) eKLR, *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

<sup>20</sup> *Kivitu v Kivitu* (1991), KLR, *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki* (1998) eKLR, *AMR v ANJ* (2012) eKLR.

contribution mattered.<sup>21</sup> In 1991, it was the opinion of the court in *Kivuitu v Kivuitu* (1991), Court of Appeal of Kenya, that non-monetary contribution was a valid form of contribution to be considered when dividing the matrimonial property.<sup>22</sup> This opinion enjoyed considerable support<sup>23</sup> until it faced strong opposition from a five-judge bench, sixteen years later, in the case of *Echaria v Echaria* (2007), Court of Appeal of Kenya.<sup>24</sup> The court in *Echaria* held that a spouse would be entitled to a beneficial interest in matrimonial property only if they made monetary contributions towards its acquisition.<sup>25</sup> Non-monetary contributions were therefore not taken into account when the court was dividing the matrimonial property.<sup>26</sup> Nevertheless, it suggested that the legislature was the appropriate body to legitimise non-monetary contributions to matrimonial property.<sup>27</sup> This debate was finally settled by the section 2 of the MPA, which defines contributions to include both monetary and non-monetary contributions.<sup>28</sup> Following this provision, courts have also recognised both contributions when dividing matrimonial property.<sup>29</sup> Surprisingly, the exact value of these contributions are yet to find a resting place in Kenyan courts.

The final and most important debate therefore asks which of the two types of contributions actually matters. Article 10 of the Constitution of Kenya (hereinafter the Constitution) mandates judicial officers, among other persons, to interpret the Constitution and any other laws in accordance with national values and principles.<sup>30</sup> One of these values is equity.<sup>31</sup> Article 20 of the Constitution further obligates courts to promote equity when interpreting the Bill of Rights.<sup>32</sup> These two articles are pertinent to resolving this third debate on the value of contributions, especially for non-monetary contributions.

As per the *Joseph Ombogi Ogentoto v Martha Ogentoto and others* case before the Supreme Court of the Republic of Kenya, the principle of equity is essential to

<sup>21</sup> *Falconer v Falconer* (1970), Court of Appeal of England and Wales, *Karanja v Karanja* (1976), Kenya Law Reports, *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007), eKLR, *PMM v SM* (2013), eKLR.

<sup>22</sup> *Kivuitu v Kivuitu* (1991), KLR, p.252.

<sup>23</sup> *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki* (1998), eKLR, p.3, *TWN v SNK* (1993), eKLR, p.2, *SAA v FM* (2005) eKLR, p.2, *Salome Wambui Wambuu v George Wambuu Wanaina* (2006) eKLR, p.2.

<sup>24</sup> *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007), eKLR, p.9.

<sup>25</sup> *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007), eKLR, p.9.

<sup>26</sup> *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007), eKLR, p.10 – 13.

<sup>27</sup> *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007), eKLR, p.13.

<sup>28</sup> Section 2, *Matrimonial Property Act* (2013).

<sup>29</sup> *TKM v SMW* (2020), eKLR, p. 5 – 7, *JAO v MOOM* (2018), eKLR, p. 3 – 4, *NGV v CNV* (2022), eKLR, para. 59 – 64.

<sup>30</sup> Article 10, *Constitution of Kenya* (2010).

<sup>31</sup> Article 10 (2)(b), *Constitution of Kenya* (2010).

<sup>32</sup> Article 20 (4)(a), *Constitution of Kenya* (2010).

the division of matrimonial property. This is because it enables the spouse who offered non-monetary contributions to gain rights in the property.<sup>33</sup> The court reasoned that the spouse's non-monetary contributions indirectly enabled the other spouse to acquire the property. This may be through caring for the children and the welfare of the home, thereby freeing the other spouse to earn money outside the home to acquire the matrimonial property. Thus, in the context of matrimonial property, the value of equity is applicable through equitable division of property, which involves an equitable assessment of contributions.

Following the enactment of the MPA, varying percentages of the matrimonial property have been granted to spouses who have offered non-monetary contributions, which was at times coupled with monetary contributions.<sup>34</sup> They often receive less than 50% of the matrimonial property, while their partners who have offered monetary contributions receive a bigger share.<sup>35</sup> At times, spouses who offer both monetary and non-monetary contribution only walk away with 50% of the matrimonial property.<sup>36</sup> The manner of arriving at these percentages is based on the discretion of the judge.<sup>37</sup> Since the weight given to non-monetary contribution is inconsistent and unpredictable, spouses with this type of contribution often face inequitable results.<sup>38</sup>

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<sup>33</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 94.

<sup>34</sup> *MBO v JOO* (2018) eKLR, para. 16 – 18; The court awarded 50% interest in the matrimonial property to the wife based on loans taken to maintain the matrimonial property and childcare. *SM v ASM* (2018) eKLR para. 35 – 38, 44; The court awarded a 25% interest in the property to the wife based on her non-monetary contributions of childcare and companionship. *ENK v MNNN* (2021) eKLR para. 37 – 40; The wife was awarded a 10% interest in the property based on her non-monetary contribution of companionship.

<sup>35</sup> *SM v ASM* (2018) eKLR para. 35 – 38, 44 (The court awarded a 25% interest in the property to the wife based on her non-monetary contributions of childcare and companionship). *ENK v MNNN* (2021) eKLR para. 37 – 40 (The wife was awarded a 10% interest in the property based on her non-monetary contribution of companionship), *FS v EZ* (2016) eKLR, (The wife was awarded about 45% of the matrimonial property based on her non-monetary contribution of companionship and managing the home, while her spouse was awarded 55% based on his monetary contribution).

<sup>36</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

<sup>37</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, *MBO v JOO* (2018) eKLR.

<sup>38</sup> *MBO v JOO* (2018) eKLR, para. 16 – 18 (the court awarded 50% interest in the matrimonial property to the wife even after offering both monetary and non-monetary contribution towards the acquisition of the matrimonial property). *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, (the court awarded 50% of the matrimonial property to the wife despite her offering both monetary and non-monetary contribution towards the acquisition of the property while her spouse only offered monetary contributions), *MAA v AR* (2018), eKLR (the court recognised the non-monetary contribution of the wife in a 36 year marriage, but went ahead to award her only 30% of the matrimonial property), Mutiso B, 'Getting to Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya's Marital Asset Division' 26 *Michigan Journal of Gender and Law* 121, 2019, 151 – 155.

Equitable division of matrimonial property is different from equal division in that it does not presume that the property should always be divided equally between the spouses at the dissolution of the marriage.<sup>39</sup> This is in line with the most recent stance of the Supreme Court of Kenya on the division of such property.<sup>40</sup> While equitable does not mean equal, equal shares may be equitable in some situations, such as where the marriage acted as a partnership.<sup>41</sup> A partnership is a marriage in which one spouse contributes financially as the breadwinner, while their partner cares for welfare of the home and their offspring as a homemaker.<sup>42</sup> In such a marriage, the property may be divided equally since the couple acted as a unit in acquiring the matrimonial property.<sup>43</sup>

As seen from the *Ogentoto* case, the Supreme Court of the Republic of Kenya conceptualised the standard of equity as a means by which spouses who offer non-monetary contribution can lay a claim to the matrimonial property.<sup>44</sup> In Singapore, the standard of equity formed the basis of inventing a mathematical formula to aid judges in offering fair valuations of the contributions of spouses.<sup>45</sup> The formula was developed in the High Court of Singapore in case of *AJR v AJS* which was a matrimonial property dispute.<sup>46</sup> The interpretation of equity by Singaporean courts is relevant to Kenyan courts because both of them have the power to order division of matrimonial property, unlike English courts which only have the power to adjust property rights.<sup>47</sup> The power of division enables the court to realise fairer outcomes for the parties as it recognises the efforts of both spouses in acquiring the property, whether directly through monetary contributions, or indirectly, through non-monetary contributions.<sup>48</sup> Thus, both courts have the power to split the property between spouses fairly, even when a spouse is not registered as the proprietor. Owing to the great strides that Singapore has made in giving fair evaluations of contributions,<sup>49</sup> their approach

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<sup>39</sup> Hofstein D, Finger S, Meyer C, Weiner E, 'Equitable Distribution Involving Large Marital Estates', 21 *Journal of the American Academy of Matrimonial Lawyers* 439, 2008, 313.

<sup>40</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

<sup>41</sup> Hofstein D *et al*, 'Equitable Distribution Involving Large Marital Estates', 340 – 347.

<sup>42</sup> *Adams v Adams* (2011), Supreme Judicial Court of Massachusetts, para 391.

<sup>43</sup> *In re Marriage of Grim* (2001), The Court of Appeals of Washington (Division Two).

<sup>44</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 93 – 96.

<sup>45</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore.

<sup>46</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore.

<sup>47</sup> Section 7, *Matrimonial Property Act* (2013), Article 112 (1), Chapter 4, *Women's Charter 1961* (Singapore), Kum L.W, 'Division of Matrimonial Assets: Recent Cases and Thoughts for Reform', *Singapore Journal of Legal Studies*, 1993, 354 – 355.

<sup>48</sup> Kum L.W, 'Division of Matrimonial Assets', 354 – 355.

<sup>49</sup> Kum L.W, 'Fifty Years and More of the Women's Charter of Singapore', *Singapore Journal of Legal Studies*, 2008, 19 – 22.

can be applied to Kenya in light of the similarities between the power of the courts.

This paper examines whether the courts valuation of non-monetary contribution aligns with the constitutional standard of equity under article 10 and 20. Where the courts appear to fall short of this standard, this paper suggests the application of a mathematical formula which facilitates the equitable assessment of this type of contribution. Thus, section II of this paper investigates the meaning of the term equity, and its applicability to the division of matrimonial property. Subsequently, the section discusses how non-monetary contribution was valued in a couple of matrimonial disputes before Kenyan courts with the aim of establishing whether the standard of equity was heeded to or ignored. Section III of this paper proposes the Singaporean mathematical formula as a means of ensuring the equitable valuation of non-monetary contribution. It also explores how the formula can be applied to the Kenyan context to guarantee the application of equity when dividing matrimonial property. Section IV concludes the paper and offers recommendations.

## II. Conceptualising equity

As stated earlier, Article 10 of the Constitution mandates judicial officers, among other persons, to interpret the Constitution and any other laws in accordance with equity.<sup>50</sup> Additionally, the Constitution directs courts to promote the value of equity when interpreting the Bill of Rights under Article 20.<sup>51</sup> The value of equity is important to matrimonial property because it leads to a fair assessment of non-monetary contributions.<sup>52</sup> It asks courts to look at the marriage as a whole and take into account any contributions, monetary or non-monetary, that spouses offered during the marriage when dividing matrimonial property between them.<sup>53</sup> Thus, this section investigates the concept of equity. Further, equity shall also form the lens of evaluating contributions in this paper. The concept of equity has different meanings. On one hand, Aristotle conceptualised equity as an exception to the law.<sup>54</sup> Other scholars contrast equity to the concept of equality, arguing that equity demands unequal treatment in some

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<sup>50</sup> Article 10, *Constitution of Kenya* (2010).

<sup>51</sup> Article 20 (4)(a), *Constitution of Kenya* (2010).

<sup>52</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 93 – 96.

<sup>53</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 94.

<sup>54</sup> Aristotle, 'Nichomachean Ethics' in Barnes J (ed) *The Complete Works of Aristotle*, Princeton University Press, Princeton, 1984, Book V, Chapter 10, 1975 – 1976.

circumstances.<sup>55</sup> In the era of the courts of Chancery, equity signified a body of rules that emanated from the dictates of conscience and were subsequently developed by the courts of chancery to cater to the inefficiencies of common law.<sup>56</sup> In this sense, equity was synonymous with natural law and justice, being the soul and spirit of the law.<sup>57</sup>

*i. Aristotelian conceptions of equity*

Aristotle begins his account on equity by asserting that what is equitable is good.<sup>58</sup> In the same way, justice as a virtue is accorded the same value of being good.<sup>59</sup> Thus, equity and justice are both excellent.<sup>60</sup> However, he shows that being equitable is better than being just because equity is better than what is legally just.<sup>61</sup> In other words, equity is unlike being legally just because it amounts to a rectification of the law, and not a simple application of the law.<sup>62</sup> Aristotle opines that the law has a universal application.<sup>63</sup> However, some circumstances may be left out in enacting the law, leading to the application of equity.<sup>64</sup> In this sense, equity is a rectification of the law because it applies to the exceptional case, the unforeseen circumstance, or the extension of a law to a case that is within its spirit but not quite within its letter.<sup>65</sup> Thus, it is not the law that has an error.<sup>66</sup> Rather, it is the subject matter to which the law applies that warrants an exception.<sup>67</sup> When applying equity, a judge does not have unfettered discretion to rectify the application of the law.<sup>68</sup> A judge is guided by what the legislator would

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<sup>55</sup> Takeuchi D.T, Dearing T.C, Bartholomew M.W, McRoy R.G, 'Equality and Equity: Expanding Opportunities to Remedy Disadvantage', 42 *Generations: Journal of the American Society on Aging* 2, 2018, 13 – 14.

<sup>56</sup> Megarry R.E, Baker P.V, *Snell's Principles of Equity*, 26 ed, Sweet and Maxwell Limited, London, 1966, 30.

<sup>57</sup> Dash S.K, 'Equity and Law', 5 *Indian Journal of Research* 11, 2016, 252 – 253.

<sup>58</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 2ed, Hackett Publishing Company, Indianapolis, 1999, 83 (This passage uses the term 'decency' to refer to equity).

<sup>59</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83.

<sup>60</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83.

<sup>61</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83.

<sup>62</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law', 59 *Law and Contemporary Problems* 1, 1996, 265.

<sup>63</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83 – 84.

<sup>64</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83 – 84.

<sup>65</sup> Ibbetson D, 'A House Built on Sand: Equity in Early Modern English Law' in Koops E, Zwolwe W.J. (eds) *Law & Equity: Approaches in Roman Law and Common Law*, Martinus Nijhoff Publishers, Leiden, 2014, 55, 57.

<sup>66</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83 – 84.

<sup>67</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 83 – 84.

<sup>68</sup> Aristotle, 'Nicomachean Ethics', 1975 – 1976.

have pronounced had they been privy to the facts of the case facing the judge.<sup>69</sup> Additionally, Aristotle describes an equitable person as one who embraces the spirit of the law rather than applying the inflexible legal rules, even when such rules may work to their own benefit.<sup>70</sup> This is because equity is concerned with the common good of all people in their relations to one another.<sup>71</sup>

Aristotle's equity has been formulated as a gap filler in the law.<sup>72</sup> Judges therefore employ equity where they believe the law to be incomplete, saying what the legislator would have said had he been present.<sup>73</sup> As evidence to this claim, Aristotle states that while the law is enacted to deal with everything, it is impossible to legislate on some cases, necessitating the use of equity.<sup>74</sup> Equity fills the gaps in law in two ways. First, it is applicable where there is no legislation on the matter in question.<sup>75</sup> These are typically cases of first impression, requiring the judge to apply equity owing to the absence of legislation or precedence addressing the matter. Second, equity is appropriate where the universal application of the law leads to unusual outcomes.<sup>76</sup> Aristotle presents the example of a law that forbids assault by use of iron weapons, or iron instruments in general.<sup>77</sup>

If a person with an iron ring were to slap another person and hurt them, a universal application of the law would render such a person guilty.<sup>78</sup> However, despite the ring being made of iron, equity would require the judge to proffer a different application of the law because the ring itself does not amount to an iron weapon or instrument within the meaning of the legislation.<sup>79</sup> Thus, the person would be acquitted of assault by use of iron weapons and would perhaps be convicted of assault of another nature.<sup>80</sup> Through this discussion, it becomes clear that equity is only applied where the law is insufficient owing to a complete legal gap, or as a result of unusual consequences.<sup>81</sup> Where a remedy has been fully

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<sup>69</sup> Aristotle, 'Nicomachean Ethics', 1975 – 1976.

<sup>70</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 84.

<sup>71</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 95 – 96.

<sup>72</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 268 – 269.

<sup>73</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 268 – 269.

<sup>74</sup> Irwin T, *Aristotle: Nicomachean Ethics*, 84.

<sup>75</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 269.

<sup>76</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 269.

<sup>77</sup> Cope E.M, *An Introduction to Aristotle's Rhetoric with Analysis Notes and Appendices*, Macmillan Publishers, Cambridge, 1867, 191 – 192.

<sup>78</sup> Cope E.M, *An Introduction to Aristotle's Rhetoric*, 191 – 192.

<sup>79</sup> Cope E.M, *An Introduction to Aristotle's Rhetoric*, 191 – 192.

<sup>80</sup> Cope E.M, *An Introduction to Aristotle's Rhetoric*, 191 – 192.

<sup>81</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 269.

provided in law, equity has no use.<sup>82</sup> Equity is thus not a competitor with what is legally just; it is a supplement to the deficiencies of the law.<sup>83</sup>

ii. *Equality versus equity*

The account on equality versus equity begins by contrasting the two terms. The former is understood as same treatment of persons.<sup>84</sup> The quality of apportioning same treatment to all persons is sometimes captured in the term ‘formal equality.’ The foundation of formal equality stipulates that things that are alike should be treated alike.<sup>85</sup> Nonetheless, some scholars claim that equality is not a right to same treatment.<sup>86</sup> Instead, they argue equality entails a claim to equity.<sup>87</sup> Equity is appreciated as unequal treatment that is based on relevant considerations.<sup>88</sup> Thus, when people claim a right to equality, they mean that they have a right to be treated unequally, as long as such unequal treatment is based on relevant considerations. Take the example of a hardworking student and an indolent one. Both students cannot be assigned the same grade especially because the hardworking student demonstrates the quality of industriousness in their work. In the same way, people have a right to exceptional treatment if it is based on relevant considerations.<sup>89</sup> Conversely, every person has a right to equal treatment if the justifications for unequal treatment are arbitrary or irrelevant.<sup>90</sup>

Having stated that exceptional treatment is justified in circumstances where the considerations are relevant, it is important to describe what amounts to a relevant consideration. First, a relevant consideration is one which applies to the issue at hand.<sup>91</sup> If an employee claims for additional pay after working overtime, such a claim is relevant because they exerted themselves outside the normal work hours. However, if the same employee were to claim additional pay because they would like to go for an expensive vacation, the claim would be irrelevant because additional pay is not granted based on the personal expenditure of an employee.

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<sup>82</sup> Hoffer P.C, *The Law's Conscience: Equitable Constitutionalism in America*, The University of North Carolina Press, Chapel Hill, 1990, 8 – 9.

<sup>83</sup> Hoffer P.C, *The Law's Conscience*, 8 – 9.

<sup>84</sup> Raphael D.D, ‘Equality and Equity’, 21 *Philosophy* 79, 1946, 120 – 122.

<sup>85</sup> Frankel C, Equality of Opportunity, 81 *Ethics* 3, 1971, 193.

<sup>86</sup> Raphael D.D, ‘Equality and Equity’, 121.

<sup>87</sup> Raphael D.D, ‘Equality and Equity’, 121.

<sup>88</sup> Stephen L, *Social Rights and Duties: Addresses to Ethical Societies*, Cambridge University Press, Online, 2012, 184.

<sup>89</sup> Stephen L, *Social Rights and Duties*, 184.

<sup>90</sup> Stephen L, *Social Rights and Duties*, 184.

<sup>91</sup> Raphael D.D, ‘Equality and Equity’, 122.

Second, a consideration is relevant where it bears a special moral claim.<sup>92</sup> Since every person has a prima facie right to equality, unequal treatment is acceptable only if there is an additional special moral consideration.<sup>93</sup>

A special moral claim exists in two circumstances.<sup>94</sup> As per the phrase 'To each according to their need', a special moral claim will assert itself where a special need is presented.<sup>95</sup> Take the example of a disabled child in school who wishes to gain the same education as his peers.<sup>96</sup> Owing to his disability, his educational pursuits will be greatly limited if he were to be given the same treatment as his able peers. To remedy this disparity, he may be given more funding or more attention to ensure that he has the same chance to excel academically as his able peers. Thus, the disparity in treatment is conferred for the purpose of restoring equality of outcome between a person facing an extraneous circumstance (disability), and the person living under normal conditions.

Another circumstance where a special moral claim will appear is when there is special desert or merit as evident in the phrase 'To each according to his merit'.<sup>97</sup> While the previous situation uses differential treatment to bring about equality of outcomes, this situation calls for special treatment on the basis of rewarding individuals for their exceptional effort.<sup>98</sup> A good example is the benefits conferred upon retired service men and their families after voluntarily offering themselves to defend and protect their country.<sup>99</sup> This second situation deviates more from the principle of equality, but the deviation is justified by the presence of desert or merit.<sup>100</sup> Hence, unequal benefit will be conferred for unequal service, while equal benefit will be granted for equal services. Under this discussion, equity is comprehended as the right to be treated exceptionally based on relevant considerations which is determined by a special moral claim. In the end, there exists a universal claim to equal treatment which is sometimes overridden by the equitable application of laws.

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<sup>92</sup> Raphael D.D, 'Equality and Equity', 122 – 123.

<sup>93</sup> Raphael D.D, 'Equality and Equity', 123.

<sup>94</sup> Raphael D.D, 'Equality and Equity', 125.

<sup>95</sup> Raphael D.D, 'Equality and Equity', 125.

<sup>96</sup> Raphael D.D, 'Equality and Equity', 125.

<sup>97</sup> Raphael D.D, 'Equality and Equity', 126 – 128.

<sup>98</sup> Raphael D.D, 'Equality and Equity', 126 – 128.

<sup>99</sup> Raphael D.D, 'Equality and Equity', 126 – 128.

<sup>100</sup> Raphael D.D, 'Equality and Equity', 126 – 128.

iii. *Equity as equality in common law*

The institutional roots of equity are traceable to the thirteenth century. During this time, two courts systems existed.<sup>101</sup> On one hand, there were local courts that were governed by feudal lords. These courts followed traditional law and statutory law. The traditional law arose from precedent and came to adopt the term ‘common law’. On the other hand, there were royal courts. The royal courts consisted of the Courts of Common Pleas, the King’s bench, and an Exchequer department. Under this last branch, there was the department of the Chancery.<sup>102</sup> This department was headed by a chancellor, and it was answerable to the King’s permanent council. Some of the roles of this office included issuing writs and overseeing cases delegated to them by the King himself.<sup>103</sup> The courts of equity emanated from this office. The birth of equity was founded upon the dictates of good conscience or good faith.<sup>104</sup> In one sentence, the difference between the two courts systems was that equity looked to matters of substance while common law courts focused on matters of form.<sup>105</sup>

Equity developed to cater for the inefficiencies of common law. Firstly, the claimants under common law had to institute their actions through a writ, which is a legally recognised cause of action. If the cause of action that the claimant had was not recognised by a writ, they could not institute their claim before a common law court.<sup>106</sup> Secondly, the remedies under common law mainly revolved around damages.<sup>107</sup> However, this remedy could become highly deficient if the claimant wanted the defendant to stop certain actions or to perform certain obligations.

In response to these shortcomings, the courts of equity presented two solutions. First, to institute a claim in these courts, no established writ was required. The claimant was only required to present a bill before the Chancellor outlining their complaint and the name of the defendant.<sup>108</sup> This then ensured that claimants who lacked a legally recognised cause of action could still find relief in the courts of equity. Second, the remedies in equity went beyond damages, and provided specific performance and injunctions as equitable remedies.<sup>109</sup> This

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<sup>101</sup> Panesar S, *Equity and Trusts*, 3<sup>rd</sup> ed, Pearson Education Limited, Harlow, 2017, 6.

<sup>102</sup> Panesar S, *Equity and Trusts*, 6-7.

<sup>103</sup> Panesar S, *Equity and Trusts*, 6-7.

<sup>104</sup> Falcón J.M, *Equity and Law*, Martinus Nijhoff Publishers, Leiden, 2008, 59.

<sup>105</sup> Panesar S, *Equity and Trusts*, 5.

<sup>106</sup> Ramjohn M, *Beginning Equity and Trusts*, Routledge Publishers, Abingdon, 2013, 15 – 16.

<sup>107</sup> Ramjohn M, *Beginning Equity and Trusts*, 15 – 16.

<sup>108</sup> Falcón J.M, *Equity and Law*, 59.

<sup>109</sup> Panesar S, *Equity and Trusts*, 11.

allowed claimants to seek more effective relief from the courts since damages could not respond to matters such as habitual trespassers.

The courts of equity developed at least seventeen maxims to aid the judges in making decisions.<sup>110</sup> These maxims acted as a set of moral markers, allowing the judges to draw upon them to justify their decisions.<sup>111</sup> An important maxim to this discourse is the maxim of ‘equality is equity’. This maxim signifies that those who have a claim to property will have the property divided equally between them in the absence of sufficient reasons for any other basis of division.<sup>112</sup> Thus, where a spouse makes substantial contributions to the acquisition of property held by the other spouse, but their exact share of their contributions cannot be ascertained, then the property will be divided equally between them and their spouse.<sup>113</sup> Alternatively, where a wife and a husband acquire property from the proceeds of a joint account, and it is difficult to ascertain the certain shares that each of them contributed to the acquisition, the maxim will require the court to divide the property in equal shares.<sup>114</sup> As a result, equity will require equal division of matrimonial property in the instances described.

#### iv. *Equity as a constitutional standard in matrimonial property rights*

##### a. *Equity in the Constitution of Kenya*

The term equity features as a national value and principle of governance in the Constitution of Kenya.<sup>115</sup> Among other values, the Constitution declares equity to be binding to all state officers whenever they apply or interpret the Constitution itself or whenever they enact, apply, or interpret any law.<sup>116</sup> Judges, being officers of the courts of Kenya, are undoubtedly bound by the same value.<sup>117</sup> Apart from being an obligatory principle, equity is also a constitutional value that should be promoted when interpreting the Bill of Rights.<sup>118</sup>

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<sup>110</sup> Warner-Reed E, *Equity and Trusts*, Pearson Education Limited, Harlow, 2011, 6 – 13.

<sup>111</sup> Warner-Reed E, *Equity and Trusts*, 6.

<sup>112</sup> Megarry R.E, Baker P.V, *Snell's Principles of Equity*, 40.

<sup>113</sup> *Gissing v Gissing* (1970), The United Kingdom House of Lords, Megarry R.E, Baker P.V, *Snell's Principles of Equity*, 42 – 43.

<sup>114</sup> *Jones v Maynard* (1951), Chancery Division, United Kingdom (the court applied the principle of equality in dividing the property in the absence of a proper basis for division), *Rimmer v Rimmer* (1953) Queen's Bench Division, United Kingdom.

<sup>115</sup> Article 10 (2)(b), *Constitution of Kenya* (2010).

<sup>116</sup> Article 10 (2)(b), *Constitution of Kenya* (2010).

<sup>117</sup> Article 10 (2)(b), *Constitution of Kenya* (2010), Section 2, *Judicial Service Act* (2011).

<sup>118</sup> Article 20 (4)(a), *Constitution of Kenya* (2010).

One of the rights guaranteed to the people of Kenya is marital equality, which persists even at the dissolution of the marriage.<sup>119</sup> Despite the constitutional declaration of equity, wives often face inequitable outcomes at the dissolution of their marriage.<sup>120</sup> Such outcomes are inequitable because their contribution (which is often non-monetary) is undervalued in comparison to monetary contribution when adjudicating upon their matrimonial property rights. Thus, through a reappraisal of matrimonial property rights at the dissolution of the marriage, the subsequent section investigates whether courts apply the principle of equity when adjudicating upon such rights, more so in the interpretation of the term equal rights. If not, a possible way to introduce the principle of equity to matrimonial property rights is explored.

v. *The value of non-monetary contribution in matrimonial property disputes in Kenya*

The importance of non-monetary contribution to economies and families cannot be understated.<sup>121</sup> Women perform 75% of unpaid care work<sup>122</sup> which has been termed as non-monetary contribution in this paper. This contribution roughly translates to about 13% of the world's global gross domestic product (GDP), protecting the economy from disruption.<sup>123</sup> Unpaid work contributes to the development of the economy in two main ways.<sup>124</sup> First, the women who participate in this work, such as wives, lessen the burden of the state in offering care and public provisioning through caring for the sick, offering education, and boosting the health and nutrition of their household. These women also close the infrastructural gaps in their communities by providing essential resources or services such as water and firewood or walking miles away from home to provide medical care. Second, non-monetary contribution subsidises the costs of business at the macro level as it is offered for free. A good example is where a wife is in charge of managing the family business, negating the need to hire external managers at an extra cost. Wives who undertake this type of contribution are often unable to actively participate in the paid economy, denying them the

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<sup>119</sup> Article 45 (3), *Constitution of Kenya* (2010).

<sup>120</sup> Mutiso B, 'Getting to Equal', 141 – 147.

<sup>121</sup> Hirway I, 'Unpaid Work and the Economy: Linkages and Their Implications', Levy Economics Institute of Bard College, Working Paper No. 838, 2015, 11 – 12, – [https://www.levyinstitute.org/pubs/wp\\_838.pdf](https://www.levyinstitute.org/pubs/wp_838.pdf) – link on 11 July 2023.

<sup>122</sup> McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion To Global Growth*, September 2015, 2.

<sup>123</sup> McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion To Global Growth*, September 2015, 2.

<sup>124</sup> Hirway I, 'Unpaid Work and the Economy', 11.

opportunity to acquire financial assets during the marriage.<sup>125</sup> As a result, they face severe post-

divorce consequences in separate property regimes such as Kenya.<sup>126</sup> This includes diminished household income, as well as reduced chances of re-entering the workforce.

However, the indispensable nature of non-monetary contribution is obscured in court rooms when it comes to the division of matrimonial property. Monetary contribution often comes out on top as is seen in a couple of court cases. This may be as a result of monetary contribution being easy to quantify,<sup>127</sup> or it may also be because monetary contributions were considered more legitimate under the previous legal regime of the Married Women's Property Act.<sup>128</sup>

As demonstrated in the previous paragraphs, the socio-economic importance of non-monetary contributions is underscored by how they sustain families and economies. If a wife is to give her best through non-monetary contributions, there would be no reason to award her a lesser percentage than her financially able spouse as this is often the only type of contribution that she could offer. In other words, offering non-monetary contribution means that the wife may forever lose the opportunity to acquire and develop her own money-earning qualifications and skills.<sup>129</sup> Further to that, if a wife offers both non-monetary and monetary contribution as her spouse does not bear the same share of parental responsibility, it seems inequitable to still award both spouses the same share of matrimonial property. This is especially true because courts interpret the principle of spousal equality under Article 45 to mean that spouses should receive shares of property that are equal to their contribution.<sup>130</sup>

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<sup>125</sup> McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion To Global Growth*, September 2015, 12 – 14, Hirway I, 'Unpaid Work and the Economy', 10 – 12.

<sup>126</sup> Gaddis I, Lahoti R, Swaminathan H, 'Women's Legal Rights and Gender Gaps in Property Ownership in Developing Countries', World Bank Group, Policy Research Working Paper 9444, 2020, 4 – 5, –<https://openknowledge.worldbank.org/server/api/core/bitstreams/a7487402-9d25-588e-9018-44686af15266/content> – link on 11 July 2023; A separate property regime is one that keeps the property rights of the spouses apart, in comparison with community of property system which intertwines the property rights of spouses owing to the fact of marriage.

<sup>127</sup> *UMM v IMM* (2014) eKLR.

<sup>128</sup> *Peter Mburn Echaria v Priscilla Njeri Echaria* (2007), eKLR: This is the landmark case that established monetary contributions as the only legitimate form of contribution to matrimonial property under the MWPA.

<sup>129</sup> *White v White* (2001), United Kingdom House of Lords, *Miller v Miller & McFarlane* (2006), United Kingdom House of Lords, Hirway I, 'Unpaid Work and the Economy', 4 – 6.

<sup>130</sup> *UMM v IMM* (2014) eKLR, *PNN V ZWN* (2017) eKLR, *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

To make evident the inequity present in valuing non-monetary contributions, the paper discusses a number of cases below. In each of these cases, the wife offered both monetary and non-monetary contributions, while the husband only made financial contributions to the home. This criteria is important as it reveals that even the presence of non-monetary contributions is not enough to tilt the shares of the matrimonial property in favour of the wife.

In the earlier cited case of *Joseph Ombogi Ogentoto v Martha Ogentoto and Others*, the Supreme Court of Kenya awarded the wife a 50% share of the matrimonial property despite offering both monetary and non-monetary contributions towards the acquisition of the matrimonial home.<sup>131</sup> Specifically, she took out multiple loans during her employment which substantially financed the construction of the matrimonial property.<sup>132</sup> She also dedicated her finances to paying school fees for the children of the marriage.<sup>133</sup> Finally, she was involved in caring for the home and running the family expenses.<sup>134</sup> On the other hand, her husband only made financial contributions towards the acquisition of the matrimonial property.<sup>135</sup> Since both parties walked away with the same share of matrimonial property, this case would seem to imply that non-monetary contribution carries a negligible weight in comparison to monetary contribution.

The High Court of Kenya at Nakuru in the case of *MW v AN* was seen to follow the same trend.<sup>136</sup> The wife was in paid employment, and she was also actively involved in taking care of the home and the three children she shared with the defendant, her husband.<sup>137</sup> From the evidence presented in court, she contributed almost 50% towards the purchase price of the parcel of land where the matrimonial home sat.<sup>138</sup> She also took out loans to finance the construction of the house.<sup>139</sup> On the other hand, her husband mainly contributed towards the financial upkeep of the family.<sup>140</sup> Surprisingly, the court divided the property equally between the spouses applying the principle of equality is equity.<sup>141</sup> It was evident that the wife bore more parental responsibility over her children, and that

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<sup>131</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR.

<sup>132</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 107.

<sup>133</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 85.

<sup>134</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 69.

<sup>135</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, para. 25 – 26.

<sup>136</sup> *MW v AN* (2021), eKLR.

<sup>137</sup> *MW v AN* (2021), eKLR, para. 34 – 38.

<sup>138</sup> *MW v AN* (2021), eKLR, para. 34.

<sup>139</sup> *MW v AN* (2021), eKLR, para. 34.

<sup>140</sup> *MW v AN* (2021), eKLR, para. 40.

<sup>141</sup> *MW v AN* (2021), eKLR, para. 41.

she used most of her earnings to put up the matrimonial home.<sup>142</sup> The husband did not help his wife to service the loans she had taken for their matrimonial home,<sup>143</sup> and neither was he involved in taking care of the children and their home.<sup>144</sup> Thus, it would seem that in this case too, the sole financial contribution of the husband toppled the double contributions of his wife since they were awarded the same shares of the matrimonial property.

A slightly different case adopting the same stance is *MAA v AR* which was decided before the High Court of Kenya at Marsabit.<sup>145</sup> This case concerned a Rendille couple whose marriage lasted for 35 years. The matrimonial property in question was rental houses which were transferred from the defendant's mother to the defendant during the subsistence of the marriage as a gift.<sup>146</sup> The judge noted that neither parties had made any monetary contribution towards the acquisition of the rentals as it was bequeathed to the defendant as a gift.<sup>147</sup> However, the plaintiff (the wife), had exerted herself in providing non-monetary contribution.<sup>148</sup> Firstly, she was involved in helping the defendant's mother in collecting the rent from the houses even before it was transferred to the defendant as a gift. Second, she dedicated her time to taking care of the defendant's ailing mother for almost eight years. Third, she efficiently managed the income from the rentals by dedicating it to the family expenses and catering for her children's school fees. Finally, she developed the rentals by installing water tanks, paying electric bills, and painting the houses.

On the other hand, the defendant was consistently absent from the home, and he made no efforts towards maintaining the rental houses.<sup>149</sup> Despite the stark contrast between the efforts of the defendant and the plaintiff towards maintaining the matrimonial property, the court went ahead to award the plaintiff 30% of the matrimonial property.<sup>150</sup> Once again, this case implied that the non-monetary contribution of the wife was not worth awarding an equal, if not greater interest in the matrimonial property, even if the other spouse had no contribution towards the property to begin with.

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<sup>142</sup> *MW v AN* (2021), eKLR, para. 38 – 40.

<sup>143</sup> *MW v AN* (2021), eKLR, para. 40.

<sup>144</sup> *MW v AN* (2021), eKLR, para. 40.

<sup>145</sup> *MAA v AR*, (2018), eKLR.

<sup>146</sup> *MAA v AR*, (2018), eKLR.

<sup>147</sup> *MAA v AR*, (2018), eKLR.

<sup>148</sup> *MAA v AR*, (2018), eKLR.

<sup>149</sup> *MAA v AR*, (2018), eKLR.

<sup>150</sup> *MAA v AR*, (2018), eKLR.

The cases above together with other court decisions all seem to imply that non-monetary contribution, even when coupled with monetary contributions is of minimal weight.<sup>151</sup> If the wives in each of these cases offered non-monetary contributions alone, it seems almost definite that they would not garner more than 30% of the shares of the matrimonial property.<sup>152</sup> The importance of non-monetary contribution is indisputable, and if its presence is not enough to tilt the scales in favour of the spouses who have offered it, then applying equity may remedy the situation as show in the subsequent section.

*vi. Applying equity to matrimonial disputes in Kenya*

At this juncture, it would be important to reconcile the views of the court with the three different conceptions of equity. First, equity is considered to be a gap-filler in the law.<sup>153</sup> This denotes its applicability where the universal application of a law leads to absurd results, or where there is yet to be a law that governs the matter at hand.<sup>154</sup> Since there is existing legislation in place to govern matrimonial property rights, it follows that equity applies to mitigate the absurd effects of a universal application of the law on matrimonial property rights. The law on matrimonial property rights provides for the division of property on the basis of contribution.<sup>155</sup>

Similar to Aristotle's conception of proportional equality,<sup>156</sup> the distribution of the matrimonial property under the MPA is guided by the inputs or contributions of the marriage partners towards the matrimonial property. Contribution has been defined to include both monetary and non-monetary contribution.<sup>157</sup> By considering the specific capabilities and contributions that each spouse makes towards the marriage, the MPA moves a step further to incorporate proportional equality. Despite this progressive provision, non-monetary contribution is

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<sup>151</sup> *AMW v JGK* (2021), eKLR; the wife offered contributed almost half of the value of the matrimonial property, and she offered non-monetary contribution as well, but the court awarded her 50% of the matrimonial property, while the husband received 50% of the matrimonial property based on his monetary contribution alone.

<sup>152</sup> *MAA v AR*, (2018), eKLR, *JNM v MM* (2019) eKLR; the court awarded 40% of the property to the wife on the basis of her non-monetary contributions, *SM v ASM* (2018) eKLR: the court awarded 25% to the wife on the basis of her non-monetary contribution.

<sup>153</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law', 59 *Law and Contemporary Problems* 1, 1996, 268 – 269.

<sup>154</sup> Zahnd E.G, 'The Application of Universal Laws to Particular Cases', 268 – 269.

<sup>155</sup> Section 7, *Matrimonial Property Act* (2013).

<sup>156</sup> Gosepath S, 'Equality', *The Stanford Encyclopedia of Philosophy*, 2021.

<sup>157</sup> Section 2, *Matrimonial Property Act* (2013).

insufficiently considered in comparison to monetary contribution.<sup>158</sup> This is because judges are likely to gloss over the non-monetary contribution of wives, leading to them to be short-changed at the point of dividing the matrimonial property.<sup>159</sup>

An application of equity in this instance would first acknowledge that the Matrimonial Property Act interprets equal rights to mean that spouses receive shares that are equal to their contribution. In light of the current undervaluing of non-monetary contribution,<sup>160</sup> equity would recommend that judges interpret the law in a manner that gives due weight to such contribution. One of the ways of doing so is by adopting a principle of equality of contribution.<sup>161</sup> This refers to giving both monetary and non-monetary contribution the same weight under law.<sup>162</sup> Consequently, where both spouses show they offered contribution, the court would divide the property equally between them regardless of the type of contribution they offered. However, where it is shown that a spouse did not offer any contribution, the court will be free to divide the property into unequal shares.

Adopting a presumption of equality of division is the right path to take in light of the difficulty of quantifying non-monetary contribution.<sup>163</sup> The economic opportunities that wives lose to take care of the marriage and its issues is another justification for equality of division of property.<sup>164</sup> Thus, in some cases, courts have seen it fit to divide matrimonial estates equally between the spouses on the basis of the diminished earning capacity of the home making wife.<sup>165</sup> Further, the historical injustices that have rendered women landless denying them the means

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<sup>158</sup> Phiri P.O, Sefah B, 'Women's Right to Matrimonial Property Is Still in Murky Waters: A Review of the Federation of Women Lawyers v the Attorney General', 20 *Economic and Social Rights Review in Africa* 3, 2019, 16 – 18.

<sup>159</sup> *MW v AN* (2021), eKLR.

<sup>160</sup> *MAA v AR* (2018), eKLR (the court recognised the non-monetary contribution of the wife in a 36-year marriage but went ahead to award her only 30% of the matrimonial property yet her spouse received 70% despite failing to significantly contribute to the property in either monetary or non-monetary means), *SM v ASM* (2018) eKLR para. 35 – 38, 44 (The court awarded a 25% interest in the property to the wife based on her non-monetary contributions of childcare and companionship). *ENK v MNNN* (2021) eKLR para. 37 – 40 (The wife was awarded a 10% interest in the property based on her non-monetary contribution of companionship), *FS v EZ* (2016) eKLR, (The wife was awarded about 45% of the matrimonial property based on her non-monetary contribution of companionship and managing the home, while her spouse was awarded 55% based on his monetary contribution).

<sup>161</sup> *CEDAW General Comment No. 21, Equality in Marriage, and Family Relations*, 1994, para. 32.

<sup>162</sup> *CEDAW General Comment No. 21, Equality in Marriage, and Family Relations*, 1994, para. 32.

<sup>163</sup> Kameri Mbote and Muriungi, 'Much ado about nothing', 94.

<sup>164</sup> Phiri P.O, Sefah B, 'Women's Right to Matrimonial Property Is Still in Murky Waters', 17.

<sup>165</sup> *Condon v Condon* (2005), Appeals Court of Massachusetts; The court awarded the wife a 50% share in the matrimonial property after finding that her absence from the workplace for almost 20 years

to provide financial contributions in their marriages.<sup>166</sup> As a result, non-monetary contribution is their only resort to claiming beneficial interests in matrimonial property, creating the need for the court to value this type of contribution at the same footing as monetary contribution. Additionally, customary laws have often denied wives of a right to their matrimonial property in spite of their enormous non-monetary contribution in maintaining the property.<sup>167</sup> Thus, applying equity as a gap-filler would motivate courts to create a transformative approach to valuing non-monetary contribution, which would most likely lead to equality of division of matrimonial property in the presence of any type of contribution.

Finally, equity was formulated as the right to unequal treatment based on relevant considerations.<sup>168</sup> Section 7 of the MPA is in harmony with this conception of equity because it grants spouses a right to unequal shares if their contribution was unequal to that of their spouse. Nonetheless, at the point of valuing the contributions, the courts appear to undermine the value of equity. This is evident in the manner in which the court undervalues non-monetary contribution.<sup>169</sup> From the preceding section on equity, equity requires favourable treatment where a special moral claim exists. Such a claim will be present in the face of a special need or a special merit. Since the courts fail to recognise the tremendous effort that goes into offering non-monetary contributions, they imply that non-monetary contributions are without merit in comparison to monetary contributions. Hence, failing to recognise the merit inherent in this type of contribution amounts to inequity.

As seen from the case discussion in the preceding section, the wives who offered non-monetary contribution received 50% or less of the matrimonial property, even where they coupled this contribution with monetary contribution.<sup>170</sup> The bias against non-monetary contribution fails to recognise that

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would impair her chances of succeeding in her career, *In re Marriage of Heroy* (2008), Appellate Court of Illinois, First District; The court awarded the wife a 55% share in the matrimonial property since she had forsaken the opportunity of advancing in her career to devote herself to the marriage, *Felis v Felis* (2013), Vermont Supreme Court; The court granted the wife a 57% share in the matrimonial property owing to the great disparity in the parties' opportunity to generate future income and acquire assets, considering the wife's homemaking role throughout the course of the longterm marriage.

<sup>166</sup> Mutiso B, 'Getting to Equal', 125 – 128.

<sup>167</sup> Mutiso B, 'Getting to Equal', 125 – 128.

<sup>168</sup> Raphael D.D, 'Equality and Equity', 121.

<sup>169</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, *MAA v AR* (2018) eKLR, *MBO v JOO* (2018) eKLR, Gayoye M, 'Why women judges really matter: The impact of women judges on property law outcomes in Kenya', 31 *Social and Legal Studies* 1, 2021, 89 – 90.

<sup>170</sup> *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023) eKLR, *MAA v AR* (2018) eKLR, *MBO v JOO* (2018) eKLR.

it greatly contributes towards the family's survival.<sup>171</sup> Additionally, it is because of their non-monetary contribution that women are unable to offer monetary contribution as they lack time to participate in income generating activities.<sup>172</sup> Hence, where wives mainly offer non-monetary contribution, this is often the only type of contribution that they can offer and assigning less percentages of the matrimonial property to them because of this form of contribution appears to disenfranchise them.

The Constitution designates equity as a binding national value and principle of governance. As such, judges as state officers are bound to apply it when interpreting the Constitution and any other legal provisions. This includes the provisions on matrimonial property and the rights of the spouses therein. The Constitution also requires that the value of equity be promoted when interpreting the Bill of Rights, which includes the rights of spouses in a marriage. Equity has a double meaning. It is referred to as an exception to a universal interpretation of the law. In creating an exception to the law, equity seeks to fill gaps where there is no legislation on the matter or where applying the law as is would lead to unforeseen consequences.

Equity is also understood as the right to be treated unequally based on relevant considerations. Having analysed how courts adjudicate over matrimonial property, the principle of equity has often been neglected, especially when valuing non-monetary contributions. In cognisance of the binding nature of equity, the subsequent section investigates a possible way to promote the equitable and just valuation of non-monetary contribution. More specifically, the section explores a mathematical formula that was used to value spousal contribution as adopted by the High Court of Singapore.

### III. The Singaporean mathematical formula and its applicability

As demonstrated in section II, non-monetary contribution is undervalued by Kenyan courts,<sup>173</sup> underscoring the need to adopt mechanisms for its equitable

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<sup>171</sup> Kameri Mbote and Muriungi, 'Much ado about nothing', 93 – 94.

<sup>172</sup> ActionAid, *Making care visible: Women's unpaid care work in Nepal, Nigeria, Uganda, and Kenya*, 2013, 5.

<sup>173</sup> *FS v EZ* (2016), eKLR (the court awarded a greater share to the husband because he offered his monetary contribution, while his wife received a smaller share because she offered non-monetary contribution), *SM v ASM* (2018) eKLR para. 35 – 38, 44 (the court awarded a 25% interest in the property to the wife based on her non-monetary contributions of childcare and companionship). *MBO v JOO* (2018) eKLR, para. 16 – 18 (the court awarded 50% interest in the matrimonial property to the wife even after offering both monetary and non-monetary contribution towards the acquisition of the matrimonial property). *Joseph Ombogi Ogentoto v Martha Ogentoto and Ors* (2023)

valuation. One of the ways of doing so is applying the principle of equitable distribution in line with the constitutional standard of equity. In applying this principle, the High Court of Singapore developed an eight-step mathematical formula as a check to the discretion of the judge in dividing matrimonial property.<sup>174</sup>

This section begins with an exposition of the background to the formula, which includes an account of the foundational provision: article 112 of the Women's Charter of the Republic of Singapore. This provision grants courts wide discretion to divide matrimonial property in a just and equitable manner. The section goes on to outline the steps of the formula, showing its relevance to valuing non-monetary contributions equitably. Ultimately, the section concludes by demonstrating whether the formula is applicable to the Kenyan context.

If applicable, the formula may prove instrumental to the valuation of non-monetary contribution in an equitable manner. This is because the formula factors in the role of non-monetary contribution to the matrimonial property in an equitable and simplified manner. The difficulty of valuing non-monetary contributions is thus partially resolved by the application of this formula. Further, as noted earlier, courts in both Kenya and Singapore have the power to divide matrimonial property according to the contribution of the parties. The formula leads to fair outcomes especially when a spouse has devoted their entire time to offering non-monetary contribution.

*i. The Singaporean framework and the mathematical formula*

*a. The division of matrimonial property under the Women's Charter 1961*

Article 112 of the Women's Charter of Singapore grants wide discretionary powers to the court when dividing matrimonial property.<sup>175</sup> It provides that the court shall have the power to order division of matrimonial assets at the point of, *inter alia*, divorce between the spouses, or the division of proceeds from the sale of any such assets in such proportions that it deems to be just and equitable.<sup>176</sup> This article also sets out a non-exhaustive list of factors to be considered when

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eKLR, (the court upheld an equal division of the property despite the wife offering both monetary and non-monetary contribution towards the acquisition of the property while her spouse only offered monetary contributions).

<sup>174</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore.

<sup>175</sup> Article 112 (1), *Women's Charter 1961* (Singapore).

<sup>176</sup> Article 112 (1), *Women's Charter 1961* (Singapore).

dividing matrimonial property, including the monetary contribution of the spouses towards the matrimonial assets, and the contribution of the spouses towards the welfare of the family.<sup>177</sup> The division of such property is hardly a mathematical exercise owing to the wide discretion granted to the court.<sup>178</sup> Further, the list of considerations during the exercise is non-exhaustive, opening the court to a myriad of factors to assess during the division of matrimonial assets.<sup>179</sup> Finally, judges are guided by three main principles when dividing matrimonial property. First, any asset that was acquired during marriage is taken to be a matrimonial asset.<sup>180</sup> Second, judges are encouraged to apply broad discretion when dividing the property.<sup>181</sup> Third, the aim of such division is to arrive at a fair and reasonable result for each party.<sup>182</sup>

In the case of *AJR v AJS*, the High Court of Singapore designed a mathematical formula to guide itself in dividing the matrimonial assets of the parties concerned.<sup>183</sup> This formula was developed in line with the discretion of the court to divide the property in a ‘just and equitable manner’ under Article 112 of the Women’s Charter.<sup>184</sup> The judge behind this novel idea clarified that the formula was not meant to replace the judicial exercise of division of matrimonial assets.<sup>185</sup> Rather, the formula was to act as a check for a judge in exercise of their discretion.<sup>186</sup> As a result, the formula would only be applicable at the end of the exercise of the division to confirm whether the judge had applied their discretion correctly.<sup>187</sup>

Before outlining the formula, it is imperative to explore the principles behind article 112 of the Charter. Matrimonial property is divided on the basis of equitable division.<sup>188</sup> This is in recognition of marriage as an equal co-operative partnership of efforts.<sup>189</sup> Thus, the roles of breadwinning and homemaking are given similar weight and when the marriage ends, these contributions

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<sup>177</sup> Article 112 (2), *Women’s Charter 1961* (Singapore).

<sup>178</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 28.

<sup>179</sup> Chen S, ‘The Division of Matrimonial Assets’, 516.

<sup>180</sup> Chen S, ‘The Division of Matrimonial Assets’, 516.

<sup>181</sup> Chen S, ‘The Division of Matrimonial Assets’, 516.

<sup>182</sup> Chen S, ‘The Division of Matrimonial Assets’, 516.

<sup>183</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23 – 24.

<sup>184</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23.

<sup>185</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23.

<sup>186</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23.

<sup>187</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23.

<sup>188</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 16.

<sup>189</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 20.

are transformed into economic interests in the matrimonial assets.<sup>190</sup> While Singaporean courts used to consider financial contributions to be the prima-facie starting point, the courts now have to contemplate other non-financial factors on a similar footing.<sup>191</sup> This is because financial contribution in itself is not determinative.<sup>192</sup> Additionally, the courts in Singapore discourage the scrutiny of the conduct and efforts of the spouses as this may disadvantage the spouse whose contribution is difficult to evaluate in financial terms.<sup>193</sup> Therefore, in the absence of documentary evidence, the court should make a rough and ready approximation of the shares to apportion to each spouse.<sup>194</sup> Besides, the court has to avoid falling into the dichotomy of direct and indirect contributions as there are other vital factors to take into account during the division exercise.<sup>195</sup>

There are three subsidiary points that the court must consider when dividing matrimonial assets. First, the court must be careful not to undervalue the indirect contribution of a spouse who has devoted their entire time to care for the family welfare.<sup>196</sup> Second, if each spouse has equally discharged their homemaking role, the court must take this into consideration.<sup>197</sup> Finally, the court should not unjustifiably eliminate some assets from the pool of matrimonial property for the sake of being less obtrusive in the division exercise.<sup>198</sup>

## b. Outlining the formula

The formula was developed in the case of *AJR v AJS*. Prior to their divorce, both of them were earning income until the husband became a househusband in 2001.<sup>199</sup> The wife continued to earn income, but she was also majorly responsible for taking care of their children.<sup>200</sup> Six years later, the couple sought a divorce, and an interim order was issued to that effect.<sup>201</sup> Before the marriage was finally dissolved, the wife purchased a considerable number of assets, changing the value of the matrimonial assets drastically.<sup>202</sup> Further, the court opined that the

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<sup>190</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 20.

<sup>191</sup> *Yow Mee Lan v Chen Kai Buan* (2000) The High Court of the Republic of Singapore.

<sup>192</sup> *Yow Mee Lan v Chen Kai Buan* (2000) The High Court of the Republic of Singapore.

<sup>193</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 28.

<sup>194</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 28.

<sup>195</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 29.

<sup>196</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 34.

<sup>197</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 37.

<sup>198</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 39.

<sup>199</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 13.

<sup>200</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 16.

<sup>201</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 17.

<sup>202</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 17.

wasteful dissipation of the matrimonial assets by one spouse should be taken into account when dividing the property at the dissolution of the marriage.<sup>203</sup> In the Kenyan context, the element of wasteful dissipation of assets would address the concerns expressed in some Kenyan court decisions over the spouses who enter into a marriage with an intention of making no contribution, but only taking away from the labor of their spouse during the marriage.<sup>204</sup>

Using his broad discretion, the judge divided the property in shares of 20% and 80% in favor of the husband and wife respectively.<sup>205</sup> Notably, the court opined that equality of division was not a default starting point.<sup>206</sup> Further, the case was not a typical scenario of one spouse being the sole breadwinner while the other devoted themselves to the homemaking role.<sup>207</sup> The court also added that it was difficult to ascertain the indirect financial contributions of the spouses towards the family welfare.<sup>208</sup> Finally, it stated that the ratio of the spouses' incomes was the default ratio of their respective direct financial contributions to the matrimonial property.<sup>209</sup>

In order to place a check on his discretion, the judge developed the said formula as a guide, and not a replacement, to the division of matrimonial property. The formula begins by calculating the total net value of the matrimonial property (\$m), together with the value of assets that have been unfairly expended (\$n) and the value of assets that were accumulated by one spouse for personal investment without expecting the other spouse to benefit from them (\$p).<sup>210</sup> Such personal investments would generally be property that was acquired using funds from the matrimonial property, but was for the use of one spouse only because the marriage was on the verge of ending through divorce.<sup>211</sup> These amount to the notional total net value of matrimonial assets to be distributed which is denoted as \$A. Thus \$A can be represented as follows:

$$\$A = \$m + \$n + \$p$$

The second part of the formula proposes that an addition of monetary contributions (B%) and non-monetary contributions (C%) should amount

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<sup>203</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 10.

<sup>204</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 16.

<sup>205</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 16.

<sup>206</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 15.

<sup>207</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 16.

<sup>208</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 21.

<sup>209</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para. 22.

<sup>210</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.26 – 27.

<sup>211</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore.

to 100%.<sup>212</sup> The ratio of these two different contributions is determined by a few important considerations. Non-monetary contributions are determined by factors such as the length of the marriage, the number of children in the family, the existence of third-party caregivers, the extent of support that one spouse offered to aid the other in their business or occupation and the time that both spouses spent on caring for the welfare of the family. This includes caring for the home and other matrimonial assets, childcare and taking care of infirmed relatives of either spouse. On the other hand, direct contributions are determined by the amount of money that each spouse dedicated towards the acquisition of the matrimonial assets, as well as the time that they devoted to their business or occupation to acquire their income. The relationship between B% and C% may be represented as such:

$$B \% + C \% = 100\%$$

It then focuses on the monetary contributions of the parties, proposing that the monetary contribution of the wife (E%) and that of the husband (D%) should add up to 100% of the monetary contributions.<sup>213</sup> Monetary contributions includes salaries, bank savings, stock options or money in social security accounts.<sup>214</sup> Thus, to obtain their separate monetary contributions, the court will multiply the ratios by B% separately to obtain EB% and DB% which are the contributions for the wife and husband respectively. The relationship between the two is represented as follows:

$$D \% + E \% = 100 \% \text{ of } B$$

The fourth part of the formula proposes the same for non-monetary contributions, indicating that the non-monetary contribution of the wife (G%) and the non-monetary contribution of the husband (F%) would form 100% of non-monetary contributions.<sup>215</sup> Similar to the monetary contributions, the court will multiply the individual contributions by C% to obtain GC% and FC% which are the respective non-monetary contributions for the wife and husband. The relationship between G% and F% is represented as follows:

$$F \% + G \% = 100\% \text{ of } C$$

The formula then goes ahead to ascertain the notional value of assets to be distributed to the husband (X).<sup>216</sup> This notional value is the sum of the

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<sup>212</sup> *AJR v AJJ* (2010), The High Court of the Republic of Singapore, para.28 – 30.

<sup>213</sup> *AJR v AJJ* (2010), The High Court of the Republic of Singapore, para.31 – 33.

<sup>214</sup> *AJR v AJJ* (2010), The High Court of the Republic of Singapore, para.31 – 33.

<sup>215</sup> *AJR v AJJ* (2010), The High Court of the Republic of Singapore, para.34.

<sup>216</sup> *AJR v AJJ* (2010), The High Court of the Republic of Singapore, para.35.

percentage of the direct or monetary contribution of the husband (DB%) and the indirect or non-monetary contribution of the husband (FC%) multiplied by the notional total value of the assets obtained from the first step of the formula (\$A).<sup>217</sup> This relationship is presented as follows:

$$X = \$A \times (DB\% + FC\%)$$

The notional value of the assets to be apportioned to the wife (Y) are obtained in the same way.<sup>218</sup> It is arrived at by adding her direct contributions (EB%) and indirect contributions (GC%), which is then multiplied by the notional total value of the assets (\$A). This is represented as follows:

$$Y = \$A \times (EB\% + GC\%)$$

The second-last step of the formula involves ascertaining the amounts that either party has squandered or exclusively expended for their own benefit.<sup>219</sup> These amounts are deducted from the notional value of the assets of the respective spouses.<sup>220</sup> For instance, if the husband had squandered \$H assets, this amount will be removed from the share of assets that is apportioned to him as shown below:

$$[\$A \times (DB\% + FC\%) - \$H]$$

If the wife has removed \$J from the pool of matrimonial assets for individual investment, this amount will also be deducted from the share of assets apportioned to her as demonstrated below:

$$[\$A \times (EB\% + GC\%) - \$J]$$

Lastly, the property is divided in the ratio of the notional value of the assets belonging to the husband and those belonging to the wife.<sup>221</sup> These ratios should add up to the notional total value of the matrimonial property.<sup>222</sup> This ratio is demonstrated below:

$$[\$A \times (DB\% + FC\%) - \$H]: [\$A \times (EB\% + GC\%) - \$J]$$

Once the court uses their discretion to adjudge the division of the property, the formula becomes handy as an assessment of whether the judge was just and equitable in the use of their discretion.<sup>223</sup>

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<sup>217</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.35.

<sup>218</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.36.

<sup>219</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.37.

<sup>220</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.37.

<sup>221</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.38.

<sup>222</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.38.

<sup>223</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.23.

ii. *Applying the formula*

According to the MPA, matrimonial property includes the matrimonial home and the household goods and effects in such a home. It also includes any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. This provision sets out a conjunctive test for ownership of matrimonial property, that is, the property must be owned and acquired jointly. The Act is also clear on what does not constitute matrimonial property: interests in either movable or immovable property that is acquired or inherited before marriage, subject to section 6. The aforementioned conjunctive test may be discriminatory owing to the requirement of joint ownership and acquisition since women have historically been marginalised from owning property.<sup>224</sup> This requirement also betrays notions of formal equality. The foundation of formal equality stipulates that things that are alike should be treated alike.<sup>225</sup> It advocates for equal treatment of individuals without regard to their individual, physical or personal characteristics.<sup>226</sup> This model of equality is blind to the supposed neutrality of the laws. Even where laws may apply equally to all persons, they may have a disparate impact.<sup>227</sup> In the same way, the MPA purports to treat wives and husbands as equals on the assumption that both men and women have equal access to property and capital, and that both of them therefore have the financial muscle to acquire and own property jointly.

Furthermore, the requirement of joint acquisition and ownership disparately impacts wives. Men form majority of the title holders to land, and women are therefore not an equal footing as they lack the means to jointly contribute to the acquisition of property.<sup>228</sup> Further, women spend majority of their time performing unpaid work, denying them the financial resources to acquire property jointly with their husbands. Finally, it appears contradictory that the Act demands that liabilities between spouses be shared equally between spouses at the dissolution of the marriage<sup>229</sup> as courts consistently reject equal sharing of the property acquired during marriage. If the non-monetary contribution of a homemaking wife is undervalued by the courts at the point of dividing the

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<sup>224</sup> Kariuki F, Ouma S, Ng'etich R, Property Law, Strathmore University Press, Nairobi, 2016, 183 – 186, Musembi C.N, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights', 28 *Third World Quarterly* 8, 2007, 1470 – 1472.

<sup>225</sup> Frankel C, Equality of Opportunity, 193.

<sup>226</sup> Frankel C, Equality of Opportunity, 193.

<sup>227</sup> Frankel C, Equality of Opportunity, 193.

<sup>228</sup> Kariuki F et al, Property Law, 183 – 186, Musembi C.N, 'De Soto and Land Relations in Rural Africa', 1470 – 1472.

<sup>229</sup> Section 10 (3), *Matrimonial Property Act* (2013).

matrimonial property, she would have the burden of catering to a marital liability without the financial means of doing so. To remedy these pitfalls, the formula presumes that all property acquired during the marriage amounts to matrimonial property. For this presumption to be applied in Kenya, legislative action would be necessary in amending the MPA to reflect that position.

While the formula was used after an interim judgement of divorce had been issued, it is still applicable where a final decree of divorce has been issued, dissolving the marriage absolutely. The most salient features of this formula that make it applicable to the Kenyan context is the recognition of both monetary and non-monetary contributions similar to what is contained under section 2 of the MPA.<sup>230</sup> It also addresses the main concern of this research, which is placing both monetary and non-monetary contribution on an equal footing. At the second step of the formula, it indicates both monetary and non-monetary contributions add up to 100%, which may be an implicit admission of their equal weight and importance to the division of matrimonial property. Under the principles for division of matrimonial property in Singapore, courts are careful to not undervalue the contribution of a spouse where they devoted their time to the welfare of the family and the home. Thus, where a spouse acted as a homemaker, the formula is careful to fairly value their contribution, creating equitable outcomes for them.

Since most, if not all, matrimonial disputes in Kenya do not disclose the monetary amount of the matrimonial property, a hypothetical will be used to show how the formula works. Consider that a couple, Marie, and Jones, have a house worth 250,000 dollars in Kileleshwa and a farm worth 240,000 dollars in Muthaiga. Let us also assume that Jones sold a family car worth 7,000 dollars just before the marriage was dissolved, and that he used this money to buy shares in a company. He anticipated that the income from these shares would be used to sustain him after his divorce proceedings with Marie. Thus, the 7,000 dollars is thus assigned the value of \$p.

On the other hand, let us assume that Marie spent 3,000 dollars of the family savings on a betting show. She was depressed about her impending divorce to Jones, and she used betting as a distraction. Thus, the figure expended by Marie is assigned the value of \$n. The total net value of the matrimonial property (\$m) is 490,000 dollars being the value of the home and the farm. The notional total net value (\$A) will therefore be the net value of the property together with the money that was used by Jones for his personal investment (\$p), and the

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<sup>230</sup> Section 2, *Matrimonial Property Act* (2013).

money that was wasted by Marie for her betting hobby (\$n). This relationship is demonstrated below:

$$\$A = \$m + \$n$$

$$\$m = 490,000$$

$$\$p = 7,000$$

$$\$n = 3,000$$

$$\text{Thus: } \$A = 490,000 + 7,000 + 3,000 = 500,000$$

Marie and Jones have been married for thirty years. Marie has worked as a lawyer in two top-tier law firms in Kenya. Jones has also done well for himself by working as an auditor at his own firm. Together, they have 5 children, all of whom are now responsible and educated adults. At some point in her career, Jones requested her to stay home and take care of their last child who was struggling with an illness. She then became a housewife in the 15th year of her marriage, but she occasionally performed consultancy services for some of her other clients. Jones continued in his business. While at the law firms, Marie had helped Jones to buy the properties by taking out loans for the purchase price of the home and farm. As a housewife, Marie was keen on raising her children well, and she managed the home for the better part of their marriage. Let us suppose that the direct contributions (B%) make up 50% of the matrimonial assets while the non-monetary contributions (C%) make up 50%. These add up to 100%. The relationship is demonstrated as follows:

$$B\% + C\% = 100\%$$

$$B\% = 50\% \rightarrow C\% = 50\%$$

$$\therefore B\% + C\% = 50\% + 50\% = 100\%$$

This is the most crucial part of the formula. If the judge gives unequal percentages to either type of contribution, the spouse with that form of contribution may end up with a lesser share. For example, if the total non-monetary contribution is set at 40%, a homemaking wife may walk away with a lesser share because her individual non-monetary contribution will be multiplied by 40% while that of her spouse is multiplied by 60%. Conversely, if the total monetary contribution is set at 40%, a breadwinning husband will also walk away with a lesser share because his individual monetary contribution will be multiplied by that 40% only. More importantly, where a spouse does not offer any contribution to the marriage, they may walk away with nothing because their individual contributions (monetary or non-monetary) will be negligible, leaving them with an equally negligible part of the matrimonial property.

Returning to the hypothetical of Marie and Jones, Jones has presumably made an 60% contribution (D%) while Marie has made a 40% contribution (E%) with respect to monetary contribution (B%). On the other hand, Jones has presumably made a 20% contribution (F%) while Marie has made an 80% contribution (G%) with regards to non-monetary contribution (C%). Accordingly:

Jones' monetary contribution	Marie's monetary contribution
$DB\% = \frac{D \times B}{100} = \frac{60 \times 50}{100} = 30\%$	$EB\% = \frac{E \times B}{100} = \frac{40 \times 50}{100} = 20\%$

Jones' monetary contribution	Marie's monetary contribution
$FC\% = \frac{F \times C}{100} = \frac{20 \times 50}{100} = 10\%$	$GC\% = \frac{G \times C}{100} = \frac{80 \times 50}{100} = 40\%$

Jones' share is  $DB\% + FC = 30\% + 10\% = 40\%$

Marie's share is  $EB\% + GC = 20\% + 40\% = 60\%$

Thus, the actual share of the husband's share is:

$$X = \{ \$A \times (DB\% + FC\%) - \$p \}$$

$$\therefore X = 500,000 \times (40\%) - 7,000 = 193,000$$

The actual share of the wife, is also determined as such:

$$Y = \{ \$A \times (EB\% + GC\%) - \$n \}$$

$$\therefore Y = 500,000 \times (60\%) - 3,000 = 297,000$$

Once the judge in the case of Marie and Jones uses his discretion, they can apply the formula above to determine whether his discretion was rightly exercised. If the result between the formula and the use of their discretion are disparate, the judge may re-examine the use of their discretion to determine whether they gave any room to bias, or whether they failed to consider some important factors when dividing the property. It is imperative to state that the discretion of the judge is also necessary in applying the formula.<sup>231</sup> This is

<sup>231</sup> Chen S, 'The Division of Matrimonial Assets', 527.

especially at the point of determining the ratio of monetary contributions to non-monetary contributions. If the hypothetical above featured a couple that had been married for 5 years, or a couple that was blessed with lesser children, it follows that the ratio of non-monetary contribution to monetary contribution may increase in favor of the latter. However, if one spouse were committed towards caring for the home while the other acted as the sole breadwinner, the value of both types of contribution may remain equal to each other.<sup>232</sup>

This formula has been criticised on three main grounds. First, since the formula is only meant to be a check and not a replacement to the exercise of dividing matrimonial property, one may question its efficacy since it seems to be applicable after the fact of division.<sup>233</sup> Second, where the broad discretion of the judge greatly veers off from the results of the mathematical formula, the formula may not offer authoritative guidance since it only supplements the judge's discretion.<sup>234</sup> Finally, some parts of the formula are still reliant on the discretion of the judge, signifying that the use of the formula may not eliminate any bias on their part.<sup>235</sup>

Nonetheless, the formula contributes to greater precision when dividing matrimonial property making it a useful tool in the exercise.<sup>236</sup> The Women's Charter of Singapore imputes an obligation upon judges to divide property in a just and equitable manner, and the formula seeks to achieve greater precision in this exercise.<sup>237</sup> Additionally, the formula equally considers non-monetary contribution during such division, ensuring that spouses who offer both types of contribution walk away with their fair share of matrimonial property.<sup>238</sup> At the point of adjudging monetary and non-monetary contributions of the spouses, the bias of the judge towards either type of contribution will be apparent. If a judge decides that 80% of the property is attributable to monetary contribution while 20% of the property is as a result of non-monetary contribution, the parties will have an opportunity to challenge this decision owing to the imbalance between the two types of contribution. Further, the formula is impartial as it evaluates the contribution of the spouses using arithmetic that does not regard the gender of the spouse.

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<sup>232</sup> *NK v NL* (2007), Singapore Court of Appeal, para. 35.

<sup>233</sup> Chen S, 'The Division of Matrimonial Assets', 527 – 529.

<sup>234</sup> Chen S, 'The Division of Matrimonial Assets', 527 – 529.

<sup>235</sup> Chen S, 'The Division of Matrimonial Assets', 527 – 529.

<sup>236</sup> Chen S, 'The Division of Matrimonial Assets', 526.

<sup>237</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.22 – 23.

<sup>238</sup> *AJR v AJS* (2010), The High Court of the Republic of Singapore, para.28 – 30.

#### IV. Recommendations

It is recommended that judicial officers adopt the mathematical formula as a guide when interpreting and applying the provision of the MPA to assess the weight of non-monetary contribution. This formula is not a replacement to the discretion of a judge, but an extension of it. Once a judge has divided the matrimonial property as per section 7 of the MPA, they can apply this formula to determine whether they have equitably exercised their discretion, especially when evaluating the weight of non-monetary contribution. The use of the mathematical formula will limit abuse of discretion because it will reveal any bias that the judge has towards any type of contribution, especially non-monetary contribution. The hypothetical of Marie and Jones is similar to the cases discussed in the doctrinal analysis. More specifically, just like Marie, the *Ogentoto* case and the *MW v AN* case feature wives who were involved heavily in both monetary and non-monetary contributions.<sup>239</sup> If the formula was applied to them as it was, they would end up with a bigger share of matrimonial property as they had both types of contributions.

If a judge gives unequal ratios to the monetary and non-monetary contribution of spouses without justification, such a determination may form the basis for appeal if an applicant deems the ratios to be unfair. Alternatively, in giving their ruling, the judge may have an opportune moment to explain the reasoning behind the ratios given to the contribution. Unequal ratios are equitable if the judge is able to show that the favourable treatment towards one spouse was because of their special effort or merit<sup>240</sup> in contributing towards the matrimonial property. As a general rule, however, where spouses act as a partnership, judges should assess the contributions on an equal footing. A partnership is a marriage in which one spouse acts as the sole breadwinner while the other acts as a stay-at-home spouse.<sup>241</sup> This is because the couple acted as a unit in acquiring the matrimonial property.<sup>242</sup>

The legal authority to apply this formula is founded on the binding constitutional standard of equity that judges are required to apply when interpreting laws, including their assessment of the weight of non-financial contributions. Equity asks the judicial officers to be conscious of the impact of the law, and where a universal application yields unjust results, equity demands

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<sup>239</sup> *MBO v JOO* (2018) eKLR, *MW v AN* (2021) eKLR.

<sup>240</sup> Raphael D.D, 'Equality and Equity', 126 – 128.

<sup>241</sup> Hofstein D *et al*, 'Equitable Distribution Involving Large Marital Estates', 340 – 347.

<sup>242</sup> Hofstein D *et al*, 'Equitable Distribution Involving Large Marital Estates', 340 – 347.

that an exception be created to yield just results. This value also requires judges to give reasons for proffering unequal treatment, signifying that judges ought to treat people equally unless they have a justification for not doing so. To that end, this paper also recommends that judges apply the formula presented as a way of equitably (or unequally) dividing property. Such equitable division is justified by the impartiality of the formula.

## **V. Conclusion**

The main aim of this paper was to identify a solution to the under-valuing of non-monetary contribution in Kenyan courts. To ameliorate the unfair outcomes faced by spouses, especially wives, when valuing their non-monetary contributions, the paper used the lens of equity which is a binding national value and principle of governance, as well as a lens of interpretation of the Bill of Rights under the Kenyan Constitution. Equity demands that where a universal interpretation of the law leads to unjust results, the court should opt for an exceptional interpretation of such a law to fit the circumstances. It is also defined as a right to be treated unequally based on relevant considerations.

The formula embraces these two aspects of equity as it creates a slight exception to the discretion of the judge when dividing matrimonial property. The formula asks the courts to attempt to embrace greater precision in dividing matrimonial property to guarantee just and equitable outcomes for both spouses. The formula also grants spouses the right to be treated unequally where their mathematical shares of division are uneven owing to their disparate efforts. In the end, the formula does not advocate for a 50:50 metric of division (which is evident from the hypothetical of Marie and Jones above). Instead, it requires courts to be as impartial as they can be when assessing the contributions of the spouses, leading to equitable outcomes regardless of the type of contribution that was offered.