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NIGERIAN COURTS AND THE ADOPTION OF STRICT PROPERTY TITLE RIGHTS APPROACH IN THE SETTLEMENT OF PROPERTY IN DIVORCE PROCEEDINGS RELATING TO STATUTORY MARRIAGE: THE NEED TO JETTISON THE APPROACH

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Abstract

In a plethora of cases relating to the dissolution of statutory marriage in Nigeria, the courts very often consider the issue of settlement of property strictly based on the financial contribution of parties to the acquisition of the property or properties in question. The Petitioner and or the Respondent are usually expected to lead clear evidence in proof of such contribution before proprietary interest in the family assets can be granted to him or her. Settlement of property at divorce is provided for by the matrimonial property law in Nigeria. A consistent trend in the attitude of Judges of courts in Nigeria has been to adopt the strict property rights approach in ordering the settlement of property in which case it is the spouse whose name appears on the title document of the marital property that is deemed the owner, unless the other spouse has documentary evidence of co-ownership or tangible contribution to the same property. This is usually detrimental to the woman who might have made invisible contribution to the acquisition of the property or properties that needs to be settled. This article examines the attitude of the courts to the settlement of property on spouses in divorce proceedings relating to statutory marriage in Nigeria. The paper argues that adopting the strict property law approach to settlement of property in divorce proceedings in Nigeria is an unfair practice as it places the woman in a very precarious situation not minding her enormous invisible contribution in most cases and it undermines the marriage partnership. This paper argues further that the cost of performing the role of a homemaker and the financial and non-financial contribution of the woman to the welfare of the family should be accorded equal economic value as whatever contribution the man makes to the sustenance of the family. The researcher made use of the doctrinal research approach. The paper is divided into six (6) sections. Section one is the introductory part, section two deals with the concept of statutory marriage. Section three addresses the issue of divorce and dissolution of marriage. Section four talks about the importation of common law principles of property law into matrimonial relationships. Section five advocates for the adoption of equity based approach in the settlement of property in divorce proceedings. The paper concludes in section six with recommendations.

Keywords: Adoption, Settlement of Property, Statutory Marriage.

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1. Introduction

Nigerian family law is founded on the English common law tradition which forms a significant part of Nigerian law.[1] Consequently, whenever there is a dispute between spouses over the ownership of property at divorce, 'the courts have recourse to the ordinary rules of property law.[2] Nigerian courts have generally failed to appreciate the extent of the statutory discretion accorded to them.[3]

Instead of an adjustive jurisdiction, the court usually proceeds to locate tittle using evidence-based tools, principally legal or formal title, but also the adversarial technicalities of pleadings and proof.[4]With regard to title, whoever has legal title for which there is documentary evidence retains separate ownership. The courts treat property over which there is formal title as if it were excluded from the court's adjustive jurisdiction, even in divorce situations.[5] The court's practice of focusing on making a finding as to who, between the parties, has title to a particular property so as to declare exclusive ownership on that party has always fettered the discretion of the courts. Such an exercise would run counter to the welfare (benefit) principle that supports the court's jurisdiction in Matrimonial Causes.[6]In Nigeria, it is common knowledge that most marital property titles are usually in the name of the male spouses. The purpose of this paper is to examine the attitude of the courts in Nigeria to the settlement of property between spouses in divorce proceedings relating to statutory marriage. The discussion centres on two key questions. They are: (1) whether the adoption of the strict property approach in its settlement of property on spouses in divorce proceedings relating to statutory marriage is not unfair to the women' and (2)

[1] A. O. Abdulmumini, 'Religious and Customary Laws in Nigeria' Emory International Law Review, 2011, P. 881- 895

[2] B. E. Umukoro, 'Settlement of Matrimonial Property upon Divorce: Challenges and Need for Reform in Nigeria and some other common wealth countries in Africa' Commercial and property law Journal, 2006, P. 116 -118

[3] M. Attah, 'Divorcing Marriage from Marital Assets: Why Equity and women fail in property readjustment actions in Nigeria' Journal of African law, 62, 3 (2018) P. 433

[4] *Ibid*

[5] *Ibid*

[6] *Ibid P. 432*

Whether the woman is actually a non-contributor to the acquisition of property or properties during the subsistence of the marriage. The article is divided into six parts. Section one, is the introductory part, section two deals with the concept of statutory marriage. Section three addresses the issue of divorce and dissolution of marriage. Section four talks about the importation of common law principles of property law into matrimonial relationships. Section five advocates for the adoption of equity based approach in the settlement of property in divorce proceedings. The paper concludes in section six with recommendations.

2. Statutory Marriage

Item 61of the exclusive legislative list in the schedule to the constitution of the Federal Republic of Nigeria, 1999 recognizes the power of the National Assembly to legislate on the "formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial proceedings relating thereto". Therefore, by virtue of section 4 (2), (3) and (5) of the 1999 constitution, no State House of Assembly can legislate on marriage except those contracted under customary law or Islamic law.[7] It is therefore clear from this constitutional provision that three forms of marriages are recognized in Nigeria. Marriage under the Act (statutory marriage), Marriage under customary law and Marriage under Islamic law.[8] Whereas only the National Assembly can legislate on Statutory or marriage under the Act, the State House of Assembly of the various states of the federation can legislate on marriages under customary law and Islamic law.[9]

The English version of the Nigerian Statutory marriage was defined by Lord Penzance in *Hyde V Hyde*.[10]as 'the voluntary union for life of one man and one woman to the exclusion of all others.' Flowing from this definition, statutory marriage is monogamous in nature.

Section 18[11] of the Interpretation Act defines monogamous marriage as:

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[7] *Obusez v. Obusez* (2007) 10 NWLR (Pt 1043) 430 at 445-446

[8] N. Tijani, Matrimonial Causes in Nigeria, Law and Practice, 2nd edn, Renaissance law publishers ltd, 2017, P. 4

[9] *Ibid*

[10] (1860) L. R. 1 PD. 130

> 'a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and the woman to the exclusion of all others during the continuance of the marriage.'

Three basic elements can be gleaned from this definition. The marriage must be a voluntary union, it must be a union for life and a union of one man and one woman to the exclusion of all others. Universally, it is accepted that marriage being a union of man and woman, involves two person of opposite sex. Consequently, sex constitutes an essential determination of marriage relationship. In order, therefore to establish the existence of a valid marriage, it must be proven that the persons involved are man and woman.[12] However it is doubtful if one can state with the same confidence that a marriage is now necessarily a union for life.[13] In modern times, couples conclude marriages for various short term objectives, for example, to obtain a particular nationality for residence purposes or to obtain an exit visa from a country in which one of the parties is normally resident or of which he or she is a citizen. Such short term marriages are nevertheless valid, even though the couple may go their separate ways as soon as their objectives are achieved. Moreover, there is nothing to prevent two people from getting married because the woman is pregnant. After the legitimate birth of the child, they could then separate and subsequently obtain a divorce.[14] Every society makes laws that regulate and promote the institution of marriage. In Nigeria, a number of legal rules are directed at promoting marriage and invalidating all acts which may interfere with that institution.[15] This is to protect the sanctity of marriage. A statutory marriage must follow certain formalities for it to be valid. Any of the intending parties must first proceed to the Marriage Registry in the district in which he or she desires to get married, and fill a form giving notice of his/her intention to get married.[16]This notice

[11] Section 18 of the Interpretation Act cap. 123 Laws of the Federation of Nigeria, 2004

[12] E. I. Nwogugu, Family law in Nigeria, HEBN Publishers Plc, Revised Edition, 1990 P. xxvii

[13] I. Sagay, Nigerian family law, Principles, Cases, Statutes and Commentaries, Malthouse Press Limited. 1999, P. I

[14] See Bromley's Family law, 7th Edition, P. 18

[15] E. I. Nwogugu, (n8)

[16] S. 7 Marriage Act. See also form A in the first schedule.

is then entered into the Marriage Notice Book by the Registrar. Where there is no impediment to the marriage of the parties and no *caveat* has been entered against the intended marriage, the Registrar must issue a certificate to the applicant, not earlier than 21 days but not later than 3 months after filing of the notice[17]

Before issuing the certificate,[18] the Registrar must be satisfied *inter alia* that one of the parties has been resident within the district in which the marriage is intended to be celebrated at least 15 days preceding the granting of the certificate. He must also be satisfied that where either of the parties is below the age of twenty-one, the requisite consent has been obtained in writing.[19] The requisite consent is usually that of the father, but if the father is dead or of unsound mind or absent from Nigeria, then the mother is competent to give consent, and if such consent cannot be obtained for the same reasons as in the case of the father, then the guardian is competent to give his consent.[20]If the Registrar is satisfied that all necessary conditions have been fulfilled, he must issue the certificate which entitles the parties to get married. The marriage itself can take place in either of two places; in the marriage Registry or in a place of worship.[21]If it is in the Registry, it must take place before the Registrar and in the presence of two witnesses between the hours of ten in the morning and four in the afternoon.[22] If it is in a place of worship, it must be conducted by a recognized Minister of the religious organization concerned.[23] The place of worship must be specifically licensed to celebrate marriage under the Act[24] and as in the case in the Registrar's office, the marriage ceremony must be witnessed by at least two people.[25] Before

[17] S. II (1) of the Marriage Act
[18] Form C of the first schedule
[19] Section 11 (1) of the Marriage Act
[20] Section 18 of the Marriage Act
[21] Section 6 and 27 of the Marriage Act
[22] Section 27 of the Marriage Act
[23] Section 21 of the Marriage Act
[24] Section 6 and 21 of the Marriage Act
[25] Section 21 of the Marriage Act

celebrating the marriage, the officiating minister must first be satisfied that a registrar's certificate has been obtained by the parties, and the marriage must take place between the hours of eight in the morning and six in the evening.[26] The officiating minister must send a copy of the marriage certificate to the Registrar of Marriage for the district within 7 days of the marriage. Failure to do this is a criminal offence punishable with imprisonment for two years.[27]

Failure to comply with most of the formal requirements, does not in any way affect the validity of the marriage.[28] For example, failure to reside in the marriage district for 15 days before the granting of the marriage certificate, or to obtain the necessary consent does not affect the validity of the marriage, although such failures can result in criminal sanctions for those guilty of the relevant lapses.[29] However, sections 12 and 33 (2) specifically state that where certain formal requirements are not complied with, the marriage shall be void. Thus, section 12 states that a marriage shall be celebrated within 3 months of the filing of the notice and all subsequent proceedings shall be void.

3. Divorce and Dissolution of Marriage

Divorce is an act by which a valid marriage is dissolved, usually freeing parties to remarry.[30] It is the termination of a marriage or marital union, the cancelling or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between a married couple under the rule of law of that particular country or state.[31] Simply put, it is the legal and formal dissolution of a marriage.[32] It is the legal separation of man and wife, effected by the Judgement of a court, and either totally dissolving the marriage

[26] Sections 21 and 22 of the Marriage Act
[27] Section 26 of the Marriage Act
[28] I. Sagay, (n 13) P. 50
[29] See Sections 41, 42,43,44,46 and 49 of the Marriage Act
[30] The Encyclopedia Britannica, 2017
[31] The Covenant Divorce Recovery Leader's Handbook, P 166, Wade Power, 2008
[32] O. A. Oniyinde, *etal*, 'Spousal Maintenance and Alimony under the Matrimonial Causes Act (MCA)' Journal of Law and Judicial System, Volume 2, Issue 3, 2019, P. 42'

relation, or suspending its effects so far as it concerns the cohabitation of the parties.[33] It imports a dissolution of the marriage relation between husband and wife, that is a complete severance of the tie by which the parties were united.[34]

The term Dissolution is used interchangeably with divorce and it is also synonymous to divorce. However, dissolution of marriage refers to the process by which a couple can end their marriage permanently.[35]It is the quicker and less expensive process for terminating a marriage, when neither spouse contests the decision of the court. Divorce on the other hand can be said to be the end result of the process of ending a marriage. Thus, dissolution of marriage ends in a divorce.[36] In a dissolution, the husband or wife file a joint petition where both parties request the court to terminate the marriage and approve separation agreement that they have prepared and agreed upon prior to filing their petition. However, in divorce, one spouse files a petition against the other spouse and both spouses have not been able to work out a separation agreement.[37]A party to a marriage can present a petition for dissolution of the marriage upon the ground that the marriage has broken down irretrievably.[38]

At first sight this appears revolutionary, for it does away with the old, rigid and artificial matrimonial offences concept and introduces the concept of breakdown which is not only a more realistic approach, because it looks at the state of marriage instead of concerning itself with guilt and the apportionment of blame, but is also fairer because as has been started over and over again, the matrimonial offence is merely symptomatic of breakdown and is not it cause.[39] However, Section 15 (2) lists the factual situation under which the court will hold

[33] B. A. Garner, Black's Law Dictionary, 8thedn, West Publishing Co. 1990, P. 515
[34] *Ibid*
[35] O. A Oniyinde, *etal*, (n 3) P. 24
[36] *Ibid*
[37] *Ibid*
[38] Section 15(1), Matrimonial Causes Act
[39] See Heron C.J in *MacDonald v. MacDonald* (1964) 6. F.L.R 58 at P. 60, Bromley's Family law, 7thedn (1987) P. 176

that a marriage has broken down irretrievably. This factual situation has indeed neutralised the revolutionary effect of section15 (1). By Section 15 (2) a court cannot hold that a marriage has broken down irretrievably, unless at least one of the eight factual situations is proved by the petitioner to be in existence. With exception of the living apart provisions and the provision on absence of a spouse raising a presumption "of death, all the factual situations consist of the old matrimonial offences, in their old form or in slightly modified forms.[40] The effect of all this is that there are now in fact eight grounds for divorce instead of one, although the decree refers to them as facts".[41] Section 16 (1) of the Matrimonial Causes Act stipulates fourteen other facts, any of which if proved would also constitute the fact in Section 15 (2) (1), that is, that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. These fourteen extra facts include the commission of rape, sodomy or bestiality by the respondent, habitual drunkenness or drug addiction for two years, frequent convictions for crime coupled with habitually leaving the petitioner or inflicting grievous bodily harm on her, refusal to comply with maintenance order made in favour of the petitioner and confinement in a mental institution for 5 years during the 6 years period immediately preceding the presentation of the petition.[42] The 'facts' in section 16 (1) are without prejudice to the generality of section 15 (2) (1). In other words, Section 15 (2) (c) exists independently of and in addition to Section 16 (1). Since proof of any of the eight facts in section 15 (2), any of the fourteen facts in section 16 (1) constitutes irretrievable breakdown, what we have in sections 15 and 16 are twenty-one independent grounds of divorce rather than one ground as section 15 (1) claims misleadingly.[43] Even though the argument advanced by the learned writer and which this writer agrees with is sound and valid, the courts in Nigeria has maintained that there is only one ground for the dissolution of marriages under the matrimonial causes Act.

[40] I. Sagay, (n 13)
[41] *Ibid*
[42] *Ibid*
[43] *Ibid*

In *Harriman v Harriman*[44] the court of appeal, per UcheOmo, J. C. A, (as he then was) stated:

> … Firstly, there is only one ground for the dissolution of all Marriages under the matrimonial causes Act, to wit "that the marriage has broken down irretrievably" vide section 15 (1) of the Act. The sub-paragraphs of sub-section 2 thereof, eight of them – (a) to (h), are only various species of the breakdown, or to put it differently, a petitioner who satisfies the court on any one or more of those facts, would be entitled to a finding that the marriage has irretrievably broken down, and consequently be entitled to a decree dissolving same. They do not constitute separate grounds on the basis of which a dissolution can be granted.

Section 15 of the matrimonial causes Act provides:

15(1) "A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts.

a) That the respondent has wilfully and persistently refused to consummate the marriage;

b) That since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

c) That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

d) That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

[44] (1989) 5 NWLR (Pt 119) 6 at 15

e) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted.

f) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition:

g) That the other party to the marriage has, for a period of not less than one year failed to comply with a decree of restitution of conjugal rights made under this Act;

h) That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

(3) For the purpose of subsection (2) (e) and (f) of this section the parties to a marriage shall be treated as living apart unless they are living with each other in the same household"

The petitioner must prove at least one of these specified facts to warrant the court to dissolve the marriage.[45]

4. The Nigerian Judiciary and the Importation of Common Law Principles of Property Law into Matrimonial Relationships.

The Matrimonial Causes Act in its Section 72 makes provision for the High Court in proceedings relating to the settlement of property.[46] Section 72 (1) provides as follows:

> The court may in proceeding under this Act by order require the parties to the Marriage, or either of them, to make, for the benefit of all or any of Parties to, and the children of the marriage, such settlement of property to which the parties are or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of each case.[47]

[45] See *Nannav Nanna* (2006) 3 NWLR (Pt 966) 1, *Akinbuwa v. Akinbuwa* (1998) 7 NWLR (Pt 559), 661

[46] Section 72 of the MCA

[47] Section 72 (1) of the MCA

By this provision, the court is enjoined to make a just and equitable order based on the circumstances of each case before it. This equitable order is in relation to the settlement and not redistribution of property.[48] Section 73 of the MCA on the other hand deals with the general powers of the court in respect of financial provisions for spouses in proceedings for maintenance, custody and property settlement[49] Section 73 (1) of the MCA is instructive as it authorises the court to discharge a property settlement order which was made pursuant to section 72 of the MCA if the spouse in whose favour the property settlement order was made remarries, or upon any other just cause for doing so.[50]Thus, by virtue of the provision of section 73 (1) (i) of the MCA, the "settlement of property" as contemplated in section 72 of the MCA implies only the right to use and enjoy the property subject to the occurrence of an event(s).[51]It does not imply a transfer of the ownership of the property from one spouse to the other except in cases where the court makes an order of sale for the purposes of discharging a maintenance order.[52]

In most divorce proceedings brought before the courts in Nigeria, where settlement of property is sought for, the courts have predominantly adopted the strict property rights approach in the determination of spouses' entitlement to property. However, in a few cases the courts have also involved their equity jurisdiction. The strict property right approach requires a court to determine legal ownership by way of documentary evidence.[53] In order to sustain a claim for beneficial interest in property, where legal title to the property is in the name of one of the spouses, this approach requires the claimant to provide evidence of a direct financial contribution to the acquisition of the property. Under this approach, therefore, in the determination of the legal title to property or beneficial interest in property,

[48] C.J. Efe and O.E Eberechi 'Property of Nigerian Women at Divorce: A case for a Redistribution order' PER/PELJ, 2020, P. 5.
[49] Section 73 of the MCA
[50] Section 73 (1) (i) of the MCA
[51] Section 73 (1) (i) of the MCA
[52] C. J Efe and O. E Eberechi, (n 48)
[53] *Ibid, P 10*

the indirect financial or non-financial contributions of a spouse to the acquisition of the property are not taken into consideration by the court.[54]

In *Nwanya v Nwanya*,[55] the respondent wife claimed that she contributed N6,000 to the building of a house that was in her husband's name. Her claim was dismissed as she was unable to substantiate it. On the vital issue of evidence, Olatawuwa JCAsaid:

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

In the case of *Amadi v Nwosu*.[56] The appellant's husband sold his house that served as their matrimonial home and moved to another part of the city. The appellant refused to vacate possession and the respondent purchaser sued her for the declaration of title, damages for trespass and an injunction. The appellant could not provide evidence to support her contention that she had an interest in the house. She merely said that she paid for labour and sand and made no effort to substantiate her testimony; under cross-examination she testified that she did not know when the house was built. Her husband testified that she was not earning money when he built the house and his testimony that he built the house without any contribution of his wife was not challenged in cross-examination. This supreme court dismissed the appellant's claim. Kutigi JSC stated thus:

> "The appellant (argued) that she contributed to the building of the house. If it were so, then certainly when she came to testify in court, she ought to have explained the quality and quantity of her contribution. She ought to have given details and particulars of the contributions which would have enabled the court to decide whether or not she owned the property with (her husband). She did not. In addition, the

[54] *Ibid*
[55] (1987) 3 NWLR (Pt 62) 697
[56] (1992) 5 NWLR (Pt 241) 273

> appellant called no witness to prove that she contributed either labour or sand to the building."

In *Adebiyi v Adebiyi*[57] the court stated expressly that where a party alleges that the property sought to be settled is joint property, he should explain the quality and quantity of his or her contribution, details and particulars of contribution which will enable the court decide whether or not they jointly owned the property. In *Onabolu v Onabolu.*[58]the court held that… a person who claim to be a joint owner of a property must be able to quantify his contribution. He must give detailed particulars and support them where necessary with receipts of what he bought towards the building of the property…In *Akinboni v Akinboni*,[59] the document of title to the matrimonial home was in the name of the petitioner husband. The respondent alleged in her cross-petition, upon which she gave evidence, that both parties owned the property jointly. She stated that she allowed the petitioner to obtain the title deed in his sole name to enable him to obtain a housing loan from his employers, who would not accept jointly owned property. There was no specific or express prayer that the building be partitioned or sold and the proceeds shared. Despite this, the court of Appeal indicated that it was willing to treat matrimonial causes liberally, but allowed the technical rules to prevail in this case. It reasoned that;

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

[57] (2013) 2 OGSLR 1 at 12; See also *Fribanic v Fribanic* (1957) 1 All ER 357
[58] (2005) 2 SMC, 135
[59] (2005) 5 NWLR (Pt 176) 564

Applying Section 132 of the evidence Act[60] and without even alluding to section 72 of the MCA, it held that the trial court was in error when it accepted the respondent's oral testimony, which operated to vary what the court and the parties had accepted to be the contents of documents of title to the matrimonial home.[61] Denying the respondent any proprietary interest in the property, the court gave her and the four children of the marriage (whose custody was given to the respondent) only a right to reside in the property during their good behaviour and restrained the appellant from selling or disposing of the property during such residence.[62]

The courts in all these cases and many more not mentioned in this article adopted the strict property law approach and the consequences were all devastating for the women who in all most all the cases applied to the court for readjustment. The attitude of the court in this line of cases places the women in a very precarious situation as whatever contribution that the women cannot prove with tangible and concrete evidence is lost. This approach is oppressive as it does not take into cognizance the indirect, invisible and unquantifiable contributions of women in terms of acquisition of marital properties. This approach expects all family agreement to be documented and this clearly contradicts the principle of family contracts.[63]it is true that most family contracts are usually oral and unwritten, and made in bed with no fear of any party breaching them.

5. Adopting the Equity Based Approach: A Better Option

A critical look at the matrimonial causes Act, specifically section 72 reveals the unlimited powers of the court in determining the fate of all properties of spouses, where there is a divorce.[64] It does not focus on ownership of property, since undoubtedly; ownership rests on the marriage union and their participants. Rather it focuses on the management (sharing and

[60] Now, Evidence Act 2011, Section 128
[61] M. Attah, (n 3) P.435
[62] *Ibid. P 435*
[63] O. Umah, who takes over the family property after Divorce? Available at https://learnnigerianlaws.com.who... Accessed 2/10/2021
[64] *Ibid*

settlement) of the property for the benefits of the participants of the marriage union.[65]The court may in matrimonial proceedings by order require the parties to the marriage, or either of them, to make settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

The settlement of the property is for the benefit of all or any of the parties to the marriage and the children of the marriage.[66] The object of Section 72 of the Act is benefit oriented. The operating words in this section are "Just and equitable" This implies what is fair in the context of the marriage partnership in the event of a divorce. It has nothing to do with the person in whom title to property or properties resides. Commenting on the scope, intention or objective of section 72 of the MCA, Nwogugu, citing *Cartwright v Cartwright*[67] explains that an order under the section will relate to the whole or part of the property involved and that the court is empowered to enable it to make proper provisions for the spouses and their children. The court's discretion on the settlement of property on parties is absolute and the range of the party's properties over which the court can exercise its jurisdiction is unlimited. In the case of *Kafi v Kafi*,[68] the court was right when it held that "the main limitation in making (a section 72) order must be "as the court considers Just and equitable". In *Acquah v Acquah*[69], it was held that the court can exercise the powers under Section 72 on its own motion. In *Oghoyone v Oghoyone*,[70] the court of Appeal expressed the view that it would be unconscionable to allow a spouse to claim exclusive possession of a matrimonial property, especially where the court can by the conduct of spouses, either express or inferred, determine the shared intentions. Equally, the court in *Okere v Akaluka*,[71] held that it would

[65] *Ibid*
[66] Section 72 (1) of the Matrimonial Causes Act
[67] (1982) 12 family law 252
[68] (1987) 3 NWLR (Pt 27), 175
[69] (1985) HCNLR 35 at 40
[70] (2010) 3 NWLR (Pt 1182) 564, 584
[71] (2014) LPELR – 24287 (CA) 1

be most unconscionable to deprive a woman and her children of the right in a property to which she contributed substantially in regard to its acquisition and development. The court also expressed the view that the indirect contribution of wives to the matrimonial property should grant them a beneficial entitlement to the property on the basis that … it was the performance of their functions as wives that enabled their husband… to perform theirs.

6. Conclusion and Recommendations

Though decisions by the courts in Nigeria adopting the equity based approach are relatively few, it is the right approach to adopt in the settlement of property in divorce proceedings. This approach takes cognizance of the role of the woman as a homemaker whose earning capacity is lost as a result of homemaking in most instances. The adoption of the strict property right approach tends to exploit the women as it takes no notice of the cost of performing the role of the home maker. Without the woman at home making invisible, indirect and unquantifiable contributions, the man cannot achieve anything.

This paper therefore makes the following recommendations:

1. That in addressing the issue of settlement of property in divorce proceedings, the cost of performing the role of a homemaker and the financial and non-financial contribution to the welfare of the family should be treated proportionately with the monetary contributions of the male spouse.
2. That both contributions be treated as having equal economic value.
3. That the Matrimonial Act be amended to include a clear definition of what constitutes Matrimonial property.
4. That the courts in Nigeria should jettison the strict property law approach in the settlement of property in divorce proceedings and adopt the equity based approach as that is the intendment of section 72 of the Matrimonial Causes Act.