



Strathmore University
Law School

**Judicial Protection of Matrimonial Property Rights: Division of Pension Benefits
at Divorce in Kenya**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School



13th February, 2024

(Word Count: 11628)

TABLE OF CONTENT

Acknowledgments	vi
Declaration	vii
Abstract	viii
Definition of Terminologies.....	ix
List of Abbreviations.....	x
List of Cases	xi
List of legal instruments	xii
CHAPTER ONE: INTRODUCTION	1
1.1 Background.....	1
1.2 Statement of the problem.....	4
1.3 Research Objectives	5
1.4 Research Questions	5
1.5 Hypothesis	5
1.6 Justification of the study.....	5
1.7 Theoretical Framework.....	7
1.8 Literature Review	9
1.9 Methodology.....	11
1.10 Limitations.....	12
Chapter Summary	12
CHAPTER TWO: LEGAL FRAMEWORK OF PENSION BENEFITS IN KENYA	13
2.1 Introduction	13
2.2 The Right to Social Security.....	13
2.3 Grounds for Retirement in Kenya	14
2.4 Regulation of Retirement Benefit Schemes in Kenya.....	15

2.5 Pension Benefit in Kenya	16
2.6 Types of Pension Plans in Kenya	17
2.6.1 Defined Contribution	17
2.6.2 Defined Benefit	17
2.7 Current Pension schemes in Kenya	17
2.7.1 The National Social Security Fund	17
2.7.2 Individual Retirement Benefit Schemes	18
2.7.3 Occupational Retirement Benefit Schemes	19
2.7.4 Umbrella Retirement Benefit Schemes	19
2.8 Limitations on Pensions	20
2.9 Conclusion	22
CHAPTER THREE: REGULATION OF MATRIMONIAL PROPERTY IN KENYA	23
3.1 Introduction	23
3.2 Marriage in Kenya	23
3.3 Grounds for Dissolution of the Marriage	23
3.4 Meaning of Matrimonial Property in Kenya	24
3.5 The Matrimonial Property Rights Systems	25
3.5.1 Community of Property	25
3.5.2 Separate Ownership	26
3.6 The Principle of Equality	27
3.7 Post-Divorce Maintenance (Alimony) in Kenya	28
3.8 Court Assessment of the Quantum of Alimony/Post-Divorce Settlement	28
3.9 Pension Benefits as Matrimonial Property in Kenya	30
3.10 Shortcoming of classification of pension as payment as alimony rather than property subject to division	31

3.11 Conclusion	32
CHAPTER FOUR: LEGAL FRAMEWORK OF PENSIONS INTEREST IN SOUTH AFRICA	33
4.1 Introduction	33
4.2 Historical Development of Pension Interest in South Africa	33
4.3 Regulation of Pension in South Africa	34
4.4 Marital Property Regimes in South Africa	34
4.5 Grounds for dissolution of marriages	35
4.6 The Legal Framework for the Division of Pensions in South Africa	36
4.7 The Process of Dividing Pensions at Divorce	37
4.7.1 Court Order	37
4.7.2 Valuation of Pension Interest	37
4.8 Settlement Agreements	38
4.9 South Africa Judicial Approach	39
4.9.1 During the Subsistence of the Marriage	39
4.9.2 During Divorce	39
4.10 Conclusion	40
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS	41
5.1 Introduction	41
5.2 Findings	41
5.2.1 Chapter One	41
5.2.2 Chapter Two	41
5.2.3 Chapter Three	41
5.2.4 Chapter Four	41
5.3 Recommendations	42
5.3.1 Need for Statutory Recognition	42

5.3.2 Rule-Based Judicial Discretion.....42

5.3.3 Further Research42

5.4 Conclusion.....42

Bibliography.....43

Appendix 146

Appendix 2.....47



Acknowledgments

I would like to express gratitude to my supervisor, Ms. Purity Wangigi, for her invaluable guidance in making my research a success. She was very instrumental in my research and writing of this research paper.

I would like to express my appreciation and thanks to my family for their love and support throughout my research, their encouragement made it possible to complete my research paper.

Above all I am thankful to the Almighty God for guiding me throughout the writing of my Research Paper.

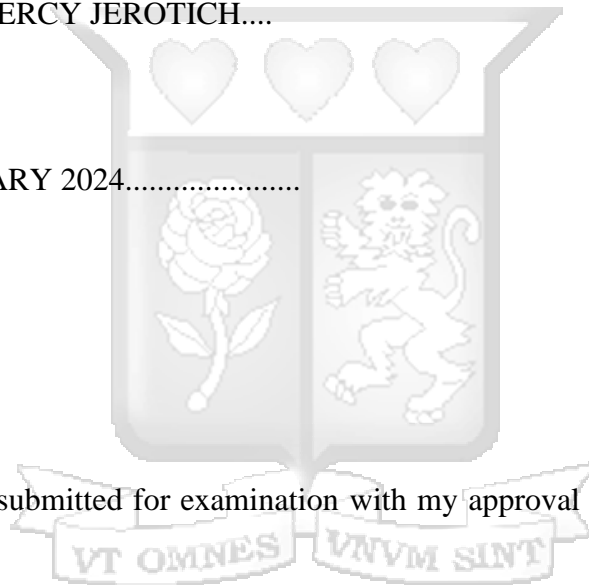


Declaration

I, BEREKE MERCY JEROTICH, do hereby declare that this research is my original work and That to the best of my knowledge and belief, it has not been previously, in its entirety or in Part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:BEREKE .MERCY JEROTICH.....

Date:13TH FEBRUARY 2024.....



This dissertation has been submitted for examination with my approval as University Supervisor.

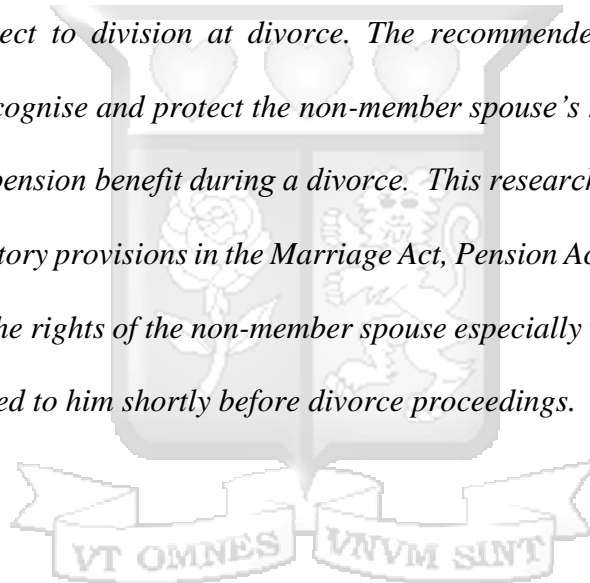
Signed:PNW.....

13th February 2024

Purity Wangigi

Abstract

Pension benefits is considered a source of wealth upon retirement and has been viewed as a marital asset during the dissolution of marriages. This paper seeks to examine pension benefits as matrimonial property in Kenya. The paper seeks to investigate whether a non-member spouse can claim a portion of a member's pension benefit at divorce. This paper essentially covers the fundamental principles of pension law, matrimonial property law, and divorce law in Kenya. The paper conducts a comparative study on how the South African courts and legislation have interpreted and applied the division of pensions under their legislation. The paper recommends that pension benefits should be considered as matrimonial property subject to division at divorce. The recommended law reform requires the legislature to effectively recognise and protect the non-member spouse's right to claim a share of the member spouse's accrued pension benefit during a divorce. This research argues that there is a need to insert the necessary statutory provisions in the Marriage Act, Pension Act and Matrimonial Property Act to adequately address the rights of the non-member spouse especially when pension benefits of the member spouse have accrued to him shortly before divorce proceedings.



Definition of Terminologies

<u>Terms</u>	<u>Meaning</u>
Accrued to	To become entitled to
Contract of service	An agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service.
Employee	A person employed for wages or a salary and includes an apprentice and indentured learner.
Employer	Any person, public body or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
Member	A member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme
Non-Member	A person who is no longer the spouse of that member due to the dissolution or confirmation of the dissolution of the relationship by a court order and to whom the court ordering or confirming the dissolution of the relationship has granted a share of the member's pension interest in the fund
Party	A spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage.
Service of the government	public service in a civil capacity in the establishment of the government.

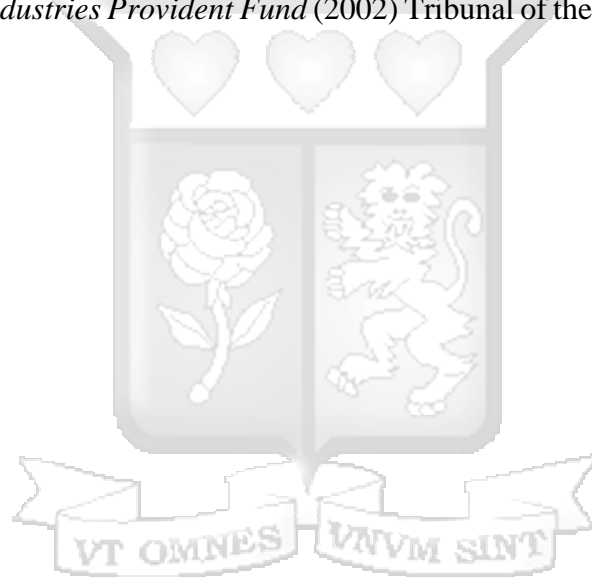
List of Abbreviations

- | | | |
|---|------|-------------------------------|
| 1 | CoK | Constitution of Kenya (2010). |
| 2 | SALC | South African Law Commission |



List of Cases

- 1) *Alexander Kamweru v Anne Wanjiru Kamweru* (2000) eKLR.
- 2) *Chidya (Kenya) limited v Africa Equipment & Engineering Power S.A (AEE Power S.A)* (2020) eKLR.
- 3) *Eskom Pension and Provident Fund v Krugel and another* (2012), The Supreme Court of Appeal of South Africa.
- 4) *Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another* [2018] eKLR
- 5) *Gugu v Zongwana* (2014) The High Court of South Africa.
- 6) *Mark Otanga Otiende v Dennis Oduor Aduol* (2021) eKLR.
- 7) *Ndaba v Ndaba* (2017), The Supreme Court of Appeal of South Africa.
- 8) *Noordien v Metal Industries Provident Fund* (2002) Tribunal of the Pension Funds Adjudicator.



List of legal instruments

Kenya Legislation

Constitution of Kenya (2010).

Employment Act (No. 11 of 2007).

Insurance Act, Chapter 487 laws of Kenya.

Marriage Act (No. 4 of 2014).

Matrimonial Property Act (No. 49 of 2013).

National Social Security Fund (No. 45 of 2013).

Pensions Act, Chapter 189 laws of Kenya.

Pensions (Increase) Act, Chapter 190 laws of Kenya.

Public Service Commission Act (No. 10 of 2017).

Retirement Benefits Act (No. 3 of 1997).

The Retirement Benefits (Individual Retirement Benefit Schemes) Regulations, 2000.

The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

South Africa Legislation

Divorce Act (No. 70 of 1979).

Financials Institution (Protection of Funds) Act (No.28 of 2001).

Financial Sector Regulation Act (No.9 of 2017).

Government Employees Pension Law, 1996

Income Tax Act (No. 58 of 1962)

Matrimonial Property Act (No. 88 of 1984)

Pension Fund Act (No. 24 of 1956)

CHAPTER ONE: INTRODUCTION

1.1 Background

Retirement is best understood as the withdrawal of an individual from employment, along with entitlement to income that is based on having been employed over a period of years.¹ The purpose of an individual choosing to retire varies from one to another.² One may choose to retire as a means of coping with health problems that make employment arduous³ or a legitimate way to drop one's job responsibilities in order to lead a life of one's own choosing.⁴ Retirement can be the best time in life when one has adequate retirement income and financial security.⁵ While the state will typically provide publicly funded old—age pensions, they tend to be limited⁶ leaving individuals with the responsibility of financially preparing for retirement.⁷ Retirement scholars and policymakers have traditionally assumed that conjugality is an equalizing force in retirement preparation and that financially spouses share or balance their savings, recent research has found this assumption to be too strong.⁸ Married and cohabiting spouses have different obligations under the legal system in the distribution of resources including retirement assets upon the dissolution of a marriage.⁹

In Kenya, the National Social Security fund provides the basic social security for its members including retirement pensions.¹⁰ The National Social Security Fund recognizes a member's pensionable age as sixty years.¹¹ The benefits provided by the fund include pension funds and

¹¹ Atchley R, "Retirement: Leaving the World of Work", 464 *The Annals of the American Academy of Political and Social Science*, 1982, 120.

² Atchley R, "Retirement: Leaving the World of Work", 120.

³ Atchley R, "Retirement: Leaving the World of Work", 120.

⁴ Atchley R, "Retirement: Leaving the World of Work", 120.

⁵ Dennis H, "Retirement Planning among Couples: Observations and Recommendations", 31 *Journal of the American Society on Aging*, 2007, 60.

⁶ Pugliese M, "The Management of Retirement Savings among Financially Heterogamous Couples," 20(4) *Journal of social policy and society*, 2021, 580.

⁷ Pugliese M, "The Management of Retirement Savings among Financially Heterogamous Couples," 20(4) *Journal of social policy and society*, 2021, 580.

⁸ Pugliese M, "The Management of Retirement Savings among Financially Heterogamous Couples," 20(4) *Journal of social policy and society*, 2021, 580.

⁹ Pugliese M, "The Management of Retirement Savings among Financially Heterogamous Couples," 20(4) *Journal of social policy and society*, 2021, 585.

¹⁰ Section 36, *National Social Security Fund* (No. 45 of 2013).

¹¹ Section 2, *National Social Security Fund* (No. 45 of 2013).

provident funds.¹² The provident fund is established for certain employees of the Government, for example, an enlisted police officer, administration police officer, or forest guard.¹³ The pension funds are categorized into retirement pensions, invalidity pensions, survivor's benefits, funeral grants, and emigration benefits.¹⁴ Every person entitled to become a member of the Pension Fund or Provident Fund as the case may be shall furnish to the Fund, in the manner prescribed, particulars concerning himself and his dependent relatives who shall receive benefits under this Part upon his death.¹⁵

The term pension refers to any pension or other benefit payable by way of periodical payments but does not include any gratuity or any sum payable otherwise than by way of periodical payments.¹⁶ Pensions fulfill two main objectives: consumption-smoothing and poverty reduction.¹⁷ Consumption-smoothing focuses on the individual, and is achieved by enabling people of working age to save and then draw these savings down in old age as a pension.¹⁸ The more an individual saves through contributions to a pension scheme, the more he or she should receive as a pension, at least in theory.¹⁹ Such pensions can be provided by the state or the private sector, and are appropriate for people whose incomes are sufficient to enable them to save.²⁰ The poverty reduction function of pensions can only be fulfilled by the state. Yet, public pensions providing older people with a minimum income can take various forms, and their effects on gender equality can vary significantly.²¹

¹² Section 34, *National Social Security Fund* (No. 45 of 2013).

¹³ Section 2, *National Social Security Fund* (No. 45 of 2013).

¹⁴ Section 36, *National Social Security Fund* (No. 45 of 2013).

¹⁵ Section 35, *National Social Security Fund* (No. 45 of 2013).

¹⁶ Section 2, *Pensions (increase Act)*, Chapter 190 laws of Kenya.

¹⁷ Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009, 378.

¹⁸ Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009, 378.

¹⁹ Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009, 378.

²⁰ Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009, 378.

²¹ Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009, 378.

A retirement pension is awarded to a member who has attained the pensionable age of sixty years or one who opted for early retirement after having attained the age of fifty years.²² Once a member at the time of retirement chooses to purchase the retirement pension, it is purchased in the member's name from a registered insurer of the member's choice.²³ Once the pension is purchased from a Registered Insurer, the terms and conditions applicable to such pension including options elected by the member and the determination of any benefits arising on his death shall be agreed between the member and the Registered Insurer and shall be set out in writing by the Registered Insurer.²⁴ The pension purchased is subject to a minimum ten-year guarantee period.²⁵ Upon the pension purchased through a registered insurer, the National Social Security Fund shall not have further liability in respect of the member, such liability having moved, from the date of purchase to the Registered Insurer from whom the pension is purchased.²⁶

Divorce disrupts, among other things, the sharing of income between spouses.²⁷ This paper is about the consequences of this disruption for pensions, especially those of divorced women who do not remarry.²⁸ Such women will usually receive less pension than they would have shared in had they remained married and inherited had they become widows.²⁹ Some may become dependent on state means-tested benefits.³⁰ Pensions provide the major, and often the only, source of income for the elderly.³¹ Under the present law, pension rights are not divisible by court order.³² This loophole in the old-age security provided by marriage raises at least two issues of public policy. One is the prevention of hardship among divorced pensioners and the other is that of providing a legal framework within which equity between divorcing partners may be approached.³³

²² Section 36, National Social Security Fund (No. 45 of 2013).

²³ Section 36(4), National Social Security Fund (No. 45 of 2013).

²⁴ Section 36(5), National Social Security Fund (No. 45 of 2013).

²⁵ Section 36(6), National Social Security Fund (No. 45 of 2013).

²⁶ Section 36(6), National Social Security Fund (No. 45 of 2013).

²⁷ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

²⁸ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

²⁹ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

³⁰ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

³¹ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

³² Section 13, Pensions Act, Chapter 189 laws of Kenya.

³³ Joshi H, "Pension Splitting and Divorce" 4(12) Wiley, 1991, 69.

This research calls for urgent law reform. The recommended law reform requires the legislature to effectively recognise and protect the non-member spouse's right to claim a share of the member spouse's accrued pension benefit during a divorce. This research argues that there is a need to insert the necessary statutory provisions in the marriage act, pension act and matrimonial property act to adequately address the rights of the non-member spouse especially when pension benefits of the member spouse have accrued to him shortly before divorce proceedings. This will prohibit the member spouse from depriving the non-member spouse of the right or entitlement to claim a portion of such accrued pension benefits. This research further endeavors to demonstrate that there is an integral interplay and/or interrelationship of matrimonial property law, pension fund law, and divorce law in Kenya.

1.2 Statement of the problem

In Kenya, matrimonial property includes the matrimonial home or homes, the household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.³⁴ The matrimonial property act provides that where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.³⁵

However, pensions in Kenya are not assignable or transferable except for the purposes of satisfying a debt due to the Government or order of any court for the payment of periodical sums of money towards the maintenance of the wife, former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted.³⁶ Pension benefits are not recognized as part of Matrimonial property that can be distributed upon the dissolution of a marriage.³⁷ The Marriage Act and The Matrimonial Property Act are silent and, as a result, there are no provisions regulating the sharing of the member spouse's pension benefits during a divorce.³⁸ In particular, the highlighted

³⁴ Section 6, Matrimonial Property Act (No. 49 of 2013).

³⁵ Section 9, Matrimonial Property Act (No. 49 of 2013).

³⁶ Section 13, Pensions Act, Chapter 189 laws of Kenya.

³⁷ Section 6, Matrimonial Property Act (No. 49 of 2013)

³⁸ Matrimonial Property Act (No. 49 of 2013), Marriage Act (No. 4 of 2014).

hindrance will result in the deprivation of the non-member spouse's right to claim a share or portion of the member spouse's pension benefit during a divorce.

1.3 Research Objectives

- 1) To determine whether the regulation of pension benefits addresses non-member spouse's right to benefit from a member's pension benefit.
- 2) To determine whether pension benefits can form part of matrimonial property in Kenya.
- 3) To determine whether pension benefits can be distributed between a member spouse and a non-member spouse at divorce.

1.4 Research Questions

- 1) Does regulation of pension benefits in Kenya address non-member spouse's right to benefit from a member's pension benefit?
- 2) Does pension benefits form part of matrimonial property in Kenya?
- 3) Does the law regulating the distribution of pension benefits, adequately address the non-member spouses' rights to benefit from the pension benefits of a member spouse during divorce proceedings?

1.5 Hypothesis

Shifting the approach of the Kenyan statutes from non-recognition of pension benefits as matrimonial property to recognising pension benefits as matrimonial property can contribute to safeguarding the right of a non-members spouse's claim to a pension benefit upon divorce.

1.6 Justification of the study

Older women and men have been of interest to academics and researchers from a wide array of disciplines for many years.³⁹ One reason for this is their larger representation in the older population.⁴⁰ While older women are more likely to be poor than older men the problem is particularly acute for women without a spouse⁴¹. Those women and men who have not worked are

³⁹ Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003, 1

⁴⁰ Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003, 1

⁴¹ Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003, 1

dependent in their later years on their spouse's lifetime earnings record.⁴² Upon the loss of their spouse, their income can be dramatically reduced due to lower social security benefits and loss of pension income.⁴³ The importance of pensions as a source of family wealth has attracted increased attention during the first decades of the twenty-first century.⁴⁴ In particular, ever greater focus is now being placed in many jurisdictions on how the wealth held in pensions is factored into financial remedies on marital breakdown with an ever-expanding body of law reform reports, empirical research and academic commentary investigating the issue.⁴⁵

The main objective of pension splitting is equity between divorcing spouses and the prevention of hardship which is a by-product in some cases.⁴⁶ There is no guarantee that the procedure will always eliminate hardship but where spouses have adequate but unequal pension entitlement, there would be an equity case for splitting the difference even though no hardship was involved.⁴⁷ This research falls under the theme of justice in practice. It vouches that justice must reach non-member spouses, specifically women, in respect of the retirement benefits of member spouses during divorce. This research is influenced by the current practical deficiency of having specific legislation that addresses the rights of non-member spouses with respect of the member spouses' retirement benefits that have accrued before divorce proceedings.⁴⁸ This research essentially covers the fundamental principles of pension law, matrimonial property law, and divorce law in trying to detect answers to the research question.⁴⁹ This research can potentially contribute significantly to the area of pension law by relaxing the strict rules regulating the benefits of member spouses that are contained in their retirement funds and divorce law during the dissolution of marriage by allowing the non-member spouses to claim adequate shares from their member spouses accrued retirement benefits.⁵⁰

⁴²Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003, 1

⁴³ Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003, 1

⁴⁴ O'Sullivan K, 'Pensions on divorce in Ireland: law, practice and way forward?' 70(3) Northern Ireland Legal Quarterly, 2019, 311.

⁴⁵ O'Sullivan K, 'Pensions on divorce in Ireland: law, practice and way forward?' 70(3) Northern Ireland Legal Quarterly, 2019, 311.

⁴⁶ Joshi H, Pension Splitting and Divorce, 4(12) Fiscal Studies, Wiley, 1991, 70.

⁴⁷ Joshi H, Pension Splitting and Divorce, 4(12) Fiscal Studies, Wiley, 1991, 70.

⁴⁸ Matrimonial Property (No. 49 of 2013).

⁴⁹ Matrimonial Property (No. 49 of 2013), Pension Act (Chapter 189 Laws of Kenya).

⁵⁰ Pension Act, (Chapter 189 Laws of Kenya)

1.7 Theoretical Framework

This study is premised on the distributive justice theory by Aristotle and the egalitarian theory by Nancy Fraser and Iris Young. Distributive justice, according to Aristotle's classic definition, is a mechanism to distribute benefits and burdens among the members of a relevant group in proportion to some criterion for distribution, such as merit, needs, equality, status and so on. Aristotle's formulation is based on a geometrical proportion between two (or more) participants, regarding their possession of the criterion/criteria for distribution and their respective share in the thing distributed (the benefit/burden). The basic structure of distributive justice, is comprised of the participants in the distribution, the thing to be distributed and the criterion/criteria for distribution.⁵¹

Under the equality literature, one of the approaches adopted in understanding the concept of equality is the one of distinction between redistribution and recognition paradigms. The philosopher Nancy Fraser makes a distinction between cultural injustice, which deals with the status and acknowledgment of members of marginalized groups in society, and socio-economic injustice, which is the unequal distribution of wealth in society. According to the "socio-economic injustice" paradigm, the primary cause of inequality in society is the unequal distribution of wealth. This inequality can be resolved by gradually redistributing wealth, making it irrelevant whether or not a person belongs to a historically underprivileged group. This point of view holds that, despite the importance of the class issue, the person is the fundamental unit of inequality and that the primary cause of inequality is the unequal distribution of wealth, which in turn leads to a deficiency of respect for the individual.⁵²

On the other hand, the "recognition" paradigm posits that societal bias towards the values and preferences of dominant groups is the primary cause of the problem, rather than economic factors. Since groups, not individuals, are the fundamental unit of inequality, the focus of solutions should be on elevating the status of historically underprivileged groups and legitimizing social

⁵¹ Keren Paz, 'Theoretical Framework' in Keren-Paz's (eds) *Torts, Egalitarianism and Distributive Justice*, Taylor and Francis Group, 2007, 5.

⁵² Fraser N, 'Justice Interruptus: Critical Reflections on the 'Post socialists' Condition' New York, 1997, 14.

differences.⁵³Fraser argues that the two paradigms are in constant conflict with one another because the recognition paradigm's solutions are intended to affirm the value of group identity, whereas the solution to the inequality of wealth distribution, which involves group membership, weakens the collective identity and aims to "put the group out of the business as a group." Iris Young contends, however, that advancing equality necessitates combining distribution and acknowledgment and that there is no conflict between the two objectives.⁵⁴

These approaches are significant as the dramatic growth of private plans since the 1940s has raised significant interest in this type of income maintenance.⁵⁵ Individuals are constantly seeking means by which to enhance their economic security.⁵⁶ However, one cause of economic insecurity is the possibility of an individual's earning power at an advanced age.⁵⁷ A spouse who has attained the age of 55 and above, there is a rebuttable presumption that it may not be easy for them to get back into employment, and this has a direct impact on her earning capacity which has since diminished.⁵⁸ In Kenya, the retirements benefit authority submitted a report on March of 2023 of a survey that was carried out to look into the experience of retirees in Kenya and how the lump sum of the pension received from their pension schemes was spent. The key findings of the survey are provided in Appendix One and Two of this paper demonstrating that a majority of the retirees invested their pensions that will cater to their financial needs post-employment and the investment they made gave them a monthly income of which some of the retirees earn up to eighty thousand Kenyan shillings. Furthermore, it outlines the great financial stability and wealth that retirees have upon retirement as a result of pensions.

Aristotle's theory highlights the importance of consideration of pension benefits as matrimonial property between the former spouses upon divorce. Issues of distributive justice are relevant to the distribution of pension benefits between a member and non – member spouse. An important aspect

⁵³ Fraser N, 'Justice Interruptus: Critical Reflections on the 'Post socialists' Condition' New York, 1997, 14.

⁵⁴ Young I, 'Unruly Categories: A critique of Nancy Fraser's Dual System Theory, *New left Rev*, 1997, 159

⁵⁵ O' Neil P, 'Pensions as Marital Property, 'Valuation, Allocation and Related Mysteries' 16(3) *Creighton Law Review* 1982, 743.

⁵⁶ O' Neil P, 'Pensions as Marital Property, 'Valuation, Allocation and Related Mysteries' 16(3) *Creighton Law Review* 1982, 743.

⁵⁷ O' Neil P, 'Pensions as Marital Property, 'Valuation, Allocation and Related Mysteries' 16(3) *Creighton Law Review* 1982, 743

⁵⁸R P M v P K M (2015) eKLR.

of the approach presented here is that the examination of the distributive effects of matrimonial property rules should be attentive to the individuals involved and affected by the distribution. In particular, the egalitarian approach by Iris requires that we give attention to the ways in which the matrimonial property rules and pension rules affect members of disadvantaged persons, such as the non-member spouse to ensure equality is achieved upon divorce.

1.8 Literature Review

The division of matrimonial property belonging to a married couple on separation or divorce is regulated by family law.⁵⁹ Various authors have discussed pensions as a marital asset subject to division at divorce. Barbara's book outlines property division as the law governing the division of property owned by the husband and wife, individually and both of them together, at the time of the divorce. she notes that whether pension is considered marital property or the sole property of the wage-earning spouse is an important factor, especially when older couples separate. she gives an example of the United States where the general rule is that the amount invested in the pension during the marriage was earned during the marriage, the other spouse, accordingly, has a claim to that portion of the pension acquired during the marriage.⁶⁰

In Miles and Scherpe's book, the authors outline the law of many jurisdictions, notably the civil law jurisdictions of continental Europe, which is based on what may be called a 'pillar system' in which the package of financial remedies for a spouse on divorce is constructed on a number of discrete elements or pillars each of which addresses a different issues which include the division of property according to the rules of the applicable matrimonial property regime, sharing of retirement pension funds or income, regular maintenance (alimony/ spousal support) payments and allocation of the use of the former matrimonial home.⁶¹ They make the argument that basis on which each pillar operates, for example, the range of property to be shared, the bases upon which maintenance might be payable varies between jurisdictions, but the pillar structure is a shared feature.⁶²

⁵⁹ Douglas P, 'The importance of pensions in a divorce' Aberdein Considine Legal, August 2023, -< [The Importance of Pensions in a Divorce | Aberdein Considine Legal \(acandco.com\)](#)> on 1 February 2024.

⁶⁰ Stark B, 'Divorce/ Property Division' in Stark B (eds), *International family law: An introduction*, Taylor & Francis Group, 2005, 118.

⁶¹ Miles J and Scherpe J, 'The legal consequences of Dissolution' Property and Financial support between spouse' in Eakelaar J, *Routledge Handbook of Family Law and Policy*, 2nd ed, Taylor & Francis Group, 2020,147.

⁶² Miles J, 'The legal consequences of Dissolution' Property and Financial support between spouse' 2020,147.

Meanwhile in a separate book, Miles makes the argument that equitable redistribution systems, prevalent amongst common law jurisdictions such as England and Wales, take a more flexible and holistic, less compartmentalized approach. They equip the courts with an extensive ‘tool box’ of remedies which empowers them to do all the sorts of things which the continental European pillars achieve, but leave it to the courts to determine what combination of remedies to deploy in any given case in pursuit of an overall result which is judged to be fair.⁶³ However, Scherpe argues that in other common law jurisdictions such as New Zealand, statutes or case law has led to the discretion being solidified to such a degree that their approach to financial relief upon divorce is called ‘rule-based discretionary approach.’⁶⁴ The default rule in such a jurisdiction with regard to property is that all matrimonial property including pension rights acquired during the marriage are to be shared equally upon divorce.⁶⁵

Elizabeth’s paper outlines the judicial approaches adopted in determining the sharing of pension funds, the paper outlines two tests which have emerged for purposes of characterizing a portion of such a pension as marital property: the marital fraction test and the accrual-of-benefits test.⁶⁶ The marital fraction is a fractional means of allocating the marital and non-marital property interests in retirement benefits, it has been recognized in some form in most jurisdictions. The division of the pension is based on a formula, which when calculating the marital fraction refers to some percent times a fraction, in which the numerator of the fraction is the total number of months of creditable service in the retirement plan earned during the marriage and the denominator is the total number of months of creditable service in the retirement plan earned as of the date of retirement.⁶⁷

Elizabeth makes the argument that the accrual- of-benefits approach for calculating the marital property interest in a pension plan is generally simpler than the marital fraction approach. Under

⁶³ Miles J, ‘The legal consequences of Dissolution’ Property and Financial support between spouse’ 2020,147.

⁶⁴ Scherpe J, ‘Marital Agreements and Private Autonomy in Comparative Perspective’ Hart Publishing Ltd, Oxford, 2012, 460.

⁶⁵ Scherpe J, ‘Marital Agreements and Private Autonomy in Comparative Perspective’ Hart Publishing Ltd, Oxford, 2012, 469.

⁶⁶ Brandt E, ‘Value, Allocation and Distribution of Retirement Plans at Divorce: Where are we,’ 35(3) *Family Law Quarterly*, 2001, 471.

this method, the accrued benefit at the date of marriage is subtracted from the accrued benefit at the date of divorce to arrive at the benefit to be divided. To use the accrued benefit approach, a practitioner also needs to know the value of the pension at the date of marriage and its value at the date of divorce. The value at the date of marriage is subtracted from the value at the date of divorce to arrive at the marital property component of the pension plan.⁶⁸

Joseph and Rowlingson conducted research into gender and pensions, which they highlighted the fact that men have built up far greater entitlements to state and private pensions than women due to their higher participation in the labour market. However, women's participation in paid work is increasing and the 'pension gap' between men and women is correspondingly decreasing, at least as far as the state pension is concerned.⁶⁹ They make the argument that many couples have no private pension wealth to split, others may have similar amounts and others may trade-off housing wealth for pension wealth, as women appeared to do before pension sharing orders were introduced.⁷⁰ These existing literatures have demonstrated the great value of pensions as an asset in the dissolution of marriages.

This study will contribute to the examination of pension benefits as matrimonial property in Kenya. Following Elizabeth's accrual of benefits approach, the paper recommends that it should be applied by the Kenyan judicial system and to be based on a Scherpe's recommended rule-based discretionary approach.

1.9 Methodology

The Research paper is a doctrinal restatement as it looks into several textbooks, projects, discussion papers, academic papers, legal journals, academic reports, and case law has been used to obtain information relating to the history, development, and current legal framework division of matrimonial property in Kenya.

⁶⁸ Brandt E, 'Value, Allocation and Distribution of Retirement Plans at Divorce: Where are we,' 35(3) *Family Law Quarterly*, 2001, 471.

⁶⁹ Joseph R and Rowlingson K, 'Her house, his pension? The Division of Assets among (ex-) Couples and the role of policy' 11(1) Cambridge University Press, 2011, 70.

⁷⁰ Joseph R, 'Her house, his pension? The Division of Assets among (ex-) Couples and the role of policy', 70.

1.10 Limitations

The study has a limitation. The right of the non-member spouse to benefit from the member spouse's pension benefits that have already accrued before the finalisation of divorce has not yet been judicially tested and the legislature has also not attended to the possible future problem.⁷¹

Chapter Summary

The first chapter provides an introduction to the research which comprises of the background to the research, the research questions and research objectives, the theoretical framework, the literature review, the limitations, the hypothesis, the justification of the study, and the research methodology to be used during the research. The second chapter of this research will critically discuss the development of the inclusion of pension benefits in light of the problems arising thereto under the Kenyan legislation. This chapter will further demonstrate the regulation of Pension benefits in Kenya and the issues relating to the payment of awarded pension benefit to the non-member spouse during divorce.

The third chapter provides a discussion on the nature of marriages in Kenya under the marriage act and regulation of matrimonial property upon the dissolution of marriages. Additionally, it provides a discussion relating to the role of matrimonial property system principles vis-à-vis the sharing of pension benefits. The fourth chapter will examine the legal position of South Africa relating to the current law on the issue of pension interest by spouses during divorce proceedings. The discussion will provide the definition and the created jurisprudence to pension benefits and pension interest in South Africa. The fifth Chapter provides the findings, recommendations and concluding remarks. In particular, the research recommends the need for statutory recognition and protection of the non-member spouse's right to claim a share of the member's pension benefits.

⁷¹ Marumoagae MC "Can a Non-Member Spouse Protect His or Her Interest in the Member Spouse's Accrued Pension Benefits Before Divorce?" 2016 Obiter 312.

CHAPTER TWO: LEGAL FRAMEWORK OF PENSION BENEFITS IN KENYA

2.1 Introduction

The second chapter discuss the development of the inclusion of pension benefits in light of the problems arising thereto under the Kenyan legislation. This chapter will further demonstrate the regulation of Pension benefits in Kenya and the issues relating to the payment of awarded pension benefit to the non-member spouse during divorce.

2.2 The Right to Social Security

In Kenya, social protection has been defined as policies and actions, including legislative measures which seek to enhance the capacity and opportunities for the poor and vulnerable to improve and sustain their livelihoods and welfare, enable income-earners and their dependants to maintain a reasonable level of income through decent work and ensure access to affordable health care, social security and social assistance.⁷²

The right to social security is recognized by the constitution as a socio-economic right in Kenya.⁷³ In the same breath, according to article 2(5) and (6) of the constitution, the general rules of international law, treaty or convention ratified by Kenya on social security automatically forms part of the laws of Kenya.⁷⁴ Having ratified the international convention on the elimination of all forms of racial discrimination, the international labour organization social security (minimum standards) convention and the international covenant on economic, social and cultural Rights, among others, Kenya has an international obligation to ensure the right to social security is enjoyed by its citizens.⁷⁵ Social security is defined by the international labour organisation as the protection provided to individuals as well as households by the society in ensuring health care access and guaranteeing income security especially during old age, times of sickness, work injury,

⁷² Kenya Vision 2023, Social protection -< [Introduction to Social Protection - National Social Protection Secretariat](#)> on 9 January 2024.

⁷³ Article 43(1)(e), Constitution of Kenya (2010).

⁷⁴ Article 2 (6), Constitution of Kenya (2010).

⁷⁵ Warui J, 'Regulation of Pension Schemes in Kenya: A case for a Pensions Guarantee Fund,' Published Thesis, The University of Nairobi, 2018

unemployment, loss of bread winner or maternity, and invalidity.⁷⁶ Additionally, the right to social security as defined by the UN Human rights of the High Commission, is the right of accessing and maintaining benefits, either in cash or in kind without being subjected to discrimination so as to be protected, *inter alia*, from lack of work-related earnings due to maternity, work-injury, sickness, unemployment, disability, inadequate family support especially for the elderly and children, unaffordable health care, and demise of a family member.⁷⁷

The International Covenant on Economic, Social and Cultural Rights provides that state parties recognise the right to social security. The United Nations of Human Rights also acknowledges four key elements to social security: availability of schemes, accessibility, affordability of the contributions and adequacy of the benefits. These echo the points elucidated above as follows: Firstly, availability, this right requires that the system of implementation is available and operational to ensure that risks and contingencies are taken care of. Secondly, accessibility, the right must be reachable physically and otherwise to all persons especially the disadvantaged and marginalised groups without discrimination. Thirdly, affordability, the contributions required should be stipulated in advance and the costs associated with the programs should be reasonable for everyone. Finally, adequacy, the benefits must be sufficient in amount and duration to enable everyone realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care.⁷⁸ In line with the international and national requirements, the Kenyan government provides social protection for all its public service workers through retirement benefits.

2.3 Grounds for Retirement in Kenya

Retirement refers to the exit of an officer from the public service with full separation benefits, including pension benefits as may be provided for in the applicable law, contract of service or a

⁷⁶ International Labour Organization, 'Facts on Social Security in Africa'-<<https://www.ilo.org/public/english/protection/socsec/pol/campagne/files/africafactsheet.pdf>>. on 9th January 2024.

⁷⁷ UN Human Rights Office of the High Commissioner, 'Toolkit for Social Security' the Economic, Social and Cultural Rights, General Comment-<<https://www.ohchr.org//Issues/RightSocialSecurity/Pages/SocialSecurity.aspx>> on 9 January 2024.

⁷⁸ United Nations Human Rights Office of the High Commissioner, 'OHCHR and the right to social security'-<[OHCHR and the right to social security | OHCHR](https://www.ohchr.org/NewsEvents/Pages/News.aspx?NewsID=9876)> 10th January 2024.

special retirement scheme agreed and upon between the public officer and the relevant lawful authority.⁷⁹ The grounds for retirement and entitlement to pension benefits may include on attainment of the mandatory retirement age as may be prescribed by regulation, on attainment of fifty years, on medical grounds, where a public office is abolished, in accordance with a special retirement scheme agreed between a public officer and the relevant lawful authority or by voluntary retirement⁸⁰ Whenever a decision to retire by a public officer is made in accordance with the Public Service Commission Act, the relevant authorized officer shall notify the public officer in writing and prepare and forward the public officer's pensions claims to the pension branch of the national treasury or other authority charged with administration of the public officer's pensions benefits.⁸¹

2.4 Regulation of Retirement Benefit Schemes in Kenya

The retirement benefit schemes are regulated and supervised by the retirement benefits authority.⁸²The functions of the authority is to protect the interests of members and sponsors of retirement benefits sector,⁸³ approve trustees' remuneration approved by members during the annual general meeting after every three years,⁸⁴ promote the development of the retirement benefits sector,⁸⁵ advise the minister on the national policy to be followed with regard to retirement benefits schemes and to implement all government policies relating to retirement benefit schemes.⁸⁶ Every retirement benefit scheme, other than a scheme established by a written law, ought to be established under an irrevocable trust.⁸⁷

⁷⁹ Section 2, Public Service Commission Act (No. 10 of 2017).

⁸⁰ Section 79, Public Service Commission Act (No. 10 of 2017).

⁸¹ Section 79, Public Service Commission Act (No. 10 of 2017).

⁸² Section 3, Retirement Benefits Act (No. 3 of 1997).

⁸³ Section 5(b) Retirement Benefit Act (No. 3 of 1997).

⁸⁴ Section 5(b)(a) Retirement Benefit Act (No. 3 of 1997).

⁸⁵ Section 5(c) Retirement Benefit Act (No. 3 of 1997).

⁸⁶ Section 5(e) Retirement Benefit Act (No. 3 of 1997).

⁸⁷ Section 26, Retirement Benefit Act (No. 3 of 1997).

2.5 Pension Benefit in Kenya

The Kenyan legislation provides for the grant and regulation of pensions, gratuities and other allowances in respect of the public service of officers under the government of Kenya.⁸⁸ Pension benefits refers to any pension, compensation, gratuity or other similar allowances payable to a person in respect of such person's service as a public officer, or to the widows, children, dependants or personal representative of such person, in respect of that service.⁸⁹ Every officer has an absolute right to a pension.⁹⁰ Whereas, a pension fund benefit refers to benefits payable from a pension fund⁹¹ and a pension refers to any pension or other benefit payable by way of periodical payments, but does not include any gratuity or any sum payable otherwise than by way of periodical payments.⁹²

There are various kinds of pension benefits such as a retirement pension, an invalidity pension, a survivor's benefit, a funeral grant and an emigration benefit.⁹³ The primary focus of the research is the retirement pension. A retirement pension is payable to a member who has attained the pensionable age or to a member who opted for early retirement having attained the age of fifty years but not having attained the pensionable age.⁹⁴ A member may elect to have the value of his pension fund credit at the date of his retirement applied to a pension payable to the member.⁹⁵ The minister, who is the cabinet secretary responsible for matters relating to finance⁹⁶ has the power to grant pensions in accordance with the pensions regulations, to officers who have been in service of the government.⁹⁷

⁸⁸ Pensions Act, Chapter 189 Laws of Kenya.

⁸⁹ Section 2, Public Service Commission Act (No. 10 of 2017).

⁹⁰ Section 5, Pension Act, Chapter 189, Laws of Kenya.

⁹¹ Section 33, National Social Security Fund Act (No. 45 of 2013).

⁹² Section 2, Pensions (Increase) Act, Chapter 190 Laws of Kenya.

⁹³ Section 34(1), National Social Security Fund Act (No. 45 of 2013).

⁹⁴ Section 36, National Social Security Fund Act (No. 45 of 2013).

⁹⁵ Section 36(2), National Social Security Fund Act (No. 45 of 2013).

⁹⁶ Section 2, Pensions Act, Chapter 189 Laws of Kenya.

⁹⁷ Section 3, Pensions Act, Chapter 189 Laws of Kenya.

2.6 Types of Pension Plans in Kenya

2.6.1 Defined Contribution

A defined contribution scheme refers to a scheme in which members and employers' retirement benefits are fixed either as a percentage of pensionable earnings or as a shilling amount and a member's retirement benefits has a value equal to those contributions, net of expenses including premiums paid for insurance of death disability risks, accumulated in an individual account with investment return and any surpluses or deficits as determined by the trustees of the schemes.⁹⁸ An employer is required to make statutory contributions into the employees' retirement benefit scheme.⁹⁹

2.6.2 Defined Benefit

The defined benefit scheme is a pension plan that provides for the payment of an amount on retirement determined based on a formula.¹⁰⁰ The amount paid is based on length of service and annual basic salary at the time of retirement.¹⁰¹

2.7 Current Pension schemes in Kenya

2.7.1 The National Social Security Fund

An employer is required to make payment to a pension in respect of each of the employee in his or her employment which the employer's contribution is six per centum of the employee's monthly pensionable earnings¹⁰² and the employee's contribution is at six per centum of the employee's pensionable earnings deducted from the employee's earnings.¹⁰³ A restriction is however imposed on the employer in regard with the deductions from the earnings in that the employer is entitled to recover from his employee's earnings, the employee's contribution by way of a deduction there from for the purpose of paying the employee's contribution, but is not permitted to deduct the

⁹⁸ Section 3, The Retirement Benefits (Transitional) Regulations, 2000

⁹⁹ Section 33, Retirement Benefits Act (No.3 of 1997).

¹⁰⁰ The National Treasury and Planning, 'Public Service Superannuation Scheme Handbook' 2020, 6

¹⁰¹ The National Treasury and Planning, 'Public Service Superannuation Scheme Handbook' 2020, 6

¹⁰² Section 20(1) (a), National Social Security Fund Act (No. 45 of 2013).

¹⁰³ Section 20(1) (b), National Social Security Fund Act (No. 45 of 2013).

employer's contribution from the employee's earnings, but is to pay from his or her own resources and remit the employee's account.¹⁰⁴

The national social security fund established the pension fund which comprises of all persons who are subject to the provisions of the employment act and are eighteen years old or above and have not attained the pensionable age are members of the pension fund¹⁰⁵. In Kenya, the pensionable age is the age of sixty years.¹⁰⁶ The amount equal to the aggregate of the prescribed pension fund contributions by and in respect of the member and any transfer payment received in respect of the member with interest is referred to as the pension fund credit.¹⁰⁷

2.7.2 Individual Retirement Benefit Schemes

The scheme is established for the benefit of individual beneficiaries for the purpose of paying a retirement benefit.¹⁰⁸ The scheme is required to make provisions for the appointment of trustees whose main duty is the supervision and administration of the scheme.¹⁰⁹ The scheme is required to have rules for the administration of the scheme which includes rules relating to a pooled fund, which is a fund established by a limited liability company other than an approved insurer for the purposes of pooling schemed funds for collective measures,¹¹⁰ for the purpose of investment and custody of the scheme fund.¹¹¹ The scheme rules make provisions for where an employer makes contributions on behalf of the employee, the benefits shall vest immediately.¹¹² The scheme rule also provide for access to pension benefits in circumstances where the employee leaves employment before attaining the retirement age, that employee shall not be entitled to more than fifty per cent of his total accrued benefits and the investment income that has accrued in respect of those contributions.¹¹³ Alternatively, where the member makes his own contributions to the

¹⁰⁴ Section 22, National Social Security Fund Act (No. 45 of 2013).

¹⁰⁵ Section 18(4), National Social Security Fund Act (No. 45 of 2013).

¹⁰⁶ Section 2, National Social Security Fund Act (No. 45 of 2013).

¹⁰⁷ Section 2, National Social Security Fund Act (No. 45 of 2013).

¹⁰⁸ Section 5, The Retirement Benefits (Individual Retirement Benefit Schemes) Regulations, 2000.

¹⁰⁹ Section 9, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

¹¹⁰ Section 3, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

¹¹¹ Section 13, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

¹¹² Section 17, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

¹¹³ Section 17, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

scheme, the member may opt for payment of the member's total accrued benefits and the investment income that accrued in respect of those contributions.¹¹⁴

2.7.3 Occupational Retirement Benefit Schemes

An occupational retirement benefit scheme is a scheme established by the employer for the benefit of the employees.¹¹⁵ The scheme rules may make provisions for the appointment of trustees whose duty is to oversee the supervision and administration of the scheme.¹¹⁶ The scheme may provide for the appointment of an administrator, who is a person appointed under an instrument by trustees to manage the affairs of the scheme.¹¹⁷ The scheme rules provide that the benefits are to fully vest in a member immediately on the commencement of a pensionable service.¹¹⁸ The scheme is required to keep and maintain books of accounts and other records for the purpose of accounting of its income and expenditure and its assets and liabilities.¹¹⁹

2.7.4 Umbrella Retirement Benefit Schemes

An umbrella scheme refers to a retirement benefit scheme established by a sponsor for the benefit of members employed by participating employers including schemes established by a written law.¹²⁰ A sponsor of a scheme constitutes a board of directors and top management of at least four persons who are academically and professionally qualified in matters relating to administration of schemes, insurance, law, accounting, banking, finance or investment of scheme funds and a person possessing at least five years' experience in administration of retirement benefit schemes.¹²¹ A sponsor can be a company, co-operative, partnership, association or societies.¹²² An umbrella scheme may either be established for either employees within an industry, trade, profession, group or association, county governments or it can be established for employers who do not have any

¹¹⁴ Section 17, The Retirement Benefit (Individual Retirement Benefits Schemes) Regulations, 2000.

¹¹⁵ Section 2, The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

¹¹⁶ Section 8, The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

¹¹⁷ Section 3, The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

¹¹⁸ Section 20, The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

¹¹⁹ Section 28, The Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

¹²⁰ Section 2, The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

¹²¹ Section 5(1), The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

¹²² Section 5(2), The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

commercial or professional relationship with each other.¹²³ An umbrella retirement scheme is required to have trustees whose duties are to ensure the administration and managing the scheme in accordance with the law and the scheme rules, keeping all proper books and records of accounts with respect to expenditure, liabilities and assets of the scheme fund and communicating regularly with the members of the scheme with respect to the affairs of the scheme¹²⁴ The benefits or contributions under the scheme are non-assignable.¹²⁵

2.8 Limitations on Pensions

The Pensions Act was assented on the 13th June, 1950 and the Act commenced on the 1st January, 1946, with the exception of section 17 of the Act which commenced on the 8th May 1942.¹²⁶ The act provides for the cessation of pensions under certain circumstances. Firstly, the anti-assignment clause. The doctrine of privity of contracts provides that a contract cannot confer rights or impose obligations on any person other than parties to the contract. Accordingly, a contract cannot be enforced wither by or against a third party.¹²⁷ One of the legal exceptions to common law doctrine of privity of contract is through assignments.¹²⁸ Assignment is the process by which one party (assignor) assigns to another party (assignee) rights and/or benefits derived from a contract known as choses of action, personal rights of property which can only be claimed or enforced by action and not by taking physical possession.¹²⁹

The pension laws of Kenya stipulate that a pension granted under the pension act shall not be assignable or transferable except for the purposes of satisfying a debt due to the government¹³⁰ or an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension has been granted, and shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim

¹²³ Section 8, The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

¹²⁴ Section 13, The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

¹²⁵ Section 31, The Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017.

¹²⁶ Pensions Act, Chapter 189 Laws of Kenya.

¹²⁷ Mark Otanga Otiende v Dennis Oduor Aduol (2021) eKLR.

¹²⁸ Chidya (Kenya) limited v Africa Equipment & Engineering Power S.A (AEE Power S.A) (2020) eKLR;’.

¹²⁹ Chidya (Kenya) limited v Africa Equipment & Engineering Power S.A (AEE Power S.A) (2020) eKLR.

¹³⁰ Section 13, Pension Act (Chapter 189, Laws of Kenya).

whatever except a debt due to the government.¹³¹ The non-assignability provision of government pension statutes has been historically held by courts as not violated by the equitable distribution of assets arising from claims under such a statute since the equitable distribution of marital assets is not tantamount to an assignment¹³². It has been further held that equitable distribution is not barred by the fact that statutes generally provide that state pensions are not subject to execution, garnishment or attachment.¹³³

Additionally, the choice in action doctrine allows for the enforcement of claims in divorce disputes.¹³⁴ Choice in action is defined as personal rights of property that can only be claimed or enforced by action and not taking (actual physical possession.)¹³⁵ Furthermore, pension benefits is considered as a form of deferred compensation for services rendered, the employee's right to such benefit is a contractual right, derived from the terms of the employment contract, and since a contractual right is not an expectancy but a choice in action, a form of property. And precisely because the law considered choice in action to be property, property law provides that it can be transferred by assignment to another.¹³⁶

Secondly, pensions are to cease on bankruptcy, where before the 1st July 1999, any person to whom a pension or allowance has been granted under the law is declared bankrupt or is declared insolvent by judgment of a court, then the pension or allowance ceases.¹³⁷ Where an officer is adjudicated bankrupt or declared insolvent by judgment of a court after retirement in circumstances in which he is eligible for pension, but before the pension is granted to him, it shall cease as from the date of adjudication or declaration.¹³⁸ Alternatively, where an officer is adjudicated bankrupt or declared insolvent by judgment of a court before such retirement and he has not obtained his

¹³¹ Section 13, Pension Act (Chapter 189, Laws of Kenya).

¹³² In Re Marriage of Branstetter, The Supreme Court of Iowa (1993),

¹³³ In Re Marriage of Branstetter, The Supreme Court of Iowa (1993),

¹³⁴ Sobel -Read K, 'The critical role of Choses in Action: A call for harmonization across common law jurisdictions' 45(3)Fordham International Law Journal, 2022, 514.

¹³⁵ Sobel -Read K, 'The critical role of Choses in Action: A call for harmonization across common law jurisdictions', 515.

¹³⁶ Sobel -Read K, 'The critical role of Choses in Action: A call for harmonization across common law jurisdictions', 515.

¹³⁷ Section 14, Pensions Act, Chapter 189 Laws of Kenya.

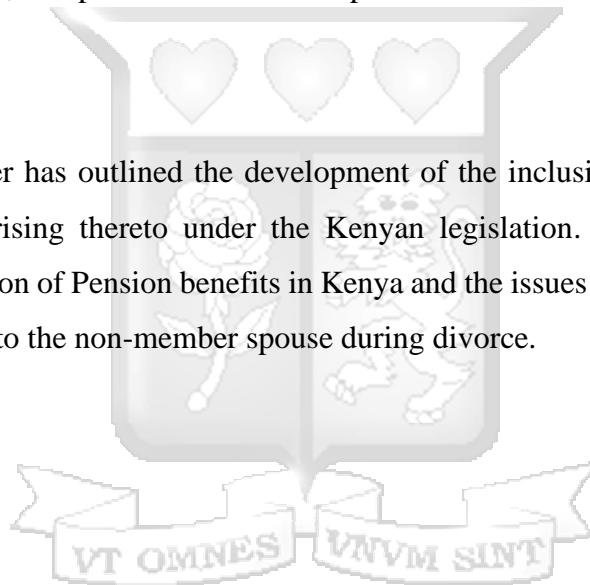
¹³⁸ Section 14 (2)(a), Pensions Act, Chapter 189 Laws of Kenya.

discharge from bankruptcy or insolvency at the date of retirement, the pension may be granted but shall cease and not become payable.¹³⁹

Thirdly, pensions may cease on conviction, where before the 1st July 1999, any person to whom a pension has been granted in accordance with the law is sentenced to a term of imprisonment by a competent court for any offence, that pension shall, if the president so directs, cease as from the date as the President determines.¹⁴⁰ Lastly, pensions may cease on accepting certain appointments, for instance where a person to whom a pension has been granted, becomes either a director of any company in which the principal part of the business is any way directly concerned with Kenya or is an officer or servant employed by Kenya by any such company, without the prior permissions in writing of the president, that pension ceases if the president so directs.¹⁴¹

2.9 Conclusion

In conclusion, the chapter has outlined the development of the inclusion of pension benefits in light of the problems arising thereto under the Kenyan legislation. This chapter has further demonstrated the regulation of Pension benefits in Kenya and the issues relating to the payment of awarded pension benefit to the non-member spouse during divorce.



¹³⁹ Section 14 (2)(b), Pensions Act, Chapter 189 Laws of Kenya.

¹⁴⁰ Section 15, Pensions Act, Chapter 189 Laws of Kenya.

¹⁴¹ Section 16, Pensions Act, Chapter 189 Laws of Kenya.

CHAPTER THREE: REGULATION OF MATRIMONIAL PROPERTY IN KENYA

3.1 Introduction

This chapter provides a discussion on the nature of marriages in Kenya under the marriage act and regulation of matrimonial property upon the dissolution of marriages. Additionally, it provides a discussion relating to the role of matrimonial property system principles vis-à-vis the sharing of pension benefits.

3.2 Marriage in Kenya

In Kenya, marriage is recognized as a voluntary union between a man and a woman whether in a polygamous or monogamous union.¹⁴² When a man and a woman come together in Marriage and share a life, there is an impact on their financial and material life.¹⁴³ They share a homestead, pay bills, raise children, buy property and generally relate to property in a manner that has far-reaching consequences on the question of property.¹⁴⁴ The constitution recognizes parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage¹⁴⁵

3.3 Grounds for Dissolution of the Marriage

The marriage act recognises several grounds under which the dissolution of marriage may occur which include one or more acts of adultery committed by the other party,¹⁴⁶ cruelty whether mental or physical inflicted by the other party on the petitioner or on the children, if any, of the marriage,¹⁴⁷ desertion by either party for at least three years immediately preceding the date of presentation of the petition,¹⁴⁸ exceptional depravity by either party¹⁴⁹ or the irretrievable breakdown of the marriage.¹⁵⁰ The standard of proof in establishing the above grounds of divorce

¹⁴² Section 3, *Marriage Act* (No. 4 of 2014).

¹⁴³ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁴⁴ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁴⁵ Section 3, *Marriage Act* (No. 4 of 2014).

¹⁴⁶ Section 65(a), *Marriage Act* (No. 4 of 2014).

¹⁴⁷ Section 65(b), *Marriage Act* (No. 4 of 2014).

¹⁴⁸ Section 65(c), *Marriage Act* (No. 4 of 2014).

¹⁴⁹ Section 65(d), *Marriage Act* (No. 4 of 2014).

¹⁵⁰ Section 65(e), *Marriage Act* (No. 4 of 2014).

is a preponderance of probability or in other words, balance of probabilities.¹⁵¹ For instance, In order for a complainant to establish cruelty they are required to prove to the court that the misconduct was of a grave and weary nature,¹⁵² injury was caused by misconduct of the respondent and the whole evidence of the conduct would amount to cruelty in the ordinary sense of the word.¹⁵³

3.4 Meaning of Matrimonial Property in Kenya

To ensure equity in the division of property, one must first determine what property can be included in the estate to be divided.¹⁵⁴ Property can be understood and manifests itself as rights.¹⁵⁵ A right is a legally recognized interest in, to or against a person or a thing.¹⁵⁶ In Kenya, every person has the right, either individually or in association with others¹⁵⁷ to acquire and own property of any description and in any part of Kenya subject to article 65, which outlines land holding by non-citizens.¹⁵⁸ As rightly put by Justice Stayton, in *Millinger v City of Houston*, ‘a right is a well-founded claim, and a well-founded claim means nothing more or less than a claim recognised or secured by law.’¹⁵⁹ The Black's Law Dictionary defines property commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal everything that has an exchangeable value or which goes to make up wealth or estate.¹⁶⁰ It extends to every species of valuation right and interest and includes real and personal property, easements, franchises, and incorporeal hereditaments.¹⁶¹ Matrimonial property refers to the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage.¹⁶² Matrimonial home has been defined as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as

¹⁵¹ *Alexander Kamweru v Anne Wanjiru Kamweru* (2000) eKLR.

¹⁵² *DM v TM* (2008) eKLR.

¹⁵³ *DM v TM* (2008) eKLR.

¹⁵⁴ Mcknight J, ‘Defining Property Subject to Division at Divorce,’ 23(2) *Family Law Quarterly*, 1989, 199.

¹⁵⁵ Kariuki F, ‘Property Law’ Strathmore University Press, 2016, 3

¹⁵⁶ Kariuki F, ‘Property Law’ Strathmore University Press, 2016, 3.

¹⁵⁷ Article 40, *Constitution of Kenya*, (2010).

¹⁵⁸ Article 65, *Constitution of Kenya*, (2010).

¹⁵⁹ Kariuki F, *Property Law*, Strathmore University Press, 2016, 2.

¹⁶⁰ Black's Law Dictionary, 6th ed.

¹⁶¹ Black's Law Dictionary, 6th ed.

¹⁶² Section 6, *Matrimonial Property Act* (Act No 49 of 2013).

their family home, and includes any other attached property.¹⁶³ The Kenyan courts stipulates that for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.¹⁶⁴ The Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.¹⁶⁵ Contribution is recognized as both monetary and non-monetary contribution.¹⁶⁶ Non - monetary contribution includes domestic work and management of the matrimonial home, child care, and companionship, management of family business s or property, and farm work.¹⁶⁷

3.5 The Matrimonial Property Rights Systems

There are two main regimes of matrimonial property systems in the world used as a guidance in understanding the approaches taken by the courts and legislature towards the division of property acquired during marriage, these are the community of property system and separate property regime.¹⁶⁸

3.5.1 Community of Property

Under this system, marriage serves as an amalgam by which all the property or assets of the spouses become conjoined to create a single estate that is jointly owned.¹⁶⁹ The interest of each spouse is co-equal and co-extensive to the other.¹⁷⁰ The entire state is owned and controlled as an undivided whole in which the spouses held inseparable and indivisible half-shares which constitute co-ownership.¹⁷¹ Each spouse has full and equal capacity to dispose of such of the property that is

¹⁶³ Section 2, *Matrimonial Property Act* (Act No 49 of 2013).

¹⁶⁴ T.M.V. v F.M.C (2018) eKLR.

¹⁶⁵ Section 6(3), *Matrimonial Property Act* (No. 49 of 2013).

¹⁶⁶ Section 2, *Matrimonial Property Act* (No 49 of 2013).

¹⁶⁷ Section 2, *Matrimonial Property Act* (Act No 49 of 2013).

¹⁶⁸ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁶⁹ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁷⁰ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁷¹ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

moveable and for that would not require to first seek or obtain consent of the other,¹⁷² however as regards to immovable property and in due consideration of its value, the general is that its disposal must be with the express consent of both parties.¹⁷³

The community of property system has its origin in the civil law jurisdiction.¹⁷⁴ Within the community of property systems, there are some that are pure community of property systems in that all property is held jointly from the point of entering into the marriage,¹⁷⁵ while others are quasi-community property systems, in that property acquired during marriage does not necessarily become community property.¹⁷⁶ However, most community of property systems generally recognize the fact that property acquired during the subsistence of a marriage is the product of the joint efforts of both spouses and therefore belongs to them irrespective of their contribution towards its acquisition.¹⁷⁷ However, spouses may waive community property rights through ante-nuptial or post-nuptial agreements.¹⁷⁸ An ante-nuptial agreement is a contract entered into by parties contemplating marriage in order to regulate how the financial aspect of any future reallocation of property upon divorce will be conducted whereas a postnuptial agreement has the same characteristics as a prenuptial agreement, except that it is entered into after the marriage.¹⁷⁹

3.5.2 Separate Ownership

Under this approach, the fact of marriage does not affect the pre-existing property rights of the spouses.¹⁸⁰ A spouse maintains full ownership and control of all the property he or she had purchased, been bequeathed, inherited or otherwise acquired before the marriage to the exclusion

¹⁷² Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁷³ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁷⁴ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁵ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁶ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁷ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁸ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁷⁹ Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 261.

¹⁸⁰ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

of the other spouse.¹⁸¹ A separate property system allows each spouse to hold property in their own name and is the system prevailing in most common law jurisdictions including Kenya.¹⁸² Although in this system parties to a marriage hold property separately, problems arise regarding the division of property held jointly or in the name of one party yet matrimonial in nature.¹⁸³ In such instances, parties have to prove their contribution to the acquisition and maintenance of the property in question.¹⁸⁴

3.6 The Principle of Equality

There are four essential components of fairness in the dissolution of marriages the sharing of property pursuant to a principle of matrimonial partnership, the alleviation of need pursuant to a principle of matrimonial obligation, compensation for relationship-generated losses and respect for the autonomy of the couple.¹⁸⁵ These key ingredients are reflected in the Kenya matrimonial system. In Kenya, a large number of disputes over the distribution of matrimonial property centers on the determination of the respective contribution of the parties.¹⁸⁶ The courts in assessing the contribution of spouses in the acquisition of matrimonial property bear in mind the peculiar facts and circumstances of each case, while guided by the principle of fairness.¹⁸⁷ The court has an obligation to apportion family property to be best of its ability taking into account not only the personal earnings of each spouse and how it was applied in the family but also each party's indirect contribution not only to the purchase of the subject property but also to the welfare of the family as a whole.¹⁸⁸

The law recognizes equal worth and equal importance of the parties in marriage.¹⁸⁹ Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya

¹⁸¹ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁸² Kariuki F, *Property law*, Strathmore University Press, Nairobi, 2016, 262.

¹⁸³ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁸⁴ Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016, 241.

¹⁸⁵ Miles J, 'The legal consequences of Dissolution' Property and Financial support between spouse' 2020,147.

¹⁸⁶ Kiage P, *Family law in Kenya: Marriage, Divorce and Children*, Law Africa, 2016, 264.

¹⁸⁷ TKM v SMW (2020) eKLR.

¹⁸⁸ MGNK v AMG (2016) eKLR.

¹⁸⁹ Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another (2018) eKLR

ultimately depends on the party's proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.¹⁹⁰ Further, the Court clarified that the principle for the division of matrimonial property between spouses shall be based on their respective contributions to acquisition.¹⁹¹ In circumstances where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.¹⁹² The Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.¹⁹³

3.7 Post-Divorce Maintenance (Alimony) in Kenya

The concept of maintenance or alimony payment provides a means for a spouse who was financially dependent on the other spouse to support themselves either before or after the dissolution of the marriage.¹⁹⁴ This concept has its origins in English Common Law but has been incorporated into Kenyan Law by statute and by judicial precedent which seeks to protect the formerly dependent spouse from the adverse consequences of the breakdown of marriage before they acquire self-sufficiency.¹⁹⁵ No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support to maintain the standard of life he or she was used to before separation or divorce.¹⁹⁶

3.8 Court Assessment of the Quantum of Alimony/Post-Divorce Settlement

The marriage act provides guideline on the circumstances under which the court may grant maintenance to a former spouse.¹⁹⁷ The court may order a person to pay maintenance to a spouse

¹⁹⁰ Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another (2018) eKLR

¹⁹¹ A W M v J G K (2021) eKLR.

¹⁹² AWM v LMK (2015) eKLR.

¹⁹³ Section 14(a), *Matrimonial Property Act* (Act No 49 of 2013).

¹⁹⁴ R P M v P K M (2015) eKLR.

¹⁹⁵ R P M v P K M (2015) eKLR.

¹⁹⁶ W M McKnight v B M L (2012) eKLR.

¹⁹⁷ Section 77, Marriage Act (No. 4 of 2014)

or a former spouse if the person has refused or neglected to provide for the spouse or former spouse as required by the Act,¹⁹⁸ if the person has deserted the other spouse or former spouse for as long as the desertion continues,¹⁹⁹ during the court of any matrimonial proceedings,²⁰⁰ when granting or after granting a decree of separation or divorce²⁰¹ or if, after making a decree of presumption of death, the spouse or former is found to be alive.²⁰² Additionally, the court may order the payment of maintenance to a spouse or former spouse where a decree of separation, divorce, or presumption of death is issued by a foreign court²⁰³ and the court may declare that the decree of separation, divorce or presumption of death .²⁰⁴

The court has been granted wide discretion in determining the maintenance to be paid to a spouse during divorce proceedings and after the granting of the decree of divorce.²⁰⁵ The Marriage Act does not however give the parameters upon which the court may assess maintenance to be paid to a spouse.²⁰⁶ In exercising its discretion to make orders for post-divorce maintenance, it is the duty of the court to be guided by the objectives sought to be achieved by such orders.²⁰⁷ These include but are not limited to the following: identifying the economic advantages and losses to the spouses as have been contributed by the subsistence of the marriage or its breakdown,²⁰⁸ apportioning between the parties the attendant expenses of maintaining the issues of the marriage,²⁰⁹ Providing relief to cover the negative consequences for the spouses as may likely arise from the breakdown of the marriage²¹⁰ and to Make sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.²¹¹

¹⁹⁸ Section 77(1), Marriage Act (No. 4 of 2014).

¹⁹⁹ Section 77(1), Marriage Act (No. 4 of 2014).

²⁰⁰ Section 77(1), Marriage Act (No. 4 of 2014).

²⁰¹ Section 77(1), Marriage Act (No. 4 of 2014).

²⁰² Section 77(1), Marriage Act (No. 4 of 2014).

²⁰³ Section 77(2), Marriage Act (No. 4 of 2014).

²⁰⁴ Section 77(2), Marriage Act (No. 4 of 2014).

²⁰⁵ R P M v P K M (2015) eKLR.

²⁰⁶ Section 77(1), Marriage Act (No. 4 of 2014).

²⁰⁷ R P M v P K M (2015) eKLR.

²⁰⁸ R P M v P K M (2015) eKLR.

²⁰⁹ R P M v P K M (2015) eKLR.

²¹⁰ R P M v P K M (2015) eKLR.

²¹¹ R P M v P K M (2015) eKLR.

The Kenyan's Court criteria for determining application for maintenance include the present and future assets, income, and earning potential of the parties,²¹² the ages and professional qualifications of the parties, the financial needs and obligations of the parties, the duration of the marriage and the duration of time in which the parties lived separately, the standard of living prior to the breakdown of the marriage, the contributions of the parties to the welfare of the family and the conduct, where relevant, of each party in relation to the eventual background of the marriage.²¹³

3.9 Pension Benefits as Matrimonial Property in Kenya

Pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefit is a contractual right, derived from the terms of the employment contract, and since a contractual right is not an expectancy but a choice in action, a form of property.²¹⁴ It is therefore that an employee acquires a property right to pension benefit when he or she completes the performance of their employment contract.²¹⁵ According to the law, if the matrimonial property is acquired during the marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse and in the names of the spouses jointly and that there is a rebuttable presumption that their beneficial interests in the matrimonial property are equal.²¹⁶ In a defined contribution scheme, where the members and the employers both contribute towards the retirement benefits, a non-member spouse, who can prove to have financially assisted the member spouse with the contribution, can make a claim as having being entitled to a share of the pension benefit as a third party to the employment contract.

Additionally, the matrimonial property act provides that where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made. Thus, there is a rebuttable presumption that a member's pension benefit is being held in trust for the non-member spouse, and it can be argued that a non-member spouse

²¹² R P M v P K M (2015) eKLR.

²¹³ M E K v G L M (2018) eKLR.

²¹⁴ In Re Marriage of Brown (1976).

²¹⁵ In Re Marriage of Brown (1976) .

²¹⁶ Section 14, *Matrimonial Property Act* (Act No 49 of 2013).

who makes a non-monetary contribution that permits the member spouse to collect a pension benefit acquires a beneficial interest. In Kenya, the task of distributing matrimonial property is based on judicial discretion and what the trial court would consider to be just in each particular case. Unlike disputes involving award of damages where there are precedents to guide the court, disputes relating to distribution of matrimonial properties are unique in the sense that at times it is difficult to determine the level of contribution of each party.²¹⁷ It therefore would be at the court's discretion to determine the distribution of the pension benefits.

3.10 Shortcoming of classification of pension as payment as alimony rather than property subject to division

Pensions are considered a method of deferred compensation from the employer for services rendered by the employee.²¹⁸ They represent a contractual right to future benefits payable upon retirement and are a type of intangible property.²¹⁹ Pensions are often used in determining alimony or child support payments, but courts have recognized the shortcomings of specifically assessing payments to the non-employee spouse as alimony,²²⁰ even though such classification provides for future modification based on changes in circumstances.²²¹ It is sometimes better to classify the division of the pension as a property division rather than spousal support so the allowance is not lost on death or remarriage.²²²

The treatment of a spouse's pension rights as a source for the future payment of spousal maintenance is viewed as not "just and equitable" because it has the effect of awarding the pension-

²¹⁷ F.S v E.Z (2016) eKLR.

²¹⁸ Prather S.J, 'Characterization, Valuation and Distribution of Pensions at Divorce' 15(2) *Journal of American Academy of Matrimonial Lawyers*, 1998, 448.

²¹⁹ Prather S.J, 'Characterization, Valuation and Distribution of Pensions at Divorce' 15(2) *Journal of American Academy of Matrimonial Lawyers*, 1998, 448.

²²⁰ Prather S.J, 'Characterization, Valuation and Distribution of Pensions at Divorce' 15(2) *Journal of American Academy of Matrimonial Lawyers*, 1998, 448.

²²¹ Prather S.J, 'Characterization, Valuation and Distribution of Pensions at Divorce' 15(2) *Journal of American Academy of Matrimonial Lawyers*, 1998, 448.

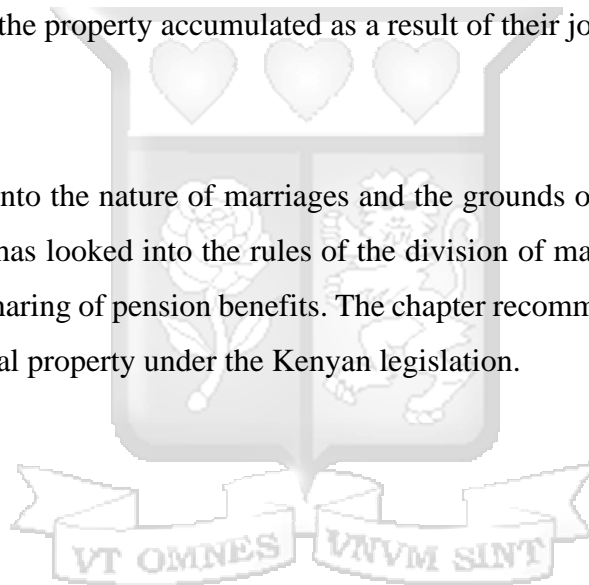
²²² Prather S.J, 'Characterization, Valuation and Distribution of Pensions at Divorce' 15(2) *Journal of American Academy of Matrimonial Lawyers*, 1998, 448.

holder spouse all his pension benefits if the dependent spouse remarries or if either she or he dies before the spouse actually begins to receive the payments.²²³

The conceptual differences between alimony and property division make the former the less satisfactory alternative: in the first instance because the spouse's right to a property division is independent of her rights to alimony in the second because alimony itself is devoid of the qualities of a property right and never mandatory.²²⁴ While the amount to which she or he is entitled may be disputed when the wife is said to have a right in the nature of a property interest, the spouse is, nevertheless, specifically guaranteed some measure of return in recognition of the significance of her contributions to the acquisition of the parties' marital assets.²²⁵ Though the court is not bound to a precise fifty-fifty split, an equitable division is based on the principle that each spouse is entitled to a just share of the property accumulated as a result of their joint efforts.²²⁶

3.11 Conclusion

This chapter has looked into the nature of marriages and the grounds of dissolution of marriages recognised in Kenya. It has looked into the rules of the division of matrimonial property and its principles vis-à-vis the sharing of pension benefits. The chapter recommends for the classification of pensions as matrimonial property under the Kenyan legislation.



²²³ *In re the Marriage of Rita v Taylor*, 329 N. W.2d 795 (1983).

²²⁴ Loper M, 'Horstmann v Horstmann: Present Right to Practice a Profession as Marital Property,' 56(4) *Denver Law Journal* (1979), 682.

²²⁵ Loper M, 'Horstmann v Horstmann: Present Right to Practice a Profession as Marital Property,' 56(4) *Denver Law Journal* (1979), 682.

²²⁶ Loper M, 'Horstmann v Horstmann: Present Right to Practice a Profession as Marital Property,' 56(4) *Denver Law Journal* (1979), 682.

CHAPTER FOUR: LEGAL FRAMEWORK OF PENSIONS INTEREST IN SOUTH AFRICA

4.1 Introduction

This chapter examines the legal framework of South Africa relating to the division of pensions. The country's legal framework has a rich jurisprudence established by the courts concerning matters of pensions interest that can provide valuable lessons to Kenya.

4.2 Historical Development of Pension Interest in South Africa

Prior to 1989, South African law did not acknowledge a divorced person's right to claim any part of his or her divorced spouse's retirement savings.²²⁷ In 1986, The South African Law Commission (SALC) noted in its report that a retirement fund benefit constitutes large portions of the divorcing retirement fund members' estate and could be used to improve the financial positions of the former spouse during divorcing by allowing them to claim a portion of such benefits.²²⁸ The South African Law Commission (as it was then) recognised that non-member spouses were prejudiced by the fact that pension benefits did not form part of the joint estate and could not be divided when the parties divorce and that they could not be taken into account when the accrual is calculated.²²⁹

The South African Law Commission in its recommendations referred to a member's right to such benefits as a member's "pension interest."²³⁰ It is important to note that, SALC recognised the entitlement that a member has to the contributions he or she had made to the retirement fund formed part of the member's assets even though those benefits had not been immediately realised.²³¹ The word "entitlement" denotes that there is a right to benefit specified especially by law or contract.²³² In 1989, the legislature implemented the phrase 'pension interest' into the Divorce Act of South Africa.²³³ The concept "pension interest" in relation to a party to a divorce

²²⁷ South African Law Commission: Sharing of pension benefits: Project 112 (1999) para 1.1.

²²⁸ South African Law Commission: Sharing of pension benefits: Project 112 (1999) para 1.2.

²²⁹ Marumoagae C, 'Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce?' *Obiter*, 2016, 318.

²³⁰ South African Law Commission: Sharing of pension benefits: Project 112 (1999) para 1.2.

²³¹ South African Law Commission: Sharing of pension benefits: Project 112 (1999) para 1.2.

²³² Marumoagae C 'The Law regarding pension interest in South Africa has been settled! Or has it? With reference to *Ndaba v Ndaba*', *Potchefstroom Electronic Law Journal*, 2017, 7.

²³³ Section 7, Divorce Act (No. 70 of 1979) (South Africa)

action is defined as the value that on the date of divorce, is placed on the interest that a party to those proceedings has in the pension benefits that will accrue to him or her as a member of a pension benefit at a certain future date or event in accordance with the rules of that particular pension fund.²³⁴ The South African court have deemed a pension interest to be part of the joint estate subject to division at the dissolution of the marriage.²³⁵ Further, the court clarified that irrespective of whether or not a party seeks a pension interest pleaded or prayed for in a case, he or she retains the right to claim the pension interest, post-divorce.²³⁶

4.3 Regulation of Pension in South Africa

The South African retirement funds sector is regulated by various legislations that include: the pension funds act,²³⁷ the government employees' pension law,²³⁸ the income tax act,²³⁹ the financial institutions (protection of funds) act²⁴⁰ and the financial sector regulation act.²⁴¹ The pension funds act regulates the South African retirement funds and pension schemes. It sets out the establishment and administration of pensions funds and the registrations and dissolutions of the pension funds.²⁴² There exists two categories of a pension fund, a defined contribution, which involves a category of members whose interest in the fund has a value at least equal to the contributions paid by the member and by the employer in terms of the rules of the fund that determine the rates of both their contributions at a fixed rate²⁴³ and a defined benefit.

4.4 Marital Property Regimes in South Africa

There are two kinds of marriages, these are marriage in community of property and marriage out of community of property.²⁴⁴ Marriage in community of property spouses have equal powers with

²³⁴ Eskom Pension and Provident Fund v Krugel and another (2012), The Supreme Court of Appeal of South Africa.

²³⁵ Ndaba v Ndaba (2017), The Supreme Court of Appeal of South Africa.

²³⁶ Ndaba v Ndaba (2017), The Supreme Court of Appeal of South Africa.

²³⁷ Pensions Fund Act (No. 24 of 1956) (South Africa).

²³⁸ Government Employees Pension Law, 1996 (South Africa).

²³⁹ Income Tax Act (No. 58 of 1962) (South Africa).

²⁴⁰ Financials Institution (Protection of Funds) Act (No.28 of 2001) (South Africa).

²⁴¹ Financial Sector Regulation Act (No.9 of 2017) (South Africa).

²⁴² Pensions Fund Act (No.24of 1956) (South Africa).

²⁴³ Section 1, Pension Fund Act (No. 24 of 1956) (South Africa).

²⁴⁴ Matrimonial Property Act (No. 88 of 1984) (South Africa).

regard to the disposal of the assets²⁴⁵ whereas marriage out of community of property ownership of assets is separate. Marriage out of community of property is further categorized in to two, marriage out of community with accrual and marriage out of community without accrual. Marriage out of community without accrual is applied to parties who have an antenuptial contract are subject to the accrual system in so far as the system is excluded in the contract.²⁴⁶The accrual of the estate of a spouse is the amount by which the net value of his or her estate at the dissolution of his or her marriage exceeds the net value of his or her estate at the commencement of that marriage.²⁴⁷

4.5 Grounds for dissolution of marriages

A marriage in South Africa may be dissolved by a court by a decree of divorce.²⁴⁸ There are only two grounds under which a decree of divorce may be granted, these are the irretrievable breakdown of the marriage²⁴⁹ and the mental illness or the continuous unconsciousness of a party to a marriage.²⁵⁰ To prove the irretrievable breakdown of the marriage, the court may accept evidence of the following, that the parties have not lived together as husband and wife for at least one year prior to the date of the institution of the divorce action,²⁵¹ that one of the parties has committed adultery²⁵² and that one of the divorcing party has been sentenced by a court and declared an habitual criminal and is undergoing imprisonment.²⁵³

Mental illness as a ground for divorce may be established if the ill party is admitted as a patient at an institution or there is evidence by at least two psychiatrists that there are no reasonable prospects that he or she will be cured of the mental illness.²⁵⁴ The physical disorder of being in a state of continuous unconsciousness as a ground for divorce is satisfied when its proven that the ill party's unconsciousness has lasted for a continuous period of at least six months immediately prior to the

²⁴⁵ Section 14, Matrimonial Property Act (No. 88 of 1984) (South Africa).

²⁴⁶ Section 2, Matrimonial Property Act (No. 88 of 1984) (South Africa).

²⁴⁷ Section 4 (1), Matrimonial Property Act (No. 88 of 1984) (South Africa).

²⁴⁸ Section 3, Divorce Act (No. 70 of 1979) (South Africa)

²⁴⁹ Section 3(a), Divorce Act (No. 70 of 1979) (South Africa).

²⁵⁰ Section 3(b), Divorce Act (No. 70 of 1979) (South Africa).

²⁵¹ Section 4(2)(a), Divorce Act (No. 70 of 1979) (South Africa).

²⁵² Section 4(2)(b), Divorce Act (No. 70 of 1979) (South Africa).

²⁵³ Section 4(2)(c), Divorce Act (No. 70 of 1979) (South Africa).

²⁵⁴ Section 5(2), Divorce Act (No. 70 of 1979) (South Africa).

institution of the divorce action²⁵⁵ and two medical practitioners one of whom is a neurologist or neurosurgeon testify that there is no reasonable prospects of the ill party regaining consciousness.²⁵⁶

4.6 The Legal Framework for the Division of Pensions in South Africa

Currently in South Africa, the monetary contributions that a retirement fund member pays to the retirement fund to be invested on his or her behalf are, once received by a retirement fund, automatically regarded as a value in which that member has an interest.²⁵⁷ It is this interest that a member is entitled to claim at the date of divorce which will be regarded as part of his or her estate making it available to be shared by the non-member spouse.²⁵⁸ In simpler terms, before the divorce, pension savings have generally not accrued and are referred to as pension interest, but once divorce occurs, the pension savings have accrued making it claimable and are regarded as pension benefits.²⁵⁹

The legislation recognise that a pension interest is part of the assets that is subject to the determination of patrimonial benefits in a divorce action²⁶⁰ The law provides that pension benefits are not transferable, reducible, or executable under the law²⁶¹ however, there are exceptions which include in an order made by a court in respect of the division of assets of to a non-member spouse in terms of the decree granted under the divorce act.²⁶² Additionally, a pension fund has the right to make deductions from a member's pension benefit to a non-member as expressly stipulated in the divorce act.²⁶³

²⁵⁵ Section 5(2)(a), Divorce Act (No. 70 of 1979) (South Africa).

²⁵⁶ Section 5(2)(b), Divorce Act (No. 70 of 1979) (South Africa).

²⁵⁷ Eskom Pension and Provident Fund v Krugel& another (2012), The Supreme Court of Appeal of South Africa.

²⁵⁸ Eskom Pension and Provident Fund v Krugel& another (2012), The Supreme Court of Appeal of South Africa.

²⁵⁹ Eskom Pension and Provident Fund v Krugel& another (2012), The Supreme Court of Appeal of South Africa.

²⁶⁰ Section 7(7)(a), Divorce Act (No. 70 of 1979)(South Africa).

²⁶¹ Section 37(a), Pension Fund Act (No. 24 of 1956)(South Africa).

²⁶²Section 37 (d), Pension Fund Act (No. 24 of 1956)(South Africa).

²⁶³ Section 37(d), Pension Fund Act (No. 24 of 1956) (South Africa).

4.7 The Process of Dividing Pensions at Divorce

4.7.1 Court Order

The South African Divorce Act provides for a statutory mechanism that opens up the member's spouse's pension interest to be shared when the member divorces.²⁶⁴ The divorce act empowers the court to make an order that any portion of the member's pension interest to be paid to the non-member spouse.²⁶⁵ Secondly, it empowers the court to instruct the registrar of the court to inform the retirement fund concerned to make such payment to the non-member spouse as a result of the parties' divorce.²⁶⁶ This applies to the dissolution of marriages entered into in community of property or out of community of property with the application of the accrual system in terms of the matrimonial property act.²⁶⁷ The pension fund act also makes provision for a pension fund to deduct an amount awarded to a non-member spouse if the amount was awarded in terms of section seven of the divorce act.²⁶⁸ In fulfilling their duty of good faith, funds are obliged to disclose to members and other persons such information as is reasonable for the exercise and protection of their rights. The failure or refusal to do so without appropriate justification would amount to an improper exercise of the fund's powers.²⁶⁹

4.7.2 Valuation of Pension Interest

The South African courts have held that both the cash component and the accrued right to the pension that is vested in a spouse in a marriage in community of property qualifies as an asset in the joint estate of the parties.²⁷⁰ The courts have determined that each party is entitled to fifty percent of the pension interest calculated from the date of marriage to the date of divorce.²⁷¹ The pension interest of a member of a pension or provident fund (an occupational retirement fund) is the withdrawal benefit to which the member spouse would have become entitled had he resigned

²⁶⁴ Section 7(7), Divorce Act (No. 70 of 1979) (South Africa).

²⁶⁵ Section 7(8), Divorce Act (No. 70 of 1979) (South Africa).

²⁶⁶ Section 7(8), Divorce Act (No. 70 of 1979) (South Africa).

²⁶⁷ Section 7(7), Divorce Act (No. 70 of 1979) (South Africa).

²⁶⁸ Section 37(d)(1)(d), Pension Fund Act (No. 24 of 1956)(South Africa)

²⁶⁹ *Noordien v Metal Industries Provident Fund* (2002) Tribunal of the Pension Funds Adjudicator.

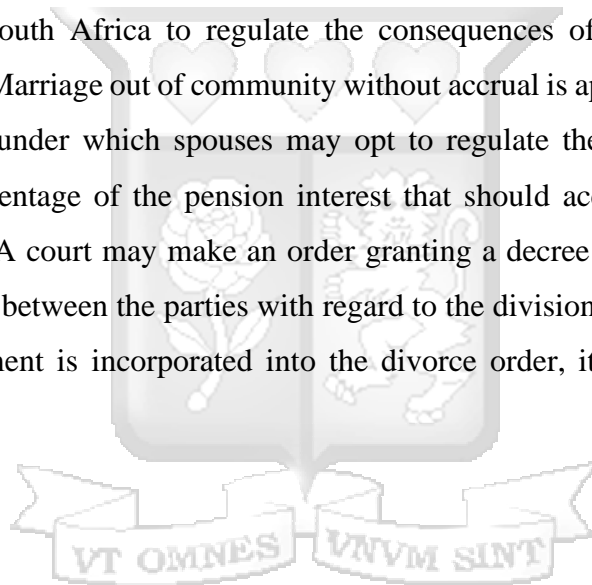
²⁷⁰ Nel E, 'Some clarity on the accrual of living annuities at death or divorce,' Nelson Mandela University, 2021, 737.

²⁷¹ *M D v N D*(2023) The High court of South Africa.

from employment and terminated his membership of the fund on the date of the divorce.²⁷² While the pension interest of a member of a retirement annuity fund is defined to mean the total of the contributions to the fund up to the date of divorce, plus simple interest thereon up to that date at the prescribed rate.²⁷³ Additionally, the pension interest is the maximum amount which may be assigned to the non-member spouse on divorce, the proportion allocated to the non-member spouse being dependent on the order of the court. It is not permissible to assign to her more than 100% of a member's pension interest.²⁷⁴

4.8 Settlement Agreements

Parties may elect to resolve their disputes in a non-adjudicatory manner.²⁷⁵ To achieve this, it is an acceptable practice in South Africa to regulate the consequences of divorce by means of a settlement agreement.²⁷⁶ Marriage out of community without accrual is applied to parties who have an antenuptial contract, under which spouses may opt to regulate the division of the pension interest such as the percentage of the pension interest that should accrue to each party in the settlement agreement.²⁷⁷ A court may make an order granting a decree of divorce in accordance with a written agreement between the parties with regard to the division of assets to the parties.²⁷⁸ Once the written agreement is incorporated into the divorce order, it acquires the status of a judgment of the court.²⁷⁹



²⁷² Nevondwe L, 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund* (2007) 3BPLR 296 (PFA) 13(1) Law, Democracy & Development, 2009, 4.

²⁷³ Nevondwe L, 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund*, 4.

²⁷⁴ Nevondwe L, 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund*, 4.

²⁷⁵ PL v YL (2013) South African court.

²⁷⁶ PL v YL (2013) South African court.

²⁷⁷ Section 7(1), Divorce Act (No. 70 of 1979) (South Africa).

²⁷⁸ Section 7(1), Divorce Act (No. 70 of 1979) (South Africa).

²⁷⁹ M D v N D(2023), The High court of South Africa.

4.9 South Africa Judicial Approach

4.9.1 During the Subsistence of the Marriage

Parties married out of community of property with the accrual system can apply to the court for the division of his or her spouse's estate to which he or she has a right when he or she perceives that the other spouse is prejudicing his or her claims to such growth.²⁸⁰ Marriage out of community of property with accrual means that both spouses have separate estates when they get married and don't share profits or losses for the duration of the marriage.²⁸¹ The matrimonial property act grants power to the court to make the division of the accrual system during the marriage. Section 8 states that "a court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just."²⁸² This provision would enable a non-member spouse to approach the court for relief regarding the division of assets during the marriage without instituting divorce proceedings.²⁸³

4.9.2 During Divorce

Marriages in community of property result in a universal community of property, which entails that the parties thereto become tied or bound co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of their marriage.²⁸⁴ The community comprises all the assets of the spouses both moveable and immovable.²⁸⁵ During the subsistence of the marriage, no asset can be physically divided and no rights pertaining to the joint estate can accrue

²⁸⁰ Marumoagae C, 'Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce?' *Obiter*, 2016, 322.

²⁸¹ Van deventers & Van deventeres Incorporated Attorneys, Marriage out of community with Accrual -<[Marriage out of community of property with accrual \(vandeventers.law\)](#)> on 15 January 2024.

²⁸² Section 8(1), Matrimonial Property Act (No. 88 of 1984) (South Africa).

²⁸³ Marumoagae C, 'Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce?' *Obiter*, 2016, 322.

²⁸⁴ *Gugu v Zongwana* (2014) The High Court of South Africa.

²⁸⁵ *Gugu v Zongwana* (2014) The High Court of South Africa.

exclusively to one of the spouses.²⁸⁶ In such marriages, both spouses in law have equal powers with regard to the management of their joint estate²⁸⁷The pension interest is deemed to be part of the member spouse's assets and would be subject to division when the parties divorce. ²⁸⁸

4.10 Conclusion

In conclusion, the chapter has examined the legal position of South Africa relating to the current law on the issue of pension interest by spouses during divorce proceedings. It has provided the definition and the created jurisprudence to pension benefits and pension interest in South Africa.



²⁸⁶ Robinson A, 'Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution' Potchefstroom Electronic Law Journal, 2007, 71.

²⁸⁷ Section 14, Divorce Act (No. 70 of 1979) (South Africa).

²⁸⁸ Section 7(1), Divorce Act (No. 70 of 1979) (South Africa).

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter summarises the chapters and highlights key findings. It then makes pertinent recommendations and concludes the study.

5.2 Findings

5.2.1 Chapter One

The chapter provides an introduction to the research which comprises of the background to the research, the research questions and research objectives, the theoretical framework, the literature review, the limitations, the hypothesis, the justification of the study, and the research methodology to be used during the research

5.2.2 Chapter Two

The chapter outlines the grounds for retirement in Kenya and provided a description of the pension benefits, the type of pension plans and pensions schemes in Kenya. It has demonstrated the limitations to pensions particularly the anti-assignment clause and how pension claims by a non-member can be resolved through the equitable distribution principle.

5.2.3 Chapter Three

The chapter looks into the nature of marriages and the grounds of dissolution of marriages recognised in Kenya. It has looked into the rules of the division of matrimonial property and its principles vis-à-vis the sharing of pension benefits. The chapter recommends for the classification of pensions as matrimonial property.

5.2.4 Chapter Four

The chapter conducts a comparative study with the South African legislation which recognise that a pension interest is part of the assets that is subject to the determination of patrimonial benefits in a divorce action. The judicial approach by the South African courts in the distribution of the pension interest is dependent upon the kinds of marriage entered into by the spouses and the type of pension schemes are factors considered by the courts in the distribution of the pension interest. It is therefore acknowledged that a pension interest is a valuable asset during the subsistence of the marriage and at the dissolution of the marriage.

Shifting the approach of the Kenyan statutes from non-recognition of pension benefits as matrimonial property to recognising pension benefits as matrimonial property as demonstrated in South Africa can contribute to safeguarding the right of a non-members spouse's claim to a pension

benefit upon divorce. The Study has demonstrated that the distribution of pension benefits as matrimonial property can contribute towards the financial well-being of a non-member spouse.

5.3 Recommendations

5.3.1 Need for Statutory Recognition

This paper proposes the recognition of pension benefits as forming part of the matrimonial property by the Kenyan law. The recommended law reform requires the legislature to effectively recognise and protect the non-member spouse's right to claim a share of the member spouse's accrued pension benefit during a divorce. This research demonstrates that there is a need to insert the necessary statutory provisions in the marriage act, pension act and matrimonial property act to adequately address the rights of the non-member spouse . This will prohibit the member spouse from depriving the non-member spouse of the right or entitlement to claim a portion of such accrued pension benefits.

5.3.2 Rule-Based Judicial Discretion

Further, upon legislation, the court is recommended to exercise a rule- based judicial discretion based upon the accrual of benefits method during the distribution of the pension benefits at divorce.

5.3.3 Further Research

Further research needs to be carried out to investigate how the various pension schemes are treated and regulated during divorce. The research should provide clarity on the areas of the pension law that require a better understanding on the regulations and implications it has on divorce and marriages in Kenya.

Additionally, research ought to be conducted as to how division of pension benefits can be distribution among spouses who are both members of a pension schemes.

5.4 Conclusion

When looking at the financial consequences of divorce, it is evident that marriage is considered to be a partnership of equals, as such property acquired during the subsistence of the marriage including pension benefits ought to be treated as matrimonial property. It is therefore recommended that there is a need for the recognition of pension benefits as forming part of the matrimonial property under the Kenyan law.

Bibliography

BOOKS

- Kariuki F, 'Property Law', Strathmore University Press, Nairobi, 2016.
- Kiage P, 'Matrimonial Property Rights' in, Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing (K) Ltd, Nairobi, 2016.
- Miles J and Scherpe J, 'The legal consequences of Dissolution' Property and Financial support between spouse' in Eakelaar J, *Routledge Handbook of Family Law and Policy*, 2nd ed, Taylor & Francis Group, 2020.
- Scherpe J, 'Marital Agreements and Private Autonomy in Comparative Perspective' Hart Publishing Ltd, Oxford, 2012.
- Stark B, 'Divorce/ Property Division' in Stark B (eds), *International family law: An introduction*, Taylor & Francis Group, 2005.

JOURNAL ARTICLES

- Atchley R, "Retirement: Leaving the World of Work", 464 *The Annals of the American Academy of Political and Social Science*, 1982.
- Brandt E, 'Value, Allocation and Distribution of Retirement Plans at Divorce: Where are we,' 35(3) *Family Law Quarterly*, 2001.
- Marumoagae MC "Can a Non-Member Spouse Protect His or Her Interest in the Member Spouse's Accrued Pension Benefits Before Divorce?" *Obiter*, 2016.
- Dennis H, "Retirement Planning among Couples: Observations and Recommendations", 31 *Journal of the American Society on Aging*, 2007.
- Jenkins C, 'Widows and Divorcees in Later Life : On Their Own Again' Taylor & Francis, 2003.
- Joshi H, "Pension Splitting and Divorce" 4(12) *Wiley*, 1991.
- Joseph R and Rowlingson K, 'Her house, his pension? The Division of Assets among (ex-) Couples and the role of policy' 11(1) *Cambridge University Press*, 2011.
- Kidd S, 'Equal pensions, equal rights: achieving universal pension coverage for older women and men in developing countries,' 17(3) *Gender and Development*, 2009.
- Marumoagae C 'The Law regarding pension interest in South Africa has been settled! Or has it? With reference to *Ndaba v Ndaba*' ,Potchefstroom Electronic Law Journal, 2017.

Mcknight J, 'Defining Property Subject to Division at Divorce,' 23(2) *Family Law Quarterly*, 1989.

Nevondwe L, 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund* (2007) 3BPLR 296 (PFA) 13(1) *Law, Democracy & Development*, 2009.

Nel E, 'Some clarity on the accrual of living annuities at death or divorce,' Nelson Mandela University, 2021.

O' Neil P, 'Pensions as Marital Property, 'Valuation, Allocation and Related Mysteries' 16(3) *Creighton Law Review*, 1982.

O'Sullivan K, 'Pensions on divorce in Ireland: law, practice and way forward?' 70(3) *Northern Ireland Legal Quarterly*, 2019.

Pugliese M, "The Management of Retirement Savings among Financially Heterogamous Couples," 20(4) *Journal of social policy and society*, 2021.

Robinson A, 'Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution' *Potchefstroom Electronic Law Journal*, 2007.

Sobel -Read K, 'The critical role of Choses in Action: A call for harmonization across common law jurisdictions' 45(3) *Fordham International law Journal*, 2022.

South African Law Commission: Sharing of pension benefits: Project 112, 1999.

The National Treasury and Planning, 'Public Service Superannuation Scheme Handbook' 2020.

DISSERTATION

Warui J, 'Regulation of Pension Schemes in Kenya: A case for a Pensions Guarantee Fund,' Published Thesis, The University of Nairobi, 2018.

ONLINE JOURNALS

Douglas P, 'The importance of pensions in a divorce' *Aberdein Considine Legal*, August 2023, - < [The Importance of Pensions in a Divorce | Aberdein Considine Legal \(acandco.com\)](#)> on 1 February 2024.

International Labour Organization, 'Facts on Social Security in Africa' <<https://www.ilo.org/public/english/protection/socsec/pol/campagne/files/africafactsheet.pdf>> on 9 January 2024.

Kenya Vision 2023, Social protection -< [Introduction to Social Protection - National Social Protection Secretariat](#)>on 9 January 2024.

UN Human Rights Office of the High Commissioner, 'Toolkit for Social Security' the Economic, Social and Cultural Rights, General Comment 19-<

<https://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx> > on 9 January 2024.

United Nations Human Rights Office of the High Commissioner, 'OHCHR and the right to social security' -<[OHCHR and the right to social security | OHCHR](#)> 10th January 2024.

Van deventers & Van deventeres Incorporated Attorneys, Marriage out of community with Accrual<[Marriage out of community of property with accrual \(vandeventers.law\)](#)>- on 15 January 2024.



Appendix 1

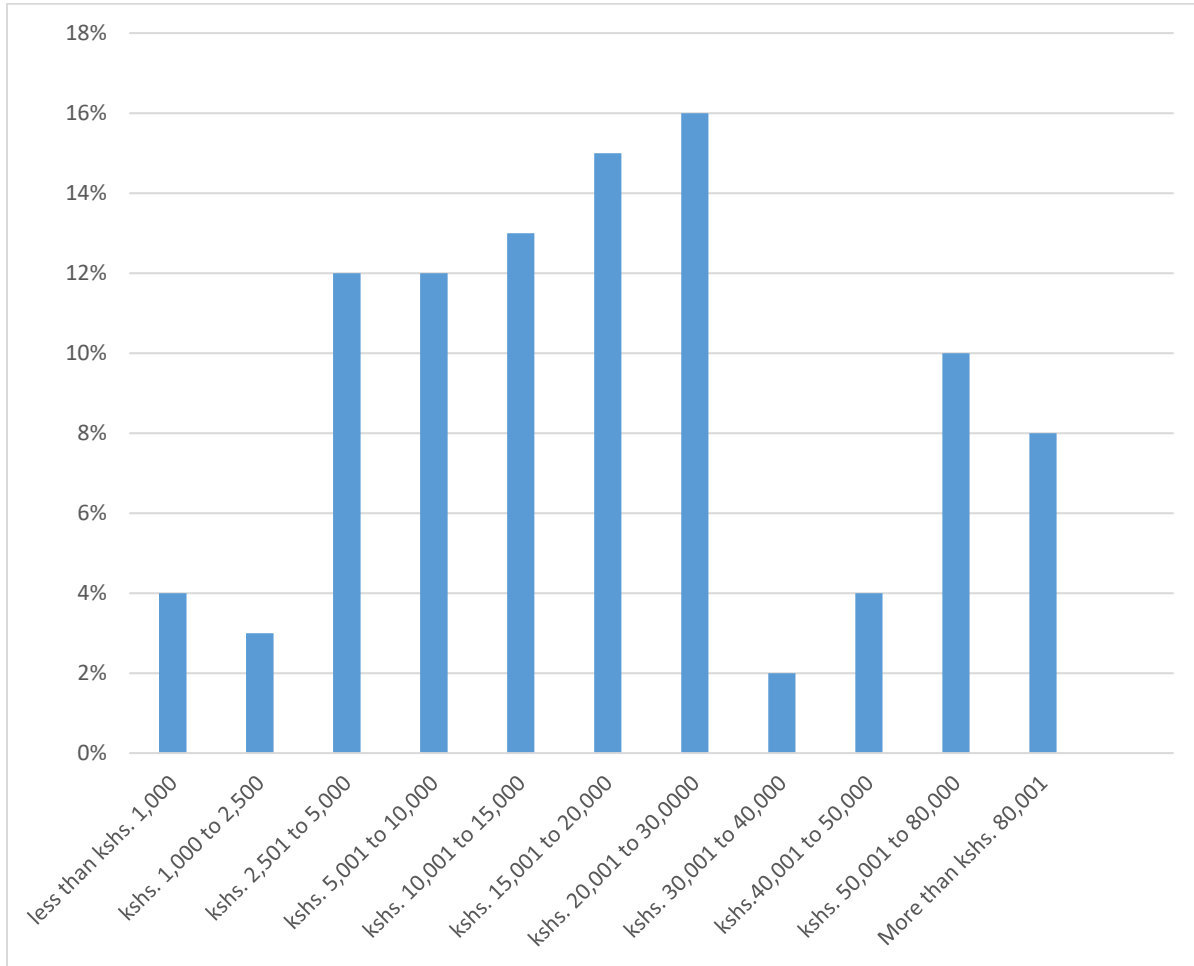
Table: Survey to investigate the Experience of Retirees in Kenya

Is the investment/s that you made with your lump sum still there?	YES	NO
Deposited in bank to earn interest	100%	0%
Land	95%	5%
Real Estate Investment	94%	6%
Farming like chicken, pigs, cows	93%	7%
Shares, bonds	92%	8%
Build or bought a house to live in	86%	14%
Business like manufacturing, retail or service	86%	14%
Paid school fees for children	84%	16%
	178	28

Source: The Retirement Benefit Authority of Kenya

Appendix 2

Table : Retirees monthly income from the investment they made



Source: The Retirement Benefit Authority of Kenya