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Division of Matrimonial Assets in Tanzania: A Doctrinal Analysis through the Lens of Equality of Spouses

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Abstract
The intersection of international and regional human rights standards and Tanzania's domestic legal framework on the division of matrimonial assets raises profound questions about the right to an equitable sharing of matrimonial assets arising from marriage, as it relates the global framework to domestic law. The principle of equality of division of matrimonial assets as embodied in the international and regional instruments is domesticated under Section 114 (2)(b) of the Law of Marriage Act, Cap. 29 R.E. 2023 (LMA), which provides for the right to a share of the matrimonial assets according to the extent of contribution of a spouse in its acquisition. This paper analyses conflicting High Court of Tanzania decisions on the division of matrimonial assets to ensure equality between spouses. The paper argues that the LMA has domesticated the principle of equality of spouses in the division of matrimonial assets and that it does not discriminate against women because it legally recognizes non-economic contribution. It recommends that the High Court of Tanzania observe consistency in dispensing justice by avoiding conflicting decisions. In interpreting the law, the court should adhere to statutory provisions and binding precedents unless ambiguity requires judicial interpretation.

1.1 Introduction

Marriage is one of the most important institutions of human society. It is a universal practice for all colours, classes and races, but its patterns and structures differ across societies.[1] The common law tradition teaches that marriage is a union between two people.[2] In Tanzania, marriage is

[1] Ugwu, N.V., (et.al.), "Moral Challenges of Marriage Institution in the Contemporary Igbo Christian Society", 12 (1) *Nsukka Journal of Religion and Cultural Studies*, 2024, pp. 63-89 at p. 63.
[2] Grossi, R., *Looking for Love in the Legal Discourse of Marriage*, Australia, Australian National University Press, 2014, p. 20.

defined as the voluntary union of a man and a woman intended to last for their joint lives.[3] During marriage, spouses may acquire assets through their joint efforts. These assets are called matrimonial assets. International and regional human rights instruments provide a right to equal division of matrimonial assets upon the dissolution of marriage.

Parliament intended the LMA to protect parties who have celebrated a valid marriage, as well as those who qualify under the statutory presumption of marriage under Section 160 of the Act. In 1971, when Section 160 of the LMA was enacted, it was widely recognised that de facto unions had become a social fact which the law could not ignore. Hence, the decision to extend to these unions the same legal consequences that follow a formal dissolution of a legal marriage. [4]The legislature was so concerned with ensuring economic protection for the female cohabitant and her children.[5]

The logic behind a presumption of marriage is a common law principle that presumes prolonged cohabitation creates a valid marriage where circumstances to the contrary do not arise. The essence of the presumption of marriage is to prevent a party from leaving the relationship empty-handed, as stated in **Hemed S. Tamim v. Renata Mashayo**.[6]

Among the legal protections to spouses in a valid marriage, or those who qualify for the statutory presumption of marriage, is the equality of division of matrimonial assets as provided for under section 114 (2)(b) of the Act.[7] Under this provision, spouses have the right to a share of matrimonial assets depending on the extent of their contribution to acquiring the assets. Section 114 (2)(b) of the LMA domesticates the international and regional human rights standards which aim to ensure that spouses enjoy equal rights in the division of matrimonial property.

This paper focuses on analysing the conflicting decisions of the High Court of Tanzania on the division of matrimonial assets to ensure equality of spouses, which have resulted from interpreting Section 114(2) of the LMA through the lens of equality of spouses, considering the international

[3] See Section 9(1) of the Law of Marriage Act, Cap. 29 R.E. 2023.
[4] Rwezaura, B., "The Proposed Abolition of De Facto Unions in Tanzania: A Case of Sailing Against a Social Current", 42 (2) *Journal of African Law,* 1998, pp.187-214 at p. 187. See also Mwaikasu, R.J.A, *Enhancing the Status of African Women Through Law*, Dar es Salaam, Mkuki na Nyota, 2015, p. 65.
[5] Rwezaura, B., 1998, p. 188.
[6] [1994] TLR 198. See also **Monica Serafini v. Richard C. Silayo**, Matrimonial Appeal No. 6 of 2022, High Court of Tanzania at Moshi (unreported).
[7] See Section 160 (2) of the Law of Marriage Act, Cap. 29 R.E. 2023.

and regional human rights instruments to which Tanzania is a party. There are two competing schools of thought which the High Court of Tanzania applies on the division of matrimonial assets: division of matrimonial assets after assessing the extent of contribution as provided under Section 114 (2)(b) of the LMA, aiming at achieving formal equality; and equal division of matrimonial assets without assessing the extent of contribution for the purpose of achieving an equal share of the matrimonial assets between spouses, aiming at achieving substantive equality. The paper aims to determine whether international and regional human rights standards on the right to equality between spouses have been properly domesticated in Tanzania. The remainder of this paper is organised as follows: Part 2 sets out the legal framework governing the division of matrimonial assets in Tanzania; Part 3 explains the methodology; Part 4 presents the analysis and discussion of findings; Part 5 presents the conclusion and gives some recommendations for avoiding conflicting decisions by the High Court of Tanzania.

1.2 The Legal Framework Governing the Division of Matrimonial Assets in Tanzania

Immediately after the Second World War, the United Nations Charter and the International Bill of Human Rights proclaimed the principle of equality between men and women.[8] Up until the 1970s, however, no international human rights treaty comprehensively addressed women's rights in political, cultural, economic, social, and family life or obliged states to take action to end discrimination against women.[9]

December 18, 1979, marked a momentous day for women worldwide. On that day, pursuant to resolution 34/180,[10] the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW entered into force in 1981, making it the first international Convention focusing exclusively on the rights of women.[11] CEDAW sets out internationally accepted principles of equality for women and men

[8] See Article 16 of the Universal Declaration of Human Rights, 1948, Article 26 of the International Covenant on Civil and Political Rights, 1966, Articles 2, 3, 6 of the International Covenant on Economic, Social and Cultural Rights, 1966.
[9] Tang, K., "Internationalizing Women's Struggle Against Discrimination: The UN Women's Convention and the Optional Protocol", 34 (8) *The British Journal of Social Work*, 2004, pp.1173-1188, at p. 1174.
[10] G.A. Resolution 34/180.
[11] Matinda, M. Z., "Implementation of the Convention on Elimination of All Forms of Discrimination Against Women: The Tanzania Experience", 26 (1/2) *Willamette Journal of International Law and Dispute Resolution*, 2019, pp. 99-137 at p. 99.

and prohibits any restriction or exclusion of women based on sex or marital status.[12] CEDAW emphasises that discrimination against women in whatever form is equivalent to a fundamental human rights violation.[13] Women's human rights under CEDAW are based on three principles: non-discrimination, equality, and a framework for state obligation.[14] As the title suggests, the goal of the Convention is to end the discrimination faced by women in their pursuit of civil, political, economic and cultural rights[15] and to promote women's rights, including the right to equal division of matrimonial assets.[16]

At the regional level, women's rights in Africa are protected exclusively under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the African Women's Protocol), which the Assembly of the African Union adopted in 2003.[17] The African Women's Protocol is more in the spirit of CEDAW. In line with both CEDAW and the African Charter on Human and Peoples' Rights, 1981, the Protocol prohibits discrimination against women.[18] The Protocol, among other things, requires African Governments to eliminate all forms of discrimination against women in Africa and to promote equality of men and women.[19] Article 7 of the Protocol provides clearly that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.[20]

International and regional human rights standards aim to ensure that individuals enjoy fundamental human rights within the context of domestic laws governing marriage and family matters. Tanzania expressed its willingness to be bound, and adhere to, principles of international and regional law relating to women rights contained in CEDAW[21] and The African Women's Protocol[22]

[12] Tinker, C., "Human Rights for Women: The U.N Convention on the Elimination of All Forms of Discrimination Against Women", 3 (2) *Human Rights Quarterly*, 1981, pp. 32-43, at p. 32.
[13] Matinda, M.Z., 2019, p. 102.
[14] Msuya, N.H., "Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary Law and Practices in Tanzania",22, *PER/PELJ*, 2019, pp. 1-29, at p. 2.
[15] Tang, K., 2004, p. 1174.
[16] See Article 16(1)(c)(h) of CEDAW, 1979.
[17] The Protocol entered into force on 25th November 2005.
[18] Banda, F., Blazing a Trail: "The African Protocol on Women's Rights Comes into Force", 50(1) *Journal of African Law*, 2006, pp. 72-84, p. 74.
[19] Msuya, N.H., 2019, 22, p. 4. See also Article 2 of the Protocol.
[20] **Mnyonge Idrisa v. Kiumbe Hussein**, PC. Matrimonial Appeal No. 04 of 2020, High Court of Tanzania at Mwanza (unreported). See also Article 6 of the The African Women's Protocol.
[21] Tanzania ratified CEDAW on 17th July 1980.
[22] Tanzania ratified The African Women's Protocol on 3rd march, 2007.

respectively by signing and ratifying them. Signing alone does not create legal obligations. Ratifying a Convention or Protocol means the ratifying state is legally bound to implement its terms. However, like other Commonwealth countries that embrace the dualist system, signing and ratification of the Convention or Protocol are not enough to warrant enforcement in domestic courts, except for persuasive purposes or to provide intellectual guidance. For the Convention or Protocol to acquire legal effect, the Tanzanian Parliament must enact enabling legislation.[23]

The spirit of CEDAW and the African Women's Protocol has been translated into the Constitution of the United Republic of Tanzania (the Constitution) and the LMA. Article 13 of the Constitution protects human rights by promoting equality and non-discrimination of men and women. Article 13 of the Constitution reflects Article 7 of the Universal Declaration of Human Rights, 1948.[24] Further, Article 9(f) of the Constitution expressly provides that state authorities and all their agencies must direct their policies and programs to ensure that human dignity is preserved in accordance with the spirit of the Universal Declaration of Human Rights. The Universal Declaration of Human Rights is the source of all subsequent international conventions/covenants/treaties/protocols dealing with human rights.[25]

The principle of equality of spouses is domesticated under Section 114 (2)(b) of the LMA, which states that, while exercising its powers in the distribution of matrimonial assets, courts shall have due regard to the extent of contribution made by each party in the form of money, property or work, and this includes the wifely duties performed by women during the subsistence of the marriage, as per **Bi Hawa Mohamedi v. Ally Sefu.**[26] Before the decision of the Court of Appeal in Bi Hawa's case, domestic work was not considered a contribution that could warrant a woman any property after divorce.[27] Part of the holding of the court was "the joint efforts and work towards the acquiring of the assets have to be construed as embracing the domestic efforts or work of husband and wife. Bi Hawa's case is now among the leading precedents in matrimonial causes.

[23] Matinda, M.Z., 2019, p. 109.
[24] See also Articles 2, 8, 16 of the Universal Declaration of Human Rights, 1948.
[25] See Article 26 of the International Covenant on Civil and Political Rights, 1966, Articles 2, 3, 6 of the International Covenant on Economic, Social and Cultural Rights, 1966, Articles 2, 3 of the African Charter oh Human and People's Rights, 1981.
[26] [1983] TLR 32 (CA). See also **Bibie Maulid v. Mohamed Brahim** [1989] TLR 162 (HC).
[27] Migiro, R.M., "The Division of Matrimonial Property in Tanzania", 28 (3) *The Journal of Modern African Studies*, 1990, pp. 521-526, at p. 524. See also Rwezaura, B.A., "Division of Matrimonial Assets under the Tanzania Marriage Law", 17 (2) *Law and Politics in Africa, Asia and Latin America*, 1984, pp. 177-193, at p. 178.

The joint property theory as reflected in the case supports a compelling conclusion that a wife's contribution to the success of the husband is indispensable, irrespective of whether the wife is in formal or informal employment. [28]Moreover, Bi Hawa demonstrated how a court may purposively interpret the law to fit the needs and aspirations of society.[29]

Under Tanzanian matrimonial jurisprudence, marriage does not change ownership of any property a spouse acquired, especially before the marriage, and it does not bar any spouse from acquiring or disposing of separate property.[30] Moreover, if a property is acquired in the name of either spouse during the subsistence of the marriage, the presumption is that it belongs to that person absolutely; if acquired in the joint names of the spouses, the presumption is that their beneficial interests are equal.[31] Thus, once it is established that the property is acquired through the joint efforts of the spouses, the said property should be distributed by considering the extent of contribution of the parties to the acquisition of the property as provided for under Section 114 (2)(b) of the LMA.

2.0 Methodology

This study employs a doctrinal research methodology, relying primarily on a review and analysis of fifteen (15) decided cases from the High Court and the Court of Appeal of Tanzania spanning the period from 1983 to 2026. The cases were purposively sampled. They were selected for their direct relevance to disputes over the division of property between spouses in a valid marriage or a presumption of marriage. Statutory interpretation, comparative judicial reasoning, and hierarchical analysis of precedent were used to identify trends, inconsistencies, and doctrinal shifts in judicial reasoning on spousal equality in the division of matrimonial assets in Tanzania.

3.0 Analysis and Discussion of Findings

3.1 Division of Matrimonial Assets after Assessing the Extent of Contribution

Analysis of five (5) cases decided by the High Court of Tanzania reveals a literal statutory interpretation of Section 114 (2)(b) of the LMA. According to the High Court in all cases, division

[28] Matinda, M. Z., 2019, p. 121.
[29] Migiro, R.M., 1990, p. 524.
[30] See Section 59 of the Law of Marriage Act, Cap. 29 R.E. 2023.
[31] See Section 60 of the Law of Marriage Act, Cap. 29 R.E. 2023.

of matrimonial properties should depend on the extent of contribution of the spouses in the acquisition of the assets to ensure formal equality as shown hereunder.

In **Karamba Silaeli v. Ester Taifa,**[32] the High Court of Tanzania stated that the matrimonial court has the power to order the division of the assets acquired by the spouses during the marriage by their joint efforts upon granting a decree of separation or divorce. In ordering the division of matrimonial properties, the court must consider several factors as enumerated under Section 114 (2) of the LMA, including the extent of the contributions made by each party in money, property or work towards the acquisition of the assets. In **Eliester Philemon Lipangahela v. Daud Makuhana**, the High Court of Tanzania stated that Section 114 (2)(b) of the LMA recognizes spousal contribution in terms of money, property, or work. The appellant's contribution towards the acquisition of matrimonial assets was in terms of that is, including household chores, bearing and rearing of children, and making the home comfortable for the respondent and the issues. In addition to her domestic duties, the appellant engaged herself in the sale of buns and vegetables. Thus, the appellant contributed to the acquisition of matrimonial assets through household chores and monetary contributions.

Similarly, in **Nestory Ludovick v. Merina Mahundi**[33] the, the court stated that it was wrong for the first appellate court to fault the trial court's finding, which was based on the correct position of law and a sound analysis of the evidence on record. Whereas the share of 15% of the plot is so minimal and trivializes the value of wifely duties in the acquisition of matrimonial assets, raising the share to 50% of the house was certainly wrong, as it does not correspond with the respondent's contribution to the construction of the house. As the trial court correctly held, since the respondent did not contribute to the construction of the house, she has no claim over it save for her contribution to making the bricks. The court went further to invoke the revisional powers vested in it and upgrade the respondent's share to 30% of the current value of the plot inclusive of the respondent's contribution in making bricks.

This means the spirit of the LMA requires the distribution of matrimonial property to be premised on evidence of the extent of the spouses' contribution to the acquisition of the assets adduced at trial, referred to as formal equality. This was also the position of the Court of Appeal of Tanzania

[32] DC Civil Appeal No.000015688 of 2024, High Court of Tanzania at Musoma (unreported).
[33] PC Civil Appeal No. 95 of 2020, High Court of Tanzania at Dar es Salaam (unreported).

in **Bi Hawa Mohamedi v. Ally Sefu**, which clearly stated that, in determining contribution towards the acquisition of matrimonial or family assets, every case must be decided in accordance with its peculiar facts and circumstances. This means that there is no fast and hard rule in the division of matrimonial properties. To do justice to the parties by ensuring equality in the division of matrimonial assets, the court shall consider the extent of contribution of each spouse in the acquisition of the said assets.[34] Thus, Section 114 (2)(b) of the LMA envisages equality based on joint effort, not necessarily a 50% share.

3.2 Equal Division of Matrimonial Assets without Assessing the Extent of Contribution

Analysis of the five (5) cases decided by the High Court of Tanzania reveals a liberal model of equality in interpreting the right of spouses to equal treatment in the division of matrimonial assets under international and regional human rights instruments to which Tanzania is a party. According to the High Court, in all cases, division of matrimonial property should focus on achieving substantial equality without the need to require spouses to give evidence to show the extent of contribution in the acquisition of the assets, as shown hereunder.

In **Victoria Sigala v. Nolasco Kilasi**, the High Court of Tanzania stated that there is no fast and hard rule for deciding the amount of contribution and the division of matrimonial assets. Where matrimonial assets were acquired during the happy days of subsistence of marriage and through the joint efforts of the spouses, there is no need to require one spouse to give evidence to show the extent of their contribution. Such assets should automatically be distributed equally. Similarly, in Gulya Mohamed v. Ahmed Makamo, the High Court of Tanzania faulted the district court's decision on the ground that it did not observe Article 13(1) of the Constitution. The court stated that the trial magistrate ought to have decided the case on the evidence on record, not on stereotypical notions about the roles of men and women. The High Court made an order of equal division of the matrimonial house even though the parties did not give any evidence as to the extent of their contribution in the acquisition of the said matrimonial property.

Similarly, in **Mwajuma Mohamed Njopeka v. Juma Said Mkorogoro**, the High Court of Tanzania observed that the primary court, having made a finding that the spouses had acquired

[34] See also **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018, [2020] TZCA 31 (unreported), **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016, [2019] TZCA 414 (unreported), **Hidaya Ally v. Amiri Mlugu**, Civil Appeal No. 105 of 2008, [2016] TZCA 323 (unreported).

two houses during the subsistence of the marriage they had to consider how they should divide the properties depending on the efforts exerted by each of the spouses. Under such circumstances, the primary court erred by not giving the appellant an effective remedy. The remedy which was given to her by ordering the respondent to pay her Tsh 500,000/= left her in a disadvantaged position contrary to what is envisaged by the principle of equality before the law provided under Article 13(1) of the Constitution. The High Court set aside the order which granted the appellant a monetary award of Tsh 500,000/= and substituted it with an order that the appellant is given one house as her share in the division of matrimonial assets. In **Perus Lucas v. Shomari Bahabi**, the High Court of Tanzania granted equal division of matrimonial assets in the spirit of CEDAW and the African Women's Protocol, which provide for the right to an equitable sharing of the joint property deriving from the marriage.

In these cases, the High Court of Tanzania applied a liberal model of equality by focusing on the automatic division of matrimonial property to achieve an identical outcome for the spouses, without considering the extent of the spouses' contributions to acquiring the assets. This school of thought contravenes the letter and spirit of Section 114 (2)(b) of the LMA and the precedents from the Court of Appeal of Tanzania, which emphasize equality grounded in the realities of the marriage. CEDAW envisages a liberal model of equality under Article 16(1)(c)(h), and the African Women's Protocol under Article 7.

4.0 Conclusion and Recommendation

The paper concludes that the intersection of international and regional human rights standards and domestic laws on the right to an equitable sharing of matrimonial assets is a complex and dynamic field that requires careful consideration. Section 114 (2)(b) of the LMA has domesticated the right to equality of spouses in the division of matrimonial assets depending on the extent of contribution, while the spirit of CEDAW and the African Women's Protocol is to give substantial equality to spouses without assessing the extent of contribution of the spouses in the acquisition of matrimonial properties.

The intention of the parliament when enacting the LMA was to ensure formal equality in the sense that justice is seen to be done, parties to the matrimonial disputes have to provide evidence showing the extent of their contribution in the acquisition of the assets, and the court is bound to divide matrimonial assets after evaluating the evidence so adduced on the balance of probabilities. The

law aligns fundamental human rights principles to ensure justice and equality for spouses. The law is not discriminatory because it legally recognises women's non-economic contribution.

The paper recommends that when the language of the statute is plain and clear, the duty of interpretation does not arise, and the provisions of law applied do not invite discussion. The Court of Appeal of Tanzania has adopted this position in several decisions.[35] Judges should not go beyond statutes to correct the intention of the legislature.

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[35] **Joseph Kihenani v. Nkasi District Council**, Civil Appeal No. 126 of 2019, [2023] TZCA 18002 (Unreported), **Director of Public Prosecutions v. Julieth Simon Peleka** [2020] 1 TLR 230 (CA), **Barnabas Msabi Nyamonge v. Assistant Registrar of Titles and Another** [2019] 1 TLR 149, **Tanzania Teachers Union v. Chief Secretary and Others**, Civil Appeal No. 96 of 2012, [2017] TZCA 1118 (Unreported).

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