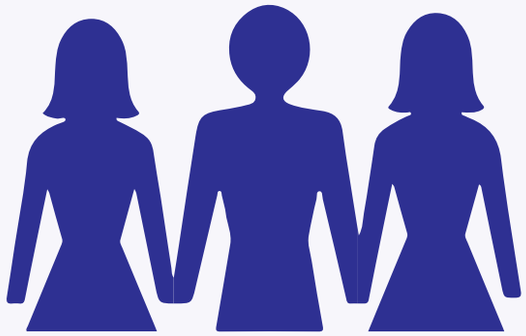
PROTECTION OF MATRIMONIAL PROPERTY RIGHTS OF NON-DIVORCING CO-WIVES IN TANZANIA

*Lukiko Vedastus Lukiko**

ABSTRACT

In *Maryam Mbaraka Saleh v. Abood Saleh Abood*[1] the Court of Appeal of Tanzania dismissed an application, by non-divorcing co-wife, for review of the court decision awarding forty percent share of the matrimonial property to a divorcing wife, in order to consider the interests of the remaining co-wife in the matrimonial property. One of the grounds for dismissal by the court was that the applicant was not a party to any of the previous proceedings. Logically, this decision obliges co-wives to be parties to divorce proceedings between their husbands and the divorcing wives for their interests to be considered during division of matrimonial property. Regrettably, the Law of Marriage Act of 1971 does not provide room for non-divorcing parties to be joined in divorce proceedings. Since only parties to the proceedings can be considered by courts in the division of marital property, the LMA currently offers no means for protection of non-divorcing co-wives' share in marital assets. This situation fetters the efforts of protecting women's matrimonial property rights, considering that almost twenty-five percent of Tanzanian women live in polygamous marriages. This article proposes for introduction of a form community of property regime providing a serial division of property scheme under the LMA. This form of matrimonial property ownership is recommended in order to secure interests of non-divorcing co-wives and limit the court's discretion in division of matrimonial property.

Keywords: polygamy, co-wives, matrimonial property



* Assistant Lecturer at the Faculty of Law (Mzumbe University). He possesses an LL.B (Mzumbe University) and an LLM in Transnational Criminal Justice and Crime Prevention (University of the Western Cape).

1 Civ. App. No. 1 of 1992, CAT (unreported).

1. Introduction

Property rights of co-wives in Tanzania are not sufficiently secured in case of divorce involving a polygamous marriage. In 1971, Tanzania enacted the Law of Marriage Act[2] (LMA) to regulate marriage relations. Section 9(3) of the LMA recognizes polygamy as a valid form of marriage. Subsequently, section 57 places women that are married to the same husband at equal levels with respect to their rights, liabilities and status in law. The provision expressly makes co-wives equal, at least in all the basic aspects of marriage, including property rights. The LMA also gives married persons the right to petition for divorce in the event that their marriage has broken down.[3]

Section 99 of the LMA requires that only parties whose marriage has broken down can petition for, and be granted a decree of, divorce. Consequently, in a polygamous marriage, the wife or wives whose marriage has not broken down cannot be parties to a petition for divorce when the other wife or wives petition for divorce. Similarly, section 105 (1) of the LMA prohibits any person from being made a co-respondent to a petition for divorce or separation. Thus, a non-divorcing co-wife cannot be a party to divorce proceedings between her husband and the other wife. Therefore, under these circumstances a non-divorcing wife cannot be a party to proceedings for division of matrimonial property in case the marriage between her husband and the other wife has been dissolved. The climax of these facts is the question: how far does the LMA protect matrimonial property rights of non-divorcing co-wives?

This article examines the existing legal framework in Tanzania with regard to matrimonial property division and the extent to which it protects the rights of co-wives in case of divorce involving a polygamous marriage. Thence, the article proposes avenues that may be utilised to overcome the deficiencies of the LMA in respect of property rights of non-divorcing co-wives. The article is divided into six sections. After this introduction, section two and three expounds the origins of polygamy in Tanzania and the history of matrimonial property regulation. Section four analyses the legal framework regulating matrimonial property relations in Tanzania, covering the LMA, the Land Acts, and customary and Islamic law regimes. Section five provides a discussion of the extent to which non-divorcing co-wives' matrimonial property rights are unsecured upon divorce of the other wife or wives. The last section draws conclusions and recommends amendments that need to be incorporated into the LMA in order to safeguard and secure rights of all wives in polygamous marriages.

2 [Cap 29 R.E. 2002]

3 Section 99 of the LMA.

2. Provenance of Polygamy in Tanzania

Before colonialism, polygamy was considered as a necessary setup for family survival.[4] Households had to be self-sufficient by producing enough food for the entire family.[5] Customarily, 'wives were a source of wealth and status'.[6] Polygamy conferred wealth in the sense that the man's productivity increased owing to the combined labour of the wives and their children.[7] It also conferred status as the large family guaranteed the man's lineage. Therefore, in traditional context polygamy was prompted significantly by economic and status considerations.

Polygamy as traditionally practiced had a momentous role in deflecting women from the effects of staying unmarried.[8] Indeed, marriage was a necessity to a woman in an ideal customary society. Without marriage, a woman had no other ways of acquiring land, the fundamental means of production of the time. Moreover, a woman needed the protection of a man in social, economic and political spheres of life. Undoubtedly, the

4 Howland R. J & Koenen A, *Divorce and Polygamy in Tanzania*, Social Justice, 2008, Paper 15 http://ecommons.luc.edu/social_justice/15 p. 8 (accessed 21 October 2017).

5 Andrews P.E, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, Utah Law Review, 2009, No. 2, pp. 351-379, at p. 370.

6 Armstrong, A. et al, Uncovering Reality: Excavating Women's Rights in African Family Law, International Journal of Law and the Family, 1993, Vol. 7, pp 314-369, at p. 334.

7 Armstrong, A. et al. (1993) p. 333.

8 Armstrong, A. et al. (1993) p. 334.

interests of women in their communities were to be represented by men.[1] Polygamy warranted women with such representation, including assurance of means of production and reproduction.

In some societies, consent of the wife was required before a man added another.[2] There was seniority ranking between wives. To a greater extent, the senior wife was in control of the juniors, including the produce of their labour.[3] As a result, most senior wives were ready to accept subsequent wives. In some traditions the senior wife was the one to present the dowry to the family of the subsequent wives who were to get married to her husband.[4]

After Germany began colonising Tanganyika in 1884, the role of polygamy in tribal structures began to change and after Tanganyika was acquired by the British from German, a foreign formal legal structure was imposed.[5] This new legal structure provided for the application of English received laws alongside the native customary law in matters involving African natives. Therefore, although polygamy conflicted with the European statutory framework that promoted individual equality, polygamy was left to persist as it ensured a solid source of cheap labour.[6]

Tanzania currently stands among a few countries in the world where polygamy is still ferocious. According to the Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC), "almost one-quarter of Tanzanian women live in polygamous marriages".[7] The map below indicates the incidence of polygamy around the world. The practice seems to be more dominant in Africa as the "polygamy belt" stretches across the various regions of the continent.

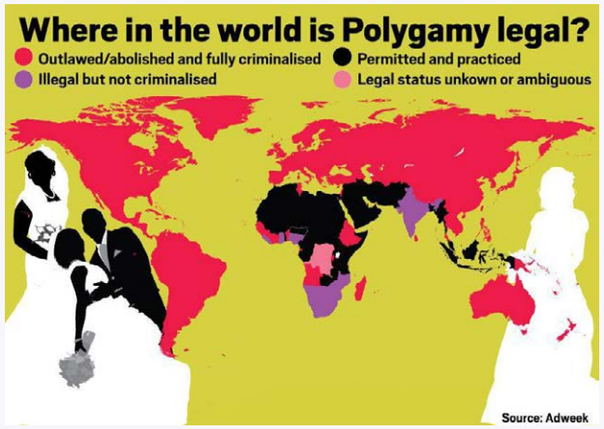


Image: Map indicating legalization of polygamy around the world.[8]

3. Historical Vista of Matrimonial Property Regulation in Tanzania

Impact of polygamy on matrimonial property relations can be traced from the different customary traditions. Traditional systems 'recognised the man as the natural head of the family with the result that a husband and a wife were not treated as equals'.[9] A woman was considered to owe her husband a duty of assisting him in his gainful work, be it farming, shop-keeping, or any lawful undertaking whatsoever.[10]

Before 1971, matrimonial property relations in Tanzania were governed by a multiple laws. These included statutory law, English received law (common law, principles of equity and statutes of general application),[11] customary law and religious law. Accordingly, there existed diverse matrimonial property systems, including customary matrimonial property regime, Islamic property regime and statutory law property regime.[12] This diversification impacted even the way divorce and division of matrimonial property operated.

With regard to the customary law regime, Rwezaura notes that 'divorce was agreed between the spouses and their families, followed in some cases by the refund of bride wealth'.[13] Therefore, there was no division of matrimonial property following divorce. This regime applied to both monogamous and polygamous marriages. Similar to the customary law regime is Islamic law. According to Islamic faith, a man may marry up to four wives so long as he is able to provide them with necessaries, equally.[14] In Islamic law, marriage is a civil contract and not a divine sacrament as is regarded in Christianity.[15] Further, like customary law, Islam does not apprize division of matrimonial property between spouses in case their marriage is dissolved.

With respect to statutory law regime, there existed six principal legislations regulating matrimonial affairs prior to the LMA. These were the Marriage Ordinance Cap. 109, the Matrimonial Causes Ordinance Cap. 364, the Matrimonial Causes (War Marriages) Ordinance Cap. 111, the Maintenance Orders (Enforcement) Ordinance Cap. 275 and the District Courts (Separation and Maintenance) Ordinance Cap. 274.

These laws gave a wife a proprietary interest in savings from housekeeping and made it clear that contributions in money or money's worth by a spouse to the improvement of the matrimonial property will ensue into a proprietary right accruing to that spouse.[16] The statutes appeared to recognise women's property rights upon divorce. Nevertheless, they did not provide for property rights of co-wives upon divorce of the other wife or wives. Certainly, colonialists, who largely were Christians, saw polygamy as degrading practice that subjugated women into men's abuse.[17] Slowly they commenced its obliteration by blotting it out of the statute book. Some colonial powers enacted legislation to enable Africans to convert their marriage into a monogamous Western type of marriage.[18] After conversion, the converts' matrimonial causes would be governed by colonial family law regime.

4. Legal Regime Governing Matrimonial Property Relations in Tanzania

Law of marriage in Tanzania is principally contained in the LMA. However, the LMA is supplemented on the one hand by other statutory law, mainly the Land Acts,[19] and judicial decisions. On the other hand, it is complemented by customary law and Islamic law. When considered as a whole, this body of family law presents a complex legal structure for regulation of matrimonial property rights. The following section analyses this legal set up to establish the extent of its protection to co-wives' property rights during divorce.

4.1 The Law of Marriage Act, 1971

The LMA was enacted in order to bestow a uniform law of marriage relating to all marriage aspects in Tanzania. The LMA supersedes customary law and Islamic law. However, it still makes reference to customary law and Islamic law in many aspects including the division of matrimonial property.[20] In order to examine the extent of protection offered to co-wives with respect to their matrimonial property rights, it's pertinent to analyse the property ownership system under the LMA.

1 Armstrong, A. et al. (1993) p. 334.
2 Armstrong, A. et al. (1993) p. 334.
3 Armstrong, A. et al. (1993) p. 334.
4 Rosario C, *Desperate Co-Wives: The Illegality of Polygamy in the New Mozambican Family Law,* 2008, Masters thesis, University of Bregen, p. 65.
5 See the Tanganyika Order-In-Council, 1920 which was regarded as the British Constitution in governing Tanganyika.
6 Howland R. J & Koenen A, (2011) p. 9.
7 Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC), *Gender Equality and Social Institutions in Tanzania* available at http://www.mcdgc.go.tz/index.php/publications/more/gender_equality_and_social_intitutions_in_tanzania/ (accessed 20 October 2017).
8 See Wheaton O, Where exactly is polygamy legal?, 2015, available at http://metro.co.uk/2015/06/22/where-exactly-is-polygamy-legal-5257418/ (accessed 23 October 2017).
9 See Binamungu C.S.M, *Division of Matrimonial Property in Tanzania: The Quest for Fairness*, 2013, PhD thesis, Open University of Tanzania, p. 2.
10 See *Iddi d/o Kungunya v Ali s/o Mpate* [1967] HCD n. 49.
11 These English statutes applied by virtue of the reception clause under the Tanganyika Order in Council of 1920; this clause is currently incorporated under the Judicature and Application of Laws Act, 1961 [Cap. 358 R.E. 2002].
12 Binamungu C.S.M, (2013) p. 54.
13 Rwezaura B.A, *The Proposed Abolition of De facto Unions in Tanzania: A Case of Sailing against the Social Current,* Journal of African Law, 1998, pp. 187 – 214 at p. 195.
14 Holy Quran, Surat 4:13.
15 Makaramba, R.V, *The Secular State and the State of Islamic Law in Tanzania,* in Jeppie S, *et al* (eds.), (2010) Muslim Family Law in Sub-Saharan Africa: Colonial legacies and Post-Colonial Challenges, Amsterdam University Press, Amsterdam, 2010, pp. 273 -295, at p. 287.
16 Binamungu, C.S.M. (2013) p. 54.
17 Zeitzen M.K, *Polygamy: A Cross-Cultural Analysis,* Berg, New York, 2008, p. 145.
18 Zeitzen M.K, (2008) p. 145.
19 The Land Act, 1999 [Cap. 113 R.E. 2002]; and the Village Land Act, 1999 [Cap. 114 R.E. 2002].
20 For example section 114 (2) (a) requires that during the division of matrimonial assets the court shall have regard to the customs of the community to which parties belong.

4.1.1 Property Ownership Under the LMA: Separate Property System or Community of Property?

Matrimonial property relations in Tanzania are based on two dimensions: separate property system and community of property system. However, the LMA recognises separate property as the primary form of property ownership. Community of property is expected to operate by the parties' agreement.

i) Separate Property System

Matrimonial property ownership under the LMA is grounded on the concept of "separate ownership of property" between spouses.[1] The Black's Law Dictionary defines separate property as "property that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party".[2] In some jurisdictions it involves property acquired after separation of spouses or after either spouse had commenced a divorce action. In some common law countries, including Tanzania, it includes property acquired by, and titled to, one individual spouse during marriage.[3]

Separate ownership of property between spouses was first introduced into the Tanzanian legal system during the unification process of the law of marriage in 1969. The Government proposals in Government Paper No. 1 of 1969 among others provided in Paragraph 19 that:

> *Moreover, the proposed law should provide expressly that either spouse may own his or her own separate property which he or she owned before marriage or acquired after marriage.*[4]

This concept, popularly known as 'separate property system' presupposes that whatever property the husband or wife had acquired before and after marriage remain his or her own property, exclusively. To the extent of such property, marriage changes nothing. Accordingly, section 60 of LMA, presupposes that during subsistence of the marriage spouses would each hold some kind of a "share certificate" indicating his or her personal property. Realistically, this is not the case. Most women in Tanzania are housewives without independent sources of income. Their share in matrimonial assets usually accrues from the contributions they make in kind towards the acquisition or development of such assets initially owned by the husband.[5] Section 58 of the LMA which provides for separate property in marriage states that:

> *subject to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.*

Therefore, following marriage, spouses' separate property remains separate until such property is improved upon by the other spouse, thus converting it into matrimonial property.[6] Marriage does not operate to automatically merge separate assets of spouses into one joint estate. Contribution of the other spouse is *sine quo non* to such amalgamation. Nonetheless, assets acquired jointly are regarded as matrimonial assets and are subject to division upon divorce or separation.[7] Even so, each spouse is entitled a share to the extent of his/her contribution towards the acquisition or development of the assets.[8]

The other spouse may change the status of a separate property through contribution in money, property or work.[9] When that happens, a matrimonial property is said to have been created between the spouses. The Alaska Court System defines matrimonial property as "the property and debt that a husband and wife acquire during marriage for the benefit of the marriage and may include property acquired when the couple lived together before marriage".[10] Similarly, the Court of Appeal of Tanzania in *Bi Hawa Mohamed* (supra) was of the view that marital property or family assets refer to "those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole". These assets may be of a capital nature such as a piece of land or of a revenue generation nature such as employment of the wife or husband.

ii) Community of Property System

The separate property system differs from community of property system. In a community of property system, save where the spouses explicitly and formerly agrees otherwise, each spouse's personal property and all post-marriage debts becomes jointly owned and must be shared between them upon divorce.[11]

Meaningfully, community of property system demands that husband and wife become 'co-owners in undivided and indivisible half-shares' of all assets and liabilities that each has at the time of contracting the marriage alongside all assets and liabilities they acquire during subsistence of marriage.[12] Accordingly, the spouses' separate estates are automatically merged into one joint estate. Upon dissolution of marriage, all liabilities are settled from the joint estate and the remainder is distributed equally between the spouses.[13] Unlike the separate property system in which women are likely to be disadvantaged, community of property endows married women with assurance of their rights in the marital property.

In Tanzania, the concept of community of property operates only by the parties' ante-nuptial agreement. In *Gharib Abdallah Juma v Kay Mlinga*[14] a Tanzanian citizen from Zanzibar but living in Denmark married a woman from Tanzania mainland. The marriage was concluded in Denmark. Apparently, Denmark was one of the countries in Europe which recognised community of property between married couple. In order to avoid the full effect of that system, the husband entered into a marriage settlement with the wife two days before marriage to exclude some of his property from the union. At that time he owned a flat in Copenhagen which he wanted to remain his separate property. The marriage settlement contained a provision to the effect that 'the flat … shall belong to me, Abdallah Juma Gharib, as separate property, which separate property shall furthermore include all proceeds from the flat and what may be gained from it. Besides that, there shall be complete community of property between us'.

In fact, besides the flat, the husband had houses and others properties in Zanzibar and Dar es Salaam. The marriage lasted for 14 years before it was terminated through judicial divorce. During division of matrimonial property, the husband objected to the equal division of the assets between him and the wife, claiming that the wife had no contribution thereto. The Court held that the marriage settlement which created community of property between the spouses gave the wife right to matrimonial assets regardless of her contribution. Thus unlike the separate property system which requires spousal contribution for him/her to have a share in the assets, community of property system bestows in a wife an automatic share in the marital assets by virtue of marriage.

1 Section 58 of the LMA provides to the effect that 'a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.'
2 Garner B. A, *Black's Law Dictionary,* 8th Ed, West Publishing Co, U.S, 2004, p. 1395.
3 Garner, B. A. (2004) p. 1395. See also Section 60(a) of the LMA, 1971.
4 The Law Reform Commission of Tanznia, *Inquiry and Report on the Law of Marriage Act, 1971,* Report submitted to the Attorney General and Minister for Justice on 4th July, 1986, p.5.
5 See *Bi Hawa Mohamed v. Ally Sefu* [1983] T.L.R. 32.
6 Binamungu C.S.M, (2013) p. 57.
7 Section 60(b) of the LMA, 1971.
8 See s. 114 of the LMA, 1971.
9 See s. 114(2) (b) and s. 114(3) of the LMA, 1971.
10 Alaska Court System, *Glossary of Family Law Terms* available at http://www.courts.alaska.gov/shc/family/glossary.htm#m (accessed 25 October 2017).
11 Binamungu C.S.M, (2013) p. 60.
12 Cronje D. S. P & Heaton J, *South African Family Law,* 2nd Ed, LexisNexis, Durban, 2004, p. 71.
13 Cronje D. S. P & Heaton J, (2004) p. 71.
14 Civil Appeal No. 10 of 2001, Court of Appeal of Tanzania at Zanzibar (unreported).

4.2 Land Legislation

In 1999, the Tanzanian legislature enacted two important laws regarding land: the Land Act[1] and the Village Land Act[2]. The Land Act equated customary rights of occupancy with statutory rights of occupancy. It also introduced women rights to acquire, use or dispose land. Section 3(2) of the Land Act explicitly states that "the right of every adult woman to acquire, hold, use, and deal with an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered."

This provision entitles women a share in the husband's property which they have acquired an equitable interest by way of their contributions. This is in line with section 114(3) of the LMA which provides that reference to assets acquired during marriage include assets owned by either spouse before the marriage but which have been improved substantially by the other spouse or by their joint efforts during marriage. Thus, upon divorce each spouse is entitled a share to the extent of her contribution in the land. The land Acts equates women with men in terms of land ownership and gives women a share in any property acquired by the spouses as either joint occupiers or occupiers in common.

4.3 Customary Law and Islamic law

As stated earlier, the LMA is supplemented by customary law and Islamic law. According to section 10(2)(a) of the LMA a marriage contracted according to customary rites or in Islamic form is presumed to be polygamous or potentially polygamous. Therefore, the two legal systems are the primary regimes in which polygamy is rooted.

The status of customary law in Tanzania was expounded by the Court of Appeal in the legendary *Maagwi Kimito v Gibeno Werema.*[3] The Court states that 'the customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary'. That being the position, marriages contracted according to customary rites has the same status and recognition as any marriage contracted in other forms. Accordingly, section 25(1)(d) of the LMA recognises customary law marriages among forms of contracting a marriage in Tanzania. Likewise, section 25(3)(a) of the LMA recognises marriages contracted according to Islamic rites.

Section 114(2) of the LMA requires courts, during division of matrimonial assets, to have regard to 'the customs of the community to which the parties belong'. The Court of Appeal and the High Court of Tanzania have interpreted "customs" to include both Islamic rites and customary rites. In *Bi Hawa Mohamed,* the Court of Appeal approved a parting gift paid by the husband and received by the wife in accordance with the religious custom of the parties. In this case, religious 'custom' meant Islamic law. In the same way, the High Court in *Pulcheria Pundugu v. Samwel Huma Pundugu*[4] construed 'customs' to mean customary law of the parties to the petition.

Regrettably, Islamic law and most customary rites do not acknowledge women's share in the marital assets. This has created a conflict between customs and the LMA. Both Islamic law and customary law give husbands autonomy over matrimonial property. Consequently, proprietary repercussions of divorce as envisaged in section 114(2)(a) of the LMA do not give wives enough security over their share in the assets, with regard to Islamic and customary norms.

1 [Cap. 113 R.E. 2002].
2 [Cap. 114 R.E. 2002].
3 [1985] T.L.R. 132 (CA).
4 [1985] T.L.R. 7 (HC).

5. Vulnerability of Non-divorcing Co-wives during Division of Matrimonial Property

Section 114(1) of the LMA empowers courts "when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale". Only properties jointly owned by the parties are subject to division upon divorce. Joint efforts of the parties may be direct or indirect. It is direct when each spouse contributes money or work towards acquisition of the property. It is indirect if one spouse uses money to acquire assets while the other spouse performs domestic chores to enable his/her partner to work smoothly.[5]

Indirect contribution of a spouse towards acquisition of matrimonial assets had geared up a debate in the High Court before 1983. On the one hand there were those judges who considered that housework of the wife could not amount to a substantial contribution as to entitle her a share in the matrimonial property.[6] On the other hand there were those judges who construed "joint efforts" under section 114 of the LMA to include household works.[7] This polemic was resolved in 1983 when the Court of Appeal in *Bi Hawa Mohamed* (supra) held that:

> "*Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets. 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.*"

5 Hamida O.H, *The law of divorce in Tanzania: a conflict between the Law of Marriage Act 1971 and Islamic Law,* The Open University Law Journal, 2013, Vol. 4, No. 1: pp 167-179.
6 See *Iddi d/o Kungunya v Ali s/o Mpate* [1967] HCD n. 49 and *Zawadi Abdallah v Ibrahim Iddi* [1981] T.L.R 311.
7 See *Rukia Diwani Konzi v Abdallah Issa Kihenya,* Matrimonial Cause No. 6 of 1977 (unreported).

This decision liberated women from the injustices of being denied a share in the matrimonial assets during divorce. Despite this liberal approach, the Court of Appeal has confined itself to legal technicalities to deny non-divorcing co-wives their share in the matrimonial assets upon divorce of the other wife. Further, although the LMA recognises polygamy it does not provide guidelines on how courts can fairly exercise discretion in the division of matrimonial assets where the divorcing couple were in a polygamous marriage. According to section 114 of the LMA, division of matrimonial property is done by court only when granting or subsequent to the grant of a decree of divorce or separation. This aspect becomes more difficult in case of a polygamous divorce.

5.1 Parties to Proceedings for Division of Matrimonial Property: *Maryam Mbaraka Salehe v Abood Salehe Abood*

In *Maryam Mbaraka Salehe v Abood Salehe Abood*[8] the Court of Appeal dismissed an application by a non-divorcing co-wife for review of its decision on the ground that she was not a party to any of the previous proceedings. The relevant facts of this case are as follows. Abood Saleh Abood (the husband) was married to Farkha Abood (first wife) and Maryam Mbaraka Saleh (second wife). His marriage to the second wife was dissolved in 1988 and the Primary Court awarded the divorcing wife a fifty percent share in the house that was shared by both the first and the second wives. The husband successfully appealed to the High Court against the lower court's order. The divorcing wife appealed further to the Court Appeal which held that the second wife had contributed to the house within the parameters of section 114 of the LMA and, therefore, awarded her a forty percent share. However, what was not brought to the attention of the court or even raised in the two courts below was that the husband was still married to another wife (Farkha) who also had contributed to the house.

8 Civ. App. No. 1 of 1992, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Following this decision, the senior wife applied to the Court of Appeal for review of its decision on the ground that she as a senior wife also was entitled to a share in the house. The Court of Appeal dismissed her application on the ground, *inter alia,* that she was not a party to any of the previous proceedings.

As the law stands, courts have powers to order division of matrimonial property only when granting or subsequent to the grant of a decree of separation or divorce.[1] Therefore, for a party to petition for division of matrimonial assets he or she must have obtained a court decree of separation or divorce. Obviously, divorce proceedings precede proceedings for division of matrimonial property. According to section 99 of the LMA "any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down". Therefore, a party to the divorce proceedings should be someone whose marriage has broken down.

In a monogamous marriage, the husband and the wife will be the parties to the divorce proceedings and the subsequent proceedings for division of matrimonial property. In polygamous marriage, a wife who is divorcing or being divorced will be a party to the divorce proceedings against the husband on the basis that the marriage between them has broken down. The other remaining wife or wives cannot be parties to the respective proceedings because their marriage to the husband has not broken down, it still subsist.

Section 105 of the LMA stipulates that "no person shall be made a co-respondent to a petition for a decree of separation". The only exception is where the petition for a decree of divorce includes allegations of adultery on the part of the respondent, in which case the person with whom the adultery is alleged to have been committed shall be made a co-respondent. This provision has the effect of restricting non-divorcing co-wives from being joined in the divorce proceedings between the husband and the other wife. Consequently, a co-wife, unless also divorcing, is denied a chance to defend her interests in the matrimonial assets.

The main controversy brought by the decision in *Maryam Mbaraka* (supra) is that although the co-wife was not a party to any previous proceedings, her interest in the property was real. She as a senior wife had a *bona fide* claim in the property subject of division. She applied for review in order to bring attention to the court that there was some other person with interest in the property, which the court had to safeguard.[2] The argument that she was not a party to the previous proceedings raises a question: how could she do so under the conditions of sections 99 and 105 of the LMA?

One may argue that she could do so by invoking the Evidence Act and come in as a witness to prove that she also contributed to the matrimonial assets subject of divorce proceedings. The court could take from the evidence and evaluate her contribution so as to award her a share in the property. While this option may sound interesting, it is not a sure solution. Section 131 of the Evidence Act[3] provides that "in all civil proceedings the parties to the suit and the husband and wife or wives of any party to the suit, shall be competent and compellable witnesses". Accordingly, the husband may call his non-divorcing co-wife or wives to testify, or they many themselves apply *suo motu* to come as witness on the part of the husband so long as the husband accepts them as witnesses. Arguably, this is not the proper way to rely on in protecting co-wives' property rights.

Most women Tanzania, especially in rural areas, are not acquainted with court procedure and very few have knowledge of law. Undoubtedly, very few women in Tanzania are capable of pursuing their matrimonial rights in the courts of law.[4] Again, for the co-wife to take initiatives to be made a witness depends on her knowing the presence of the case and the stages that it has reached. In most cases, husbands will not tell their wives on the stages the case has reached and sometimes the wife will not know even that a divorce decree has been granted to the other wife.

5.2 Contribution Towards Acquisition of Matrimonial Property

Division of matrimonial assets is regulated by section 114 of the Law of Marriage Act. The section guides the court on the factors to bear in mind at the time of making an order for division of matrimonial assets. Factors to be considered include customs of the community to which the couple belongs and the extent of contribution made by each in money, property or work towards the acquisition of the assets and debts owned by either the husband or the wife. The other relevant factor is the need of infant children of the marriage, which the spouses have.

The meaning of 'contribution towards acquisition of matrimonial assets' has been dealt with extensively by the court.[5] However, the LMA does not expressly define what 'contribution' is and what amounts to 'joint efforts' of the spouses. All have been construed through judicial precedent. Even since the decision of the Court of Appeal in *Bi Hawa Mohamed* was delivered, the legislature has not taken step to incorporate this interpretation into the statute book. This silence by the legislature plunged Migiro into the fear of another panel of justices of the Court of Appeal to return to the conservative school of thought some days, as the Court of Appeal is not bound by its decision.[6]

In polygamous marriages, assessing contribution of each co-wife towards the matrimonial property is not an easy task. Most of co-wives do not have formal jobs by which they earn income. Most of them perform domestic chores for the upkeep of the family and farming for those who reside in rural areas. Ultimately, they both contribute domestic services towards the same husband and the same house. Assessing contribution of each co-wife in such situation is arduous. In *Pulcheria Pundugu v Samwel Huwa Pundugu*[7] the late Mnzavas faced the difficulty of dividing matrimonial assets without set guidelines. All he could do was to take into account all the necessary and relevant factors to give a fair decision. In the absence of predetermined standard for calculation of spousal contributions, courts are left with wide discretion on such sensitive matter.

The extent of discretion exercised by courts during division of matrimonial property often places non-divorcing co-wives at risk of losing their share. Most likely, for a non-divorcing co-wife's share to be considered in the division of matrimonial assets will depend upon the judge's acumen. In the case of *Anna Kanungha v. Andrea Kanungha*[8] Justice Mwalusanya exercised his discretion during division of matrimonial property by awarding a lesser portion of the property to a divorcing wife after considering other two wives who remained married to the husband. He said:

> ***"...****considering the fact that respondent has some two other younger wives, with a number of children, I will give the appellant a lesser portion of the cattle".*

This kind of discretion was exercised in the negative by the Court of Appeal in the case of Maryam Mbaraka Salehe by refusing to consider the interests of the non-divorcing co-wife. Indeed the absence of well established principles on which courts have to base their decisions when granting division of matrimonial property has left co-wives' property rights uncertain.

1 Section 114 (1) of the LMA.

2 Rwezaura B, *Tanzania: Building a New Family Law out of a Plural Legal System,* University of Louisville Journal of Family Law, 1995, Vol. 33, No. 523, pp. 523-540, at p. 532.

3 [Cap. 6 R.E. 2002].

4 Rwezaura B, (1995) p. 532

5 See *Bi Hawa Mohamed* (supra).

6 Rose-Migiro M, *The Division of Matrimonial Property in Tanzania*, The Journal of Modern African Studies, 1990, No. 28, pp 521-526.

7 [1985] T.L.R. 7 (HC).

8 [1996] TLR 195 (HC) .

6. Conclusion and recommendation

The law cannot continue to be silent and leave co-wives to pursue their property rights on their own. Currently, non-divorcing co-wives have to depend upon their husband's will to move the court to consider their contribution in the matrimonial assets. The law as it is gives divorcing wives a preferential chance in the division of matrimonial assets over non-divorcing co-wives. This is contrary to Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which provides that: "in the case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from the marriage". Also, lack of predetermined standards to regulate division of matrimonial assets allows courts to exercise wide discretion, sometimes in contravention of co-wives' property rights.

Therefore, there is a need to amend the LMA in order to ensure justice and protect rights of women in polygamous marriages. The simple way would be to do away with polygamy, altogether. However, as long as customary law and Islamic law remain sources of law in Tanzania, an outright ban of polygamy is impracticable. In that regard, the LMA should be amended to incorporate provisions which protects and ensures equitable division of matrimonial assets among co-wives. Doing so will provide a chance to combat harmful and discriminatory practices specific to polygamy, without needing to outlaw the practice entirely.

Hereunder is a draft provision that is proposed to be incorporated into the LMA. The provision has been extrapolated from section 8 of the Kenya Matrimonial Property Act[1], section 70 of the Uganda Domestic Relations Bill, 2003 and section 20 of the Ghana Property Rights of Spouses Bill, 2008. The proposed provisions states:

(1) *Where a man has more than one wife in a polygamous marriage, ownership of property between that man and each wife shall be determined as follows during marriage and upon divorce:*

(a) all assets and liabilities acquired by or accruing to the man and the first wife before, on or after the date of the marriage, and acquired or accrued before the man married the second wife, shall be owned in equal shares between the man and the first wife;

(b) any property acquired by or accruing to the man after he marries the second wife shall be owned in equal shares between the man, the first wife and the second wife, and the same principle shall be applied to any other subsequent wife or wives; and

(c) any property acquired by or accruing to the wives of the man after the first marriage shall be their respective separate property and they have the right to administer and freely dispose it.[2]

This provision introduces a form of community of property regime, in the form of a serial division of marital property. This regime does not warrant court discretion during division of matrimonial assets. Prior to a husband marrying a second wife, the spouses share all of the assets and liabilities they own in equal shares. In order to protect the interests of the first wife, second and subsequent wives do not share in property acquired before they were married. Therefore, where a husband marries more than one wife, each subsequent wife shares with her husband and any earlier wives only the property acquired by the husband after the date of their marriage. Subsection (c) stipulates that each co-wife retains individual ownership of any property or assets that she acquires separately. This is to ensure a wife is not required to share her own separate property with the other co-wives. The husband has the obligation to share his assets equally with all his wives.

Through the explicit terms of this proposed provision, Section 105 of the LMA, which disallows a non-divorcing co-wife from being party to the divorce proceedings, will no longer be utilised to deny a non-divorcing co-wife her share of the marital property upon divorce of the other co-wives. This is because shares of each co-wife will be determined categorically by the serial distribution scheme. Further, this proposed regime will automatically absorb customary law and Islamic law property regimes into the LMA since under the Second Schedule to the LMA it is provided that "the rules of customary law and Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971".[3] Lastly, section 105 of the LMA should be amended to allow any interested party to be joined in proceedings for division of matrimonial property. This will provide room for non-divorcing co-wives to defend their interests in the property upon divorce of the other wife.

1 No 49 of 2013 (Kenya).

2 Similar provision is proposed by Canadian HIV/AIDS Legal Network (2009) *Respect, Protect and Fulfil: Legislating for Women's Rights in the Context of HIV/AIDS Volume Two: Family and Property Issues — Module 3: Property in Marriage.*

3 See Second Schedule to the LMA.