DIVISION OF MATRIMONIAL ASSETS AFTER DIVORCE: A Feminist Theoretical Standpoint vis a vis Tanzanian Law

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Abstract

Division of matrimonial property upon divorce is very important aspect in matrimonial disputes. However in Tanzania the division is somehow blurred. It is more of courts discretion rather than a clear yardstick on how the division should be. The foregoing is as a result of the courts being masterminded by discretion rather than a clear yardstick for division. Henceforth the phenomenon of division has remained somehow a "dubious" undertaking. It is against the above background that the article considers the extent to which the Law of Marriage Act Cap: 29 RE: 2002 and the Tanzania case laws appreciate ownership and distribution of matrimonial property acquired by spouses during the subsistence of marriage. In so doing, the article considers whether courts in matrimonial cases consider domestic chores (work) as a contribution of value in distributing matrimonial property. The article underscores that whilst domestic work was recognized in a 1983 landmark decision as one among the basis for contribution in acquisition of the matrimonial home, there is lacuna on its implementation which is associated with the use of discretionary power by the courts. The discretion is in relation to determining percentages or value that attach to domestic work. The authors therefore examine this lacuna on the use of discretionary power from a gender perspective. The article argues that the discretion hinders fair and reasonable distribution of property. The authors offer recommendations on how best the courts may adjudicate cases by incorporating gender issues.

Key words: Property, Divorce, Feminist

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1.0 Introduction

Injustices on the division of matrimonial assets have been noted on many decided cases in Tanzania through judicial decisions. This is contributed by the failure of the relevant legislation to recognize the value of formal or informal contribution of women towards the acquisition of matrimonial assets[3].

It is the trend of feminists all over the world to fight against any kind of injustice to women. It is not disputed that at family level the economic development of the family is contributed by both men and women regardless of whether one is employed in the formal or informal sector. The value of domestic work is also indispensable as it has a direct impact to make home's life comfortable and ensures peace and harmony in the matrimonial home. As such, domestic work contributes significantly to family economic development. In this paper, the authors try to establish whether courts in matrimonial cases consider domestic chores (work) as a contribution of value in distributing matrimonial property. The article underscores that whilst domestic work was recognized in a 1983 landmark decision as one among the basis for contribution in acquisition of the matrimonial home, there is lacuna on its implementation. The lacuna is associated with the use of discretionary power by the courts. It is thus a thrust and driving force of this article to address the phenomenon.

3 There are plethora of authorities to this effect, most referred is in the case of *Maryam Mbaraka Saleh v. Abood Saleh Abood*, Civ. App. No. 1 of 1992

2.0 Feminist Theory on Women and Property

There are many feminist theories and perspectives which address women's property rights. But for the purpose of this article, attention is paid on three feminist theories and their views on women's property rights particularly their contribution on matrimonial assets and the way their contribution are valued.

Liberals hold that freedom is a fundamental value, and that the just state ensures freedom for individuals. Liberal feminists share this view, and insist on freedom for women. Liberal Feminists believe that female subordination is rooted in a set of customary and legal constraints that block entrance and success to them.[4] They presuppose that women's rights in most cases are denied by the presence of some customs and laws which are unfriendly to women. Thus, there is need to fight for access and equitable enjoyment of rights. This can be achieved by emphasizing on woman's ability to maintain equality through actions. Liberal feminists believe that women's domestic responsibilities will inevitably place them at a disadvantage and favour policies that encourage men to assume a proportionate share of family responsibilities.[5] Therefore, domestic responsibilities of a woman can be weighed as an asset as well as an exploitation tool in acquiring matrimonial property during the subsistence of a marriage.

On the other hand, the Radical Feminists believe that the oppression of women is so deep that it will take a significant overhaul of existing society structures

4 Available at http://en.m.wikipedia.org/wiki/liberal-feminism accessed on 17th March, 2017

5 Carbone, JR A Feminist Perspective on Divorce available at http://www.nbci,nlm.nih.gov/pubmed/7922279 accessed on 15th March, 2017

to make the world fairer to women.[6] Those advocating for this theory believe that injustices to women is a historical phenomenon embedded in male dominance over women. Therefore, it is very difficult to appreciate women's effort and contribution through domestic work and its impact to the economic development of the family.

Cultural Feminism is based mainly on the biological difference between a man and a woman. The differences which mainly focused on the reproductive functions resulted in the woman being considered as the main care taker for children. However, their service as care takers is so undermined to the extent that it is not considered as part of contribution on acquisition of matrimonial property.

3.0 Property Rights of Spouses in International Human Rights Laws

The right of spouses to own property within marriage has not been given special attention in International Human Rights Instruments. The Instruments however recognize the general right of everyone to own property. For example, article 17 (1) of the Universal Declaration of Human Rights of 1948, (the Declaration)[7] guarantees every individual a right to own property alone as well as in association with others. The Declaration presupposes two types of ownership of property, sole ownership and joint ownership of property. The Declaration further provides for equal rights during marriage and at its dissolution[8]. As long as all human being are born free and equal in dignity and rights[9], therefore, in order to be just and fair it is reasonable to suggest that, if there is sole ownership of the property that property is not subject to division. It would also be reasonable to conclude that if there is contribution whether formal or informal by a spouse in the acquisition of property, that property will be considered as jointly owned and therefore subject to division during dissolution.

The Convention on the Elimination of All Forms of Discrimination Against Women[10] (CEDAW) does not have a specific provision concerning the issue of division of the matrimonial assets. It argues for the need for state parties to take appropriate measures to eliminate discrimination against women in all matters related to marriage and family relation and in particular to recognize the same right and responsibilities during marriage and at its dissolution.[11]

The above provision provides one among the rights which women may enjoy during marriage and at its dissolution. CEDAW emphasis is to have equality of men and women during the subsistence of marriage and at its dissolution. This right might be implied in property rights of the spouses during and at dissolution of marriage. It may therefore be argued that spouses have equal rights to independently or jointly acquire property. As such, if the property is jointly acquired, the right to equal division of the property will also be implied.

6 Available at study.com/academy/lesson/cultural-feminism-definition-lesson-quiz.html accessed on 17th March 2017

7 General Assembly of the United Nations, Resolution 217A, passed in Paris France, 10th December 1948

8 Article 16(3) of the Universal Declaration of Human Rights of 1948, the same can also be seen under Article 16(1)c of the Convention on the Elimination of All Forms of Discrimination against Women under which Tanzania had ratified in 1985.

9 Article 1 of the Universal Declaration of Human Rights of 1948

10 Tanzania had signed it on 17th July, 1980 and ratified it on 20th August, 1985

11 Article 16(3) of CEDAW

In addition to the above, the Protocol to the African Charter on Human and People's Rights of Women in Africa[12] (the Protocol) recognizes the right of a woman during marriage to acquire her own property and to administer and manage it freely.[13] The Protocol gives space to a woman to have the right to have sole ownership of property to the exclusion of her spouse. The aspect of marriage therefore does not interfere with the right to independently own property.

Again, the Protocol requires state parties to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation and divorce and in particular to ensure that women and men have the right to equitably share joint property from the marriage.[14]

The above provision has strongly denied unjust and biased decisions on the division of joint property acquired during marriage. Impliedly, the provision reveals the need for having in place a piece of legislation which could facilitate an equitable sharing of property by looking at contribution of spouses. This suggests that the contribution is not necessarily to be in form of money. It can be in the form of work or property so long as it has an input during the realization of the property.

Even if the equitable sharing is subjective, what is important is to have a reasonable decision in the eyes of the reasonable man by taking into consideration all the circumstances which contributed to the acquisition of the joint property in dispute.

12 Tanzania signed it on 5th November 2003 and ratified it on 3th March, 2007
13 Article 6 (j) of the Protocol to the African Charter on Human and People's Rights of Women in Africa
14 *Ibid* Article 7 (d)

4.0 Legal Framework Governing Property Rights of Spouses at the National Laws

Right to own property is one among the fundamental rights which have been guaranteed by the mother law of the land that is the Constitution of the United Republic of Tanzania of 1977 (the Constitution) as amended from time to time. When one takes a glance to the reality on the ground, one aspect is very evident. Husbands and wives have not been treated as equals, men have been considered as heads of families, a resultant of which significantly affects the division of matrimonial property.[15]

4.1 The Constitution

The Constitution[16] recognizes the entitlement which an individual has on owning and protection of his property in accordance with the law. The stated right impliedly extends also to the spouses. This is because there is no specific provision in the Constitution which provides for the modality of owning, protecting and distributing property among spouses during marriage and at the dissolution of marriage.

The Constitution assumes the rights of the spouses to own property as one of the basic rights. It does not accord special rights to women as regards ownership, acquisition and protection of property during the subsistence of marriage and its dissolution.

In the feminist stand point of view, the lacuna of the specific provision in the mother law of the country is a serious

15 See Binamungu C.S.M, Division of Matrimonial Property in Tanzania: The Quest for Fairness, 2013, PhD thesis, Open University of Tanzania,p.2
16 Article 24(1) of the Constitution of the United Republic of Tanzania, Cap 2of 1977

anomaly which cannot be cured by including the woman in the group of every person. There ought to be a special provision which must recognize the rights of the woman to own property during the marriage and its protection when the marriage is dissolved. This is because women have been historically disadvantaged in property ownership and acquisition especially in marriage in Tanzania.

4.2 The Law of Marriage Act, Cap 29 R.E 2002

The enactment of the Law of Marriage Act in 1971 came as a panacea towards harmonizing the regime of matrimonial property relations which in essence prior to the enactment was governed by multiple laws.[17] The enactment of the Law of Marriage Act of 1971 to regulate family matters including marriage, divorce, property rights between spouses and other incidental related matters in marriage was a milestone in realizing the property rights of spouses during marriages. The Act is also relevant in the division of property when the marriage is broken down at the time of granting decree of separation or when it is broken down beyond repair which ultimately results in a decree of divorce. The Act is however supplemented by other Acts like the Land Act[18] and the Village Land Act[19], among others.

The Law of Marriage Act[20] (the LMA) is a consultative statute in Tanzania on family matters. The Law through its provisions recognizes the right of the spouses to own property individually and jointly[21] during the subsistence of the marriage. It is a well established principle in the Law that marriage does not affect the property rights of the spouse as it allows each of the spouses to own property to the exclusion of the other. The law presumed that in any property acquired by either of the spouses during the subsistence of marriage, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his/her spouse.[22]

The above position was enunciated in the case of *Samwel Olung'aigogo and two others Vs Social Action Trust Fund and others*[23] which held that deeds of plots in the name of a husband indicated that the plots solely belonged to him. This meant that the issue of joint ownership could not be established based on the available proof of the title deeds.

The afore abstraction is famously known as "separate property" which presupposes that whatever property the husband or wife acquired before and after marriage remains his or her property, exclusively. To the extent of such property, marriage changes nothing. Accordingly, section 60 of the 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 their husbands.[24]

17 It should be taken into cognizance that, prior to 1971 laws governing matrimonial property relations included the following, Statutory Law, English Law (common law, principles of general application and principles of equity), customary law and religious law.
18 Cap . 113 R.E 2002
19 Cap. 114 R. E 2002
20 Cap 29 R.E 2002
21 Sometimes referred to as Joint and Community property ownership
22 *Ibid* Section 60(a)
23 [2003] TLR 343
24 Lukiko, V. "Protection of Matrimonial Property Rights of Non-co Divorcing Wives in Tanzania," Institute of Judicial Administration Lushoto Journal Volume I, Issue No. II, June , 2018 , at p.48. It was an apt position as well in the case of *Bi Hawa Mohamed v. Ally Sefu [1983] T.L.R. 32*

The foregoing legal position means that it requires conclusive proof to rebut the presumption of sole ownership to property. If that proof is unavailable, the presumption will hold water and there will be no avenue for that property to be subjected to matrimonial assets and division thereof during the granting of the decree of separation or divorce.[25] In other words, following marriage, spouses' separate property remains separate until such property is improved upon by the other spouse, thus converting it into matrimonial property.[26]

Despite the ownership in the names of both spouses, the law presumed that there are equal beneficial interests to the named couple.[27] Again, this is a rebuttable presumption in which the court welcomes any conclusive proof to prove otherwise. If that proof cannot be established and the court is not convinced on a balance or preponderance of probability, the presumption stands as the mentioned provision stated. Consequently, the property will be regarded as matrimonial property and subject to division when the decree of separation or divorce is granted by the court.

It is also worth to note that, property independently acquired during or before marriage if substantially improved by the other party or spouse during the subsistence of marriage is considered as part of matrimonial property and therefore subject to division when the decree of separation or divorce is granted.[28]

The above has been stated in the case of *Anna Kanungha Vs Andrea Kanungha*[29] in which the court held that, in terms of S. 114 (3) of the Law, personal property is liable for distribution when such property has been substantially improved during marriage by the joint efforts of the spouses.[30]

Therefore, our laws recognize all property which is acquired by the parties before and during the marriage as part of matrimonial property so long as there is contribution of each of the spouses either in terms of money, property or work. The contribution must have substantially improved the property in question. Thus, the law is very clear that what is subject to division when the decree of separation or divorce is granted is any property which will be termed as a matrimonial property.

Now an interesting issue which this article tries to examine is the extent to which the law and case law appreciate the division of the matrimonial assets based upon the contribution made by each party on acquiring the property from a gender perspective. It is important to note that one among the challenges of the law is its failure to define what constitutes matrimonial assets. This is despite the fact that its presence is appreciated under section 114 of the LMA that gives power to the court to order the division of the matrimonial assets when granting or subsequent to the grant of a decree of separation or divorce.

25 The position in the case of *Samwel Olung'aigogo and Two others vs. Social Action Trust Fund and Others* (*supra*) is explicitly coined under Section 58 of the LMA which 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.'

26 Binamungu, C.S.M, (2013) p.57

27 *Supra* 60(b)

28 Section 114(3) of Cap 29 R.E 2002

29 [1996] TLR 195

30 This was an akin view in the case of *Bi Hawa Mohamed* (supra) which as to what is "a family or marital property" was to the effect that "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"

Meanwhile, the term matrimonial assets has neither been clearly defined in the Law nor in the judicial decisions. The failure is notwithstanding that the concept of matrimonial asset has been appreciated in various judicial decisions through interpretation of section 114 of the LMA. For example, in the case of *Samweli Moyo Vs Mary Cassian Kayombo,*[31] the court held that, the District Court erred in ordering the division of the matrimonial assets because the assets were acquired neither during the marriage nor through the joint efforts of the parties. This decision suggests that matrimonial assets include those assets acquired by the parties during the subsistence of marriage and properties acquired by the parties before the marriage which has been substantially improved by the spouses during the subsistence of the marriage.

It has to be borne in mind that the law and the judicial decisions are silent on those assets which are acquired by the parties during a pending court proceeding of either separation or divorce. It is still a question whether these can be considered as part of matrimonial assets so as to be part of the division. It is important to have a clear definition because during court proceedings the law still considers the parties as husband and wife.[32]

A difficult situation arises when the couples are still cohabiting in the matrimonial home. The wise decision on that scenario is to confirm whether the other party had contributed towards the acquisition of the matrimonial property or not without forgetting to take into consideration the contribution in terms of work particularly domestic work performed by one of the spouses.

31 [1999] TLR 197

32 See section 99 of Cap 29 R.E 2002 which authorize the court of law to issue divorce

5.0 Power of the Court to Order Division Matrimonial Assets

The Law empowers the court when granting a decree of separation or divorce to order among other reliefs the issue of division of matrimonial assets acquired by the parties during the subsistence of marriage.[33]

It has to be noted that a distinction must be drawn between assets acquired by the parties through their joint efforts and those properties acquired by the sole efforts of one spouse in which the other spouse had substantially improved. The two scenarios cannot be equated at the time of ordering the division of the matrimonial assets since their contribution on acquiring the property cannot be the same even if both are considered as matrimonial assets.

The principles governing jointly acquired assets are set out under section 114 of the Law. The Law empowers the court subject to consideration stated in the above provision to incline towards equality on the issue of division of the matrimonial assets acquired by them during the marriage by their joint effort. The law is very clear that what is subject to division are those properties which are acquired by the joint efforts of the parties. In this respect, the law tries to set out the criteria to be considered by the court when exercising the power conferred to it in order to arrive at a just and reasonable decision in the eyes of the law.

33 However as it introduced this article squarely ventures on the division of matrimonial property upon divorce per se

5.1 The Operation of Section 114 of the LMA on Division of Matrimonial Assets

In Tanzania there is no presumption of equal sharing of the matrimonial assets. Equality of division may apply only if the court is satisfied that the claimed property is jointly acquired by the spouse in terms of money, property or work. The following are the principles that owe its origin from the above provision of the Law to guide the court on the issue of division of the matrimonial assets acquired by the joint efforts of the parties

i. The Custom of the Community to which the parties belong;
ii. The extent of the contribution made by each party in money, property or work towards the acquisition of the assets;
iii. To any debts owing by either party which were contracted for their joint benefit and
iv. To the needs of the infant children, if any, of the marriage.

With all the above considerations, the court should have a serious commitment to divide the property based on equality and without any kind of discrimination. In some cases the court can have regard to all the above stated factors in arriving at its verdict. However in other cases the court may only consider one or two of the stated factors depending on the circumstances of the case. All this is allowed, what is important is to make sure that equality is upheld in the division of matrimonial assets.

5.1.1 The Custom of the Community to which the Parties Belong

Tanzanian's legal system is pluralist in nature as it has distinct systems of law. Customary law is one of the laws which is applicable in the country. The legal basis for the application of customary law in Tanzania can be seen under the Constitution which impliedly authorizes its application so long as its provisions don not conflict with it.[34] The Constitution is very clear that any law which is in contradiction with its provisions can be declared null and void to the extent of its inconsistency. The application of customary law is subject upon the following pre requisite; the custom in question must be in existence and practiced in an area, the parties involved in disputes should be natives of that area, the rules of customary law should be relevant to the matter between the member of one community or if the rule of both communities make similar provision and the matter in dispute should be of civil nature.[35]

Since the division of matrimonial assets is one among the reliefs recognized when there is matrimonial disputes, the law authorizes the application of custom of the community among the criteria for division of the matrimonial assets if the property was acquired by the joint efforts of the parties. In the case of *Pulcheria Pundugu V Samwel Huma Pundugu*[36] the court stated that, on the question of division of matrimonial assets if the parties are of different customs a non-traditional mode of life may be assumed and the criteria of division will not base on the custom of the community. It is

34 The Constitution of the United Republic of Tanzania, Cap 2 under Article 64(5)
35 Section 11(1) a of Judicature and Application of Laws Act Cap 352 R.E 2002
36 [1985] TLR 7

worth to note that, this decision impliedly suggest that if the spouses belong to the same community, the rule of customary law may apply. This has however a negative impact on women because in some communities, custom dictates that a divorced woman is not entitled to a share of a matrimonial property even if the property was jointly acquired during the subsistence of the marriage.[37]

Such customary laws are arguably bad laws since they discriminate women which is against the Constitution and International Human Rights Instruments discussed above. Tanzania signed and ratified the International Human Rights Instruments without any reservation. After ratification the state party had affirmed to domesticate them into its national laws though not all the provisions have been domesticated.

There are two contradictory decisions from the High Court. One school ventures towards declaring customary law unconstitutional and the other one is reluctant to subject the customary law to constitutional scrutiny. The first school of thought is to the effect that, any custom which does not recognize the contribution of a woman in acquiring matrimonial property should be declared unconstitutional and it should lack legal effects to enforce it. This is a position in the case of *Ephraim Vs Pastory and Another*[38] in which the court declared the customary law of Haya as unconstitutional because it contravened the right to enjoy the property of woman as guaranteed under the Constitution.

On the other hand, the High Court in the case of *Elizabeth Stephen & Another v. Attorney General of Tanzania*[39] denied inheritance rights of two widows who each had been married under customary law. Despite the court recognizing the impugned provisions of Local Customary Declaration Order No. 4 being discriminatory, the Court nevertheless refused to invalidate the law on the basis of its unconstitutionality. Instead, the High Court stated,

> *"it is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality. This will be opening Pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path."*

The two cases before the High Court as observed above are in juxta position, having disturbed the position that was enjoyed for quite sometimes in the case of *Ephraim v Pastory (supra)*. As a result, the situation remains precarious in relation to constitutionality of customary law.[40]

Moreover, in recognizing the custom to which the parties belong, the Law does not resolve the circumstance when one party of the dispute is in polygamous

37 This is the practice of most of the patrilineal societies in Tanzania

38 Civil Appeal No. 70 of 1989, High Court of Tanzania at Mwanza (Unreported)

39 Miscellaneous Civil Cause No. 82 of 2005 , Judgment of the High Court 2006

40 Whilst waiting for more directives from upper courts, we are of the view that Communication to CEDAW as a result of the High Court decision be maintained. And that is for the parties be given " appropriate reparation and adequate compensation commensurate the seriousness of the infringements of the rights", this is per CEDAW Committee Communication No. 48/2013 as adopted by the Committee at its 16th Session , 15th February, 2015.

marriage since the law presumed that customary marriage allows the husband to have more than one wife.[41] The interesting question is how the court will consider the issue of division of matrimonial assets to the other spouses who did not petition for divorce.[42]

5.1.2 The Contribution Made by Each Party in terms of Money, Work and Property

The Law considers the contribution towards the acquisition of matrimonial assets in a very peculiar style for the purpose of enabling the spouse to acquire a share when the marriage is dissolved by the court. It takes into account the contribution in terms of money, works and property.

Before 1984 the interpretation of assets jointly acquired before the marriage was quite different with what is, as of now. Case law did not consider the purposive meaning of the word 'works' as is defined and connoted in the Law. The case law suggested that 'works' include formal or informal undertaking done by the spouses and did not consider domestic work as part of 'works.' Traditionally, domestic work is considered as a part and parcel of a woman's job and therefore to be done by women alone.

That can be seen in the case of *Christna Petro Lugemalira v Helena Abatoli Kolwe*[43] in which the Court held that, section 114 of the Law required that contribution should be in terms of money, property or works and not otherwise. The decision emphasized that the works intended under the above provision does not include the domestic work of cooking. The Judge in that case disowned the decision of the Primary Court which took into consideration the contribution of the wife in acquisition of matrimonial property through cooking food and performing of other housewife duties.

The controversy on the interpretation of the Law was resolved by the 1983 landmark decision of the Court of Appeal in the case of *Bi Hawa Mohamed V Ally Sefu.*[44] In this case, the Court of Appeal defined work as it is provided under s. 114 of the Law to include the domestic works done by the wife as a contribution towards acquiring matrimonial property and so to be considered as part of the contribution in acquisition of matrimonial assets.

The contribution in terms of works in the above case has to be considered as embracing the domestic work of a husband and wife. It means that, the work is not strictly limited to formal works but also includes household chores, bearing and rearing of children, making the home comfortable to the other spouse and the issue of marriage.

Therefore, the principle under s. 114 of the Law concerning the division of matrimonial assets is that of compensation whether what is being compensated is direct monetary contribution or domestic services as it was held in the case of *Mohamed Abdallah Vs Halima Lisangwe.*[45] The decision established the need for compensation on the duties done by a woman which are considered as the primary duties of the woman. The duties include but not limited to delivering children, rearing them and taking care of the matrimonial home.

41 Section 10 of the Cap 29 recognize polygamous marriage on the part of the husband who contracted customary or Islamic marriage

42 The position on this may be a food for thought when one visits the case of *Maryam Saleh v. Abood Saleh Abood*, Civ. App. No. 1 of 1992, the Court of Appeal of Tanzania (unreported)

43 [1982] TLR 146

44 *Ibid*

45 [1988] TLR 197

In another case of *Bibie Mauridi v Mohamed Ibrahim*[46] it was held that performance of domestic duties amount to contribution towards acquisition but not necessarily 50% since the amount to be awarded normally depends on the extent of contribution made by each party in the acquisition of the matrimonial property in dispute.

The issue now is how the court assesses the percentage of domestic work when it is considered as part of contribution. The question is whether the performance of domestic work adds any credit to a spouse when the marriage is dissolved. The other matter to consider is with regard to women who apart from doing domestic work, they are also working in formal or informal sector. The question would be whether these women are entitled to a double share during division of matrimonial property. Do our Law and Court have positive discrimination when interpreting section 114 of the Law?

There is still ambiguity on the issue of percentage a woman is entitled to receive as her compensation by performing domestic duties apart from her contribution from her formal or informal work. This was evident in the case of *Charles s/o Manoo Kasare and Another Vs Apolina w/o Manoo Kasare*[47] in which the woman prayed to be awarded half of the value of the property acquired during the subsistence of the marriage on the basis that they had stayed together and she performed wifely services for 25 years and that she had also provided monetary contribution towards the acquisition of the property. Unfortunately, at the end of the day the woman was awarded only a quarter of the value of the property even where the court recognized that there was ample evidence proving her monetary contribution towards the acquisition of the properties apart from her housewife services.

In another case of *Sophia Mgalla Vs Adolph Amian*[48] the appellants appealed against the decision of the trial court's order refusing her an equal share of the matrimonial assets when an order for divorce was granted. Despite her monetary and housewifely contribution still the trial court denied her equal share on the matrimonial assets acquired during the subsistence of the marriage. This can be seen in the following remarks of the High Court Judge:

> *'The appellant was both a housewife and a businesswoman. Her contribution as a housewife embraces both her domestic efforts and work. Her contribution as a businesswoman was both in terms of money and work'.*

The above testimony shows that the appellate court was satisfied with the contribution of the appellant based upon the evidence presented in the trial court. Despite the good remarks made by the Judge, the court failed to award the appellant an equal share of the matrimonial assets as she prayed, instead she was awarded forty percent of the market value of the matrimonial property in dispute. This shows that the mindset of some of judicial officers does not adequately address the issue of contribution made by the woman particularly the contribution in terms of domestic work. In the above case it was well proved that the woman had doubled her contributions towards the acquisition

46 [1989] TLR 162
47 [2003] TLR 425
48 Civil Appeal no 73 of 2005, High Court of Tanzania at Dar es Salaam (Unreported)

of the matrimonial property through her monetary and domestic work. However, the Judge abandoned her contributions by failing to appreciate her prayer of equal share of the matrimonial assets.

The above issues create a centre of contention on the proper use of discretionary powers exercised by judicial officers when adjudicating division of matrimonial assets in divorce cases. The judicial discretion needs to be exercised in a just and fair manner as intended by the law. It is very clear that the court recognize domestic work as a primary duty done by women owing to patriarchal system in our jurisdiction as part of contribution in acquisition of matrimonial property. However, the court does not compute it in terms of percentage to assess the contribution of the woman. In most cases the court uses discretional power to evaluate the domestic work. The extent to which the discretional power is exercised judicially is one among the issues which this article is trying to address.

5.1.3 To any debts owing by either party which were contracted for their joint benefit

The Law extends its power when ordering the division of matrimonial assets to include the debts that the spouses have contracted jointly during the subsistence of marriage. If the assets are divided by the spouses, it is wise also to share the liabilities so long as it will be proved that the liabilities contracted benefited both spouses or if both spouses signed the contract and the creditor's documents prove the name of both[49].

The above division will not include the debts contracted by the wife in accordance with section 64 of the LMA. This is because the law presumed wife's authority to pledge her husband credit if the spouses are living together, or separated or deserted of which the husband is under a duty to provide maintenance on necessary items to the wife and the children and the wife does not receive such maintenance and does not have sufficient means to receive the same. The division does not also include the debts contracted by either of the spouse before contracting the marriage.

It is worth to note that, so far the authors have not come across any decided case on the issue of debts contracted by the joint efforts of the spouse. Therefore, the court should have the same spirit of dividing the debts as the way they do in assets. Suffice to say that it is advisable that reasonable arrangements be made for payment of the debts before ordering the division of the assets.

5.1.4 To the needs of the infant children, if any, of the marriage

This is another criteria in which the court may consider when granting an order on the division of matrimonial property. The division of the matrimonial assets shall also consider the best interest of the children. The vigorous approach on exercising judicial discretion on the division of matrimonial assets on Feminist standpoint can be seen in the case of *Eliester Philemon Lipangahela V Daud Makuhana*[50] where by one among the reliefs sought by the appellant was the equal division of matrimonial assets in which the trial court held that the appellant failed to adduce evidence to

49 This position was aptly dealt with in the case of *Richard William Sawe v. Woitara Richard Sawe*, Court of Appeal of Tanzania at Dar es Salaam [Court of Appeal of Tanzania, Civil Appeal No. 38 of 1992]

50 Civil Appeal no 139 of 2002, High Court of Tanzania at Dar es Salaam, (Unreported)

prove the extent of her direct financial contribution to satisfy the requirements of section 114(2)b of the Law.

The appellate court allowed the appeal and set aside the trial court decision on the division of matrimonial assets on the reason that the trial court contravened the spirit of the above provision since it was proved that, apart from the appellants doing her housewifely duties she also engaged in the business of selling vegetables.

Therefore, the Appellate Court awarded each of them 50% of the share of the matrimonial assets because the properties in dispute were obtained by the joint efforts of both parties. Also the court considered the needs of the children of the marriage because each party was granted custody of one child.

6.0 Experience from other Jurisdictions

In the Ugandan case of *Bakiza vs Nafuna Bakiza*[51] Lady Justice Percy Night Tuhaise, referred to another *Ugandan case of Muwanga v. Kintu* [52] 'that matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to'

The Ugandan case may be persuasive in our jurisdiction as to what are the assets which are subject to division when the decree of separation or divorce is granted by the court. Thus in view of the above decision, the property which are held in trust for a clan by one of the spouses or the property which is owned by a spouse before the marriage cannot be termed as matrimonial assets and therefore should not be subject to division.

One of the most difficult legal challenge which this article is trying to address is the extent to which the Court uses Legislation and Case Laws to address the issue of division of matrimonial assets on just and equitable basis which is the baseline of the Feminist standpoint instead of exercising a wide discretion which the court is enjoying on division of matrimonial assets at the moment which cannot be exercised judicially.

The discretion exercised by the Judge or Magistrate to divide the matrimonial assets in many aspects is done not in accordance with the law. In most cases, it favours the patriarchy system and men as they head the family and does not much appreciate the double contribution of women in terms of domestic works and proceeds from their engagement in formal/informal employment.

In Kenya, the division of matrimonial assets is based on the contribution of the parties in acquisition of the property. This is because ownership of matrimonial assets is vested in the spouses.[53] Unlike Tanzania, the Kenya legislation has gone far by defining contribution to include domestic work and management of domestic home, child care, companionship, management of family business or property and farm work.[54] Furthermore, it defines matrimonial property to mean matrimonial homes, household goods, any other movable and immovable property jointly owned and acquired during the subsistence of the marriage[55].

51 (Divorce Cause No.22 of 2011) (2015) UGHCFD 26 (20 August, 2015) available at www.ulii.org/ug/judgement//high-court-family-division/2015/26 accessed on 18th April, 2018

52 High Court Divorce Appeal No 135/1997

53 S 7 of the Matrimonial Property Act, No 49 of 2013

54 *Ibid* Section 2

55 *Ibid* Section 6(1)

The above Kenyan Legislation should be regarded as a model to our jurisdiction as it clears doubts on the interpretation of matrimonial assets and the contributions which is the best way to determine the rights of spouses in relation to the matrimonial properties.

Apart from the above credit, the Legislation failed to percentage the extent of contribution in performing domestic work and farm work. There was need to go a mile further to percentage the domestic work performed by the wife. This has resulted in gender biased decisions. For example, in the case of *GAA Vs ZTG*[56] the Justice appreciated the indirect contributions of the wife based upon the evidence adduced by both parties before the court which showed that the wife was a great home maker, cared for their children, made food and tea and took it to the husband and their staff at their business. Despite the above contributions, the court held that the wife was only entitled to 10% of the matrimonial assets.

It must be noted that the above decision was before the coming into force of the new Legislation. However, neither the Legislation nor the case laws specifically apportioned the contributions of domestic work in acquisition of matrimonial assets.

7.0 Conclusion

Apart from addressing the issue of divorce, a number of matrimonial causes filed in the courts also entertain the division of matrimonial assets acquired by the spouses. The division is based on a number of considerations one of which is the contribution made by the spouses through domestic work. The court's guidance on adjudicating the relief sought by the parties is the Law and case laws. The Law is not much clear since some of the issues are not clearly defined; it is through case laws which clear doubts on the interpretation of the law. Unfortunately, on the issue of accounting the contribution in terms of domestic work a clear guidance is missing. The case laws appreciate the contribution realized through domestic work but fail to apportion it in terms of percentage. This contributes to discrimination of women in acquisition of matrimonial assets since they end up getting small portions. The article has shown that in most cases women double their contributions to the matrimonial property (contribution by works and monetary) but this is taken as a single contribution by the courts. It is advanced by the article that the portion of domestic work should be known and quantified before distribution. This will bring in fairness in the division of property as it will be treated separately from other types of contribution such as monetary contributions.

8.0 Recommendations

The LMA cannot be silent ***sine die***. There is an impelling thrust to explicitly attribute meaning to the statute book as to what entails " contribution towards acquisition of matrimonial property and/ assets".

The court should consider the length of the marriage in valuing the contributions made by the spouse particularly on evaluating contributions made in domestic work. The longer the spouse stayed in the marriage the more they make the home comfortable which has a positive impact on acquisition

56 . Nairobi, ELC NO.675 of 2011

of matrimonial assets. This should be subject to proof that the parties were not in separation.

The value of the matrimonial assets should be evaluated from the date when the suit was filed in the court since there might be a significant change from the date the suit was filed to the date of the final decision. This is because it is very rare for the spouse to be in a friendly relation when the matter is before the court. That is to say there is a possibility for one spouse to make substantial change in the property with exclusion of the other. Therefore, it will be unfair to divide the property as if the other had contributed, but again this is subject to concrete proof.

The judicial officers should consider gender factors in interpreting the contributions. This should be a key factor when dividing matrimonial properties. Purposive interpretation may help to reach a fair and reasonable decision.

There is an impelling need to incorporate International Human Rights Instruments particularly those which Tanzania had signed and ratified when adjudicating cases. These may act as a catalyst to the judicial officers and other justice stakeholders when adjudicating cases.

The Government and those advocating for human rights particularly women's rights should make awareness of the gender issues to judicial officers, officers of the court, and the entire public in order to sensitize them. Also more encouragement should be directed to Tanzanians to have the culture of valuing domestic work and to eliminate the belief rooted in the patriarchal system which considers domestic work as part and parcel of the woman and having no bearing on acquisition of the matrimonial properties.