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# An Examination of the Law of Marriage: Act regarding the Distribution of Matrimonial Real Property in the Context of Customary and Islamic Polygamous Marriages in Mainland Tanzania

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## ABSTRACT

*This paper examines the Law of Marriage Act as it pertains to the division of matrimonial real property within the context of customary and Islamic marriages in Mainland Tanzania. It highlights the legal frameworks governing property rights, identifying disparities and challenges faced by spouses in these marriage types. The study reveals that while the Act aims to provide equitable property distribution, it often falls short in addressing the unique cultural and religious dynamics of customary and Islamic practices. Key issues include inadequate legal recognition of non-formalized marriages and conflicting interpretations of property rights. By analyzing case law and existing literature, this paper advocates for reforms to enhance legal clarity and ensure fair treatment for all spouses, promoting gender equity and protecting the rights of individuals within diverse marital contexts. Ultimately, it underscores the need for an inclusive legal approach to matrimonial property rights in Tanzania.*

**Keywords:** *Polygamous Marriage, Customary Marriage, Islamic Marriages and Division of Matrimonial Real Property.*

## I. INTRODUCTION

A polygamous marriage (Islamic or customary) is a marriage in which a husband gets married to more than one wife at the same time concurrently or simultaneously.<sup>2</sup> Polygamous marriages are significantly influenced by cultural practices, societal beliefs, community perspectives, and individual decisions to engage in a polygamous lifestyle, all of which intersect with legal

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<sup>2</sup> Lea Mwambene, What Is the Future of Polygyny (Polygamy) in Africa? 20 Potchefstroom Electron. L.J.2, 1-33 (2017); See also **Law of Marriage Act, Cap. 29, R.E. 2019 (Tanz.)** Sections 9(3), 10(1) (b) and 10(2) (a).

considerations surrounding marriage and family law.<sup>3</sup>

Traditionally, many Tanzanian societies have and still practice polygyny, permitting a man to have multiple wives, provided he can adequately support them.<sup>4</sup> This custom is deeply rooted in cultural norms and intersects with legal frameworks governing marriage in the country. Moreover, polygamous marriage is upheld within Islamic societies<sup>5</sup>, as Islamic law permits a man to marry up to four wives, provided he treats each wife equitably and that all marriages are entered into with mutual consent.<sup>6</sup> Ultimately, polygamous marriages are statutorily allowed in Tanzania.<sup>7</sup> It is estimated that approximately one-quarter of women in Tanzania are engaged in polygamous relationships.<sup>8</sup> In Islamic marriage, a husband can marry up to four wives; in customary marriage, a man can marry more than one wife without restriction.<sup>9</sup>

Marriage fosters confidence in spouses to make investments for their present and future needs,<sup>10</sup> including acquiring various forms of property, particularly real estate, which must be addressed in the event of divorce. Despite the protections offered by international instruments and constitutional guarantees of property rights<sup>11</sup>, the division of matrimonial real property in polygamous marriages presents significant challenges under the existing matrimonial laws (statutory, Islamic, and customary law) Although the Law of Marriage Act (LMA) seeks to integrate personal, religious, and customary laws, discrepancies remain between the LMA, the Judicature and Application of Laws Act,<sup>12</sup> and applicable customary and Islamic laws. This article examines the legal dilemmas and challenges associated with dividing matrimonial real property in polygamous marriages upon divorce, ultimately proposing necessary reforms to the LMA and other relevant legislation

### **(A) Material and Methods**

This paper employs a doctrinal legal research method, which is essential for identifying,

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<sup>3</sup> David Simotua Sigilai, *The Practice of Polygamy and Church's Response: A Case Study of Africa Inland Church Losirwa in Uasin Gishu County, Kenya*, 1 *ShahidiHub Int'l J. Theology & Religious Studies* 74, 73-86 (2021).

<sup>4</sup> Fatuma A. Mgomba, *Right to Health: Polygyny and De Facto Polygyny May Increase Women's Vulnerability to HIV/AIDS in Tanzania*, 3 *East Afr. J. Traditions, Culture & Religion* 2, 1-11 (2021).

<sup>5</sup> Kumedi A. Ja'far, Rudi Santoso & Agus Hermanto, *A Sociohistorical Study of Polygamy and Justice*, in 1st Raden Intan Int'l Conf. on Muslim Societies & Social Sciences (RIICMuSSS 2019) 338, 338-342 (Atlantis Press 2020).

<sup>6</sup> David Simotua Sigilai (FN 3), 80.

<sup>7</sup> *Law of Marriage Act, Cap. 29, R.E. 2019 (Tanz.)*, sections 10(1) (b), 10(2) (a) and 25(1) (c) and (d).

<sup>8</sup> Rachel J. Howland & Ashley Koenen, *Divorce and Polygamy in Tanzania*, 15 *Soc. Justice*, 10, 1-39(2014)

<sup>9</sup> Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 58, (Nairobi: Law Africa Publishing (K) Ltd 2016).

<sup>10</sup> Robert Rowthorn, *Marriage and Trust: Some Lessons from Economics*, 23 *Cambridge J. Econ.* 661, 661-691 (1999).

<sup>11</sup> The Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2008, Article 24.

<sup>12</sup> The Judicature and Application of Laws Act, Cap. 358, R.E. 2019 (Tanz.).

analyzing, and synthesizing contents law, rules, and doctrines of law.<sup>13</sup> This method immensely contributes to the continuity, consistency, and certainty of law, by examining case law, legal instruments, and legislation as primary data.<sup>14</sup> Additionally, the doctrinal method utilizes secondary sources, such as books and journal articles, to provide a comprehensive overview of the field. This paper analyses law, cases, legal instruments and literature in the context of the division of real matrimonial property in Islamic and customary marriages to examine the challenges therein. The doctrinal method is complemented by empirical legal research, which considers law within its social context.<sup>15</sup> Empirical legal research is used because it identifies external factors influencing the laws<sup>16</sup> on the division of matrimonial real property in customary and Islamic contexts.

The paper also adopts a feminist approach because it emphasizes the centrality of gender in societal development,<sup>17</sup> advocating for legal reforms to address inequalities and promote justice.<sup>18</sup> This approach calls for a redefinition of laws to align them with the realities of familial and gender dynamics, aiming to eliminate gender oppression and promote equity.<sup>19</sup> This article adopts this perspective to illuminate and address systemic inequalities in society.<sup>20</sup>

## II. DATA ANALYSIS

In the context of this paper, this section outlines the existing legal framework and its challenges. Additionally, it addresses the complexities involved in the division of matrimonial real property within customary and Islamic polygamous marriages. The aim is to highlight the current state of the law and identify key issues that need to be addressed concerning in line with the topic at hand.

### (A) Legal Frameworks on Division of Matrimonial Property in Polygamy

Tanzania Mainland has various laws and is a party to various instruments that guarantee the

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<sup>13</sup> Dawn Watkins & Mandy Burton, *Research Methods in Law* 33-36, (11th ed. Routledge 2013).

<sup>14</sup> Terry Christine M. Hutchinson, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*, 8 *Erasmus L. Rev.* 130 (2015), available at SSRN: <https://ssrn.com/abstract=2734131>

<sup>15</sup> Vijay M. Gawas, *Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards Research Development*, 3 *Int'l L.J.*, 128-130, (2017),

<sup>16</sup> Helen Benjamini Kiusi, *Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Perspective* 23 (Ph.D. thesis, The Open University of Tanzania 2017), see also Alexander Boniface Makulilo, *Protection of Personal Data in Sub-Saharan Africa*, 54 (Ph.D. thesis, Bremen University of Germany 2012)

<sup>17</sup> Archampong, E.A 'Matrimonial Property Division at Marriage Breakdown: The Way Forward,' 4 *KNUST LJ*, 79, 78-98 (2007).

<sup>18</sup> Rosemary Auchmuty, *Law and the Power of Feminism: How Marriage Lost Its Power to Oppress Women*, 20 *Feminist Legal Studies* 72 (2012).

<sup>19</sup> Martha A. Fineman, *Feminist Legal Theory*, 13 *Am. U.J. Gender Soc. Pol'y & L.* 18 (2005).

<sup>20</sup> Alison Diduck & Katherine O'Donovan, *Feminism and Families: Plus Ça Change?*, in *Feminist Perspectives on Family Law*, 3 (Routledge-Cavendish 2007). See also Nanthaporn Chitchai & Wichuwan Satsomboon, *Epistemological View of Feminist Theory and Human Resource and Organization Development*, 4 *HUM. RES. & ORG. DEV. J.* 59, 47-62 (2012).

rights to own property and the right to division of matrimonial real property in a polygamous marriage during divorce. These include; The Constitution guarantees the right to ownership of property,<sup>21</sup> and the Universal Declaration of Human Rights (UDHR)<sup>22</sup> provides that every person has the right to own property alone as well as in association with others. The Constitution prohibits the acquisition or deprivation of property without the authority, fair, prompt and adequate compensation.<sup>23</sup> It also guarantees the protection of matrimonial life, family and residence.<sup>24</sup> On the other hand the Land Act<sup>25</sup>, Village Land Act<sup>26</sup> and the LMA<sup>27</sup> provide for the right of man and woman married or unmarried to own, acquire, hold and dispose of property whether movable or immovable.<sup>28</sup> This right is fundamental and cannot be interfered with by any law, custom or tradition since it is protected by the Constitution.<sup>29</sup>

Furthermore, Article 13(1) of the Constitution, Article 7 of the UDHR, Article 15(1) of the Convention on the Elimination of all Forms of Discrimination (CEDAW)<sup>30</sup> and Article 3(1) of the African Charter on Peoples and Human Rights (Banjul Charter)<sup>31</sup> stipulate equality of all people and protection before the law. Additionally, Article 13(2) of the Constitution prevents laws that are discriminatory by themselves or in their effect. Likewise, people of full age and capacity are entitled to equal rights during the subsistence of the marriage and at its dissolution.<sup>32</sup> Equality is not only based on being treated alike but should also redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance voice and participation; accommodate differences and achieve structural change.<sup>33</sup> In addition, the CEDAW mandates states to ensure equality between men and women by enacting legislation and putting constitutional safeguards against discrimination of any type against women in all spheres<sup>34</sup> and ensuring the protection of the rights of women and their children.<sup>35</sup> To fulfil this

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<sup>21</sup> The Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2008, Article 24.

<sup>22</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Article 17 (1).

<sup>23</sup> The Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2008, Article 24(2); See also, The Land Act, Cap. 113 (R.E. 2019) (Tanz.) section 22(k) and the Village Land Act, Cap. 114 (R.E. 2019) (Tanz.), section 18(1) (I).

<sup>24</sup> The Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2008, Article 16(1-2),

<sup>25</sup> The Land Act, Cap. 113 (R.E. 2019) (Tanz.), section 3(2).

<sup>26</sup> The Village Land Act, Cap. 114 (R.E. 2019) (Tanz.), section 3(2).

<sup>27</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 56.

<sup>28</sup> *Shaibu M. Rombola v. Rehema Donald*, Civil Appeal No. 111 of 2018, [2020] TZHC 1565, 9.

<sup>29</sup> *Fraisca A. Rugimbana & 9 Others v. Augustine Anatory Rugimbana & Another*, Land Appeal No. 73 of 2018, [2020] TZHC 4394, 14.

<sup>30</sup> The Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979).

<sup>31</sup> African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1986).

<sup>32</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Article 16 (1).

<sup>33</sup> Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l J. Const. L., 713, 712 -738 (2016).

<sup>34</sup> The Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979).Articles, 2 (a-b), 13 (a).

<sup>35</sup> The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1986), Article 18 (3).

concept, state parties are mandated respect, protect and fulfil women's right to non-discrimination and enjoyment of equality.<sup>36</sup> This entails that equality is impaired if some laws and policies are prejudicial to one gender. For example, laws denying the rights of one gender to acquire or dispose of property.<sup>37</sup>

Despite the protections afforded by the Constitution and various legal instruments explained above, provisions in the Law of Marriage Act, specifically Section 114(2) (a), and the Land Act, particularly Section 180(1) (b), necessitate reference to customary practices that often undermine the rights of women in the division of matrimonial property and real property ownership. These statutory frameworks lack clarity regarding which customs should be considered, particularly in the context of polygamous marriages where the customs of spouses may differ significantly, potentially leading to disparate and inequitable outcomes. In the same footing, the National Land Policy of Tanzania of 1997 under paragraph 4.2.6 (ii) indicates that ownership of land between husband and wife shall not be the subject of legislation implying that customary practices will govern this relationship. This can lead to varying interpretations and practices depending on the community, which may or may not favor women's rights. Without a clear legislative framework to govern spousal land ownership, there is a risk that traditional norms may perpetuate existing inequalities, potentially placing women at a disadvantage in terms of property rights and ownership. Despite ownership of land being legislated in the Law of Marriage Act, Land Act and Village Land Act, this provision remains unamended in the National Land Policy.

Furthermore, in the legal framework, LMA and Land Act define a matrimonial home as a building or part of the building in which the husband and wife ordinarily reside together and includes a building or curtilage occupied for residential purposes only, that curtilage and out-building thereon. It also includes a building occupied in conjunction with agricultural land any land allocated by the husband or the wife as the case may be, his or her spouse for her or his exclusive use.<sup>38</sup> In the case of *National Bank of Commerce Limited v. Nurbano Abdallah Mulla*,<sup>39</sup> a property is termed a matrimonial home when the spouses ordinarily occupy it as their family residence. The above provision is silent on matrimonial homes in condominiums thereby

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<sup>36</sup> U.N. CEDAW Comm., General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/2010/28 (Dec. 16, 2010), Comment No. 9.

<sup>37</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 114(2) (a); the Land Act, Cap 113(R.E. 2019) (Tanz.), section of 180 (1) (b) and see also the National Land Policy (Tanz. 1997), paragraph 4.2.6.

<sup>38</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), Section 2(1), see also the Land Act, Cap 113 (R.E. 2019) (Tanz.), sections 2 (1), 112 (2) & 112 (2) (b).

<sup>39</sup> Civil Appeal No. 283 of 2017, [2020] TZCA 238, 7- 8.

leaving a lacuna.

The LMA protects spouses from alienation from a matrimonial home. Thus, where an interest in the matrimonial property is owned by the husband and wife, none of them is allowed to alienate the matrimonial home by way of lease, mortgage, sale or gifts without the consent of the other.<sup>40</sup> Following this provision, in cases of disposition, the spouse with an interest in a matrimonial home has a right to remain in such home until the marriage is dissolved.<sup>41</sup> Or, if there is a decree of separation or maintenance unless the buyer of the matrimonial home was unaware and could not have been aware of the interest by exercise of reasonable diligence.<sup>42</sup> Furthermore, a deserted wife or husband should be evicted from the matrimonial home by the other spouse or any person claiming through that other spouse except on the sale of estate or interest in the execution of a lawful decree<sup>43</sup> and by a trustee in bankruptcy of the spouse.<sup>44</sup> This does not affect spouses in a tenancy provided rent was lawfully paid as they will reside in the premises under the relevant provision of the law.<sup>45</sup> Additionally, a spouse cannot be enjoined in a matrimonial home because there is no specific provision, which provides for an order for an injunction against one of the spouses in respect of the occupation of the matrimonial home.<sup>46</sup> The law is silent on the assets or property acquired from the proceeds of the family business. Consequently, Section 59 of the LMA deals with matrimonial homes. It does not speak of other matrimonial real property in which the spouses are not residing. There is no provision specifically dealing with the matrimonial property under the LMA in which spouses are not residing. Courts have noted that Section 59 of the LMA deals with the protection of the matrimonial home. It does not deal with the protection of matrimonial property.<sup>47</sup>

Ultimately, under section 59 of the LMA an interest in the matrimonial property is owned by the husband and wife, none of them is allowed to alienate the matrimonial home by way of lease, mortgage, sale or gifts without the consent of the other.<sup>48</sup> The provision is silent on the question of whether a spouse in a matrimonial home has the right to institute legal proceedings against any other person who interferes with it, nor does it explain how spouses may defend

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<sup>40</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 59 (1) and the Land Act, Cap 113 (R.E. 2019) (Tanz.), sections 114 (1) (a-b), (2-4).

<sup>41</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), 59(2) (a).

<sup>42</sup> See Proviso to the Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), under section 59(2) (b).

<sup>43</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 59(3) (a).

<sup>44</sup> *Ibid*, section 59(3) (b).

<sup>45</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 59(4).

<sup>46</sup> *Paola Abdullah v. Mohamed Norman bin Abdullah*, Matrimonial Cause No. 3 of 2001 (H.C.T. Dar es Salaam unreported)

<sup>47</sup> *Sospeter Zakaria Bussa v. Gladys Josia & Thomas Samba*, Misc. Land Application No. 193 of 2019 (H.C.T. Mwanza unreported) (FK Manyanda, J.), 8.

<sup>48</sup> Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 59 (1).

legal proceedings instituted by any other person. The Act is silent on issues as to whether suing for the protection of the home or being sued requires consent from the other spouse or spouses in case of polygamous marriage and how the other spouse(s) would defend their interest in such matrimonial home.

On the concept of equality between wives. The LMA stipulates that wives under polygamous marriages have equal rights in matrimonial property and equal liability in contract or tort, subject laws enforced in Tanzania.<sup>49</sup> This means that, during marriage, a husband and wife should participate equally in responsibility and authority within the family.<sup>50</sup> In line with this, states are required to review their legislation ensuring equal rights to spouses in the ownership and administration of property and ensuring equality during termination of marriage, as well as decisions in property distribution.<sup>51</sup> However, marriage does not change ownership of property rights separately acquired and owned<sup>52</sup>. Thus separate properties are not matrimonial properties unless the owner decides to include the other spouse in such ownership.<sup>53</sup> In that thought, spouses can dispose of their separate properties without interference from the other.<sup>54</sup> However, separate property acquired before or after the marriage can be matrimonial property if it was substantially improved by the other spouse<sup>55</sup> or if the other spouse contributed by domestic contribution to the property.<sup>56</sup> Joint property deriving from marriage comprises all property acquired, including inherited family land by the spouses during the subsistence of the marriage unless expressly exempted by State legislation or by contract. Property acquired before the marriage, as well as gifts, inheritance, and tort settlements in favour of one spouse, may not be divided at divorce and may be considered exempt unless such assets have been treated by the spouses during the subsistence of marriage as joint properties.<sup>57</sup> Several cases have cemented this principle. For example, in *Mwinyimkuu M. Zame v. Zamzam H. Hassan*,<sup>58</sup> the court noted

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<sup>49</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), sections 56 and 57.

<sup>50</sup> U.N. Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000). Clause No. 25, see also U.N. Human Rights Comm., General Comment No. 19: Article 23 (The Family), Protection of the Family, the Right to Marriage and Equality of Spouses, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (July 27, 1990), at comment 6.

<sup>51</sup> U.N. Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), Clauses No. 25-26.

<sup>52</sup> The Law of Marriage Act, section 60.

<sup>53</sup> Hansard No. 579281, Second Sitting of the National Assembly Deliberation on the Law of Marriage Bill (Jan. 19, 1971), p. 73.

<sup>54</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 58.

<sup>55</sup> *Ibid*, sections 59 & 114 (3).

<sup>56</sup> *Asile Ally Said v. Irene Redentha Emmanuel Soka @ Another*, Civil Appeal No. 80 of 2020, [2024] TZCA 33, 18.

<sup>57</sup> The African Comm'n on Human & Peoples' Rights, General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted at the 27th Extra Ordinary Session (Feb. 19 – Mar. 4, 2020), Clause 45 and 46.

<sup>58</sup> *Civil Appeal 78 of 2019*, [2019] TZHC 52, 4, See also *Anna Benjamin Malongo v. Yohana Balole*, *Matrimonial Appeal 1 of 2017*, [2018] TZHC 2936, at 9.



that a separate property of one spouse is not subject to distribution unless it has been substantially improved during the subsistence of the marriage by the other party or by their joint efforts according to section 114(3) of the LMA to make it in the realm of distribution.

Spouses must be in a valid marriage to have matrimonial property<sup>59</sup> that can be legally divided upon divorce.<sup>60</sup> Such property must be obtained by joint efforts during the subsistence of marriage or where agreed by the spouses to be matrimonial assets.<sup>61</sup> The order of division of matrimonial assets under the LMA<sup>62</sup> is given by the court when granting or subsequent<sup>63</sup> after being satisfied that the marriage has broken down irreparably.<sup>64</sup> The court can order the division or sale of properties acquired during the subsistence of the marriage by joint efforts and share the proceeds of the sale.<sup>65</sup> Division of matrimonial property can be done during divorce or if the division of property was not decided during divorce, a party can bring a petition for division of property later only that he/she must show that divorce had been issued.<sup>66</sup> The Court of Appeal set the criteria for division matrimonial properties which must co-exist for section 114(1) of the LMA to apply in the case of *Samwel Moyo v. Mary Cassian Kayombo*,<sup>67</sup> thus, the property must be matrimonial assets, it must be acquired by the spouses during the marriage and it must have been acquired by their joint's efforts.

Consequently, in dividing the matrimonial property, the court must look at the conditions stipulated under section 114(2) of the LMA namely (a) the customs of the community to which the parties belong;(b) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets;(c) any debts owing by either party which were contracted for their joint benefit; and (d) the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

The CEDAW recommendation<sup>68</sup> requires recognition of non-financial contributions of the spouse's household and family care, lost economic opportunity and tangible or intangible

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<sup>59</sup> *P.O.M v. M.N.K (2017) eKLR*.

<sup>60</sup> *Gladness Jackson Mujinja v. Sosper Crispine Makene [2017] T.L.S. L.R. 217*.

<sup>61</sup> *T.M.V. v. F.M.C (2018) eKLR*.

<sup>62</sup> Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 114(1).

<sup>63</sup> The term subsequent in section 114 of the LMA, was defined by Hon. Judge Makaramba in *Regina d/o Lutandula v. Pendo s/o Joseph [2017] T.L.S. L.R 51* to mean "after" that is "the court has power to order division of matrimonial after the grant of divorce...".

<sup>64</sup> *Arabia Mohamedi v. Msafiri Selemani Lalikila [2017] T.L.S. L.R. 1*.

<sup>65</sup> Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 114(1).

<sup>66</sup> *Regina d/o Lutandula v. Pendo s/o Joseph [2017] T.L.S. L.R 51*. See also *Mariamam Suleimani v Suleiman Ahmed, Civil Appeal 27 of 2010, HCT, Dar es Salaam, [2010] TZHC 13, at.4-5*.

<sup>67</sup> [1999] TLR 197.

<sup>68</sup> U.N. CEDAW Comm., General Recommendation No. 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution), U.N. Doc. CEDAW/C/2013/29 (Oct. 30, 2013)

contributions to either spouse's career development and other economic activity and the development of his or her human capital.<sup>69</sup> Furthermore, the capacity to manage property accumulated during the marriage.<sup>70</sup> Likewise, the recommendation requires interrupted education and childcare responsibilities among other factors preventing women's employment opportunities be considered among the conditions to be looked at in the division of matrimonial properties.<sup>71</sup> Additionally, the court must consider the equality of economic advantages and disadvantages of the spouses and the functions and roles of spouses during the division of the property.<sup>72</sup> However, these principles are not part of the conditions under the LMA.

On the other hand, the International Covenant on Civil and Political Rights (ICCPR) under article 23(4) requires that during a marriage and its dissolution states should make necessary protection of any children. To meet this obligation they must ensure that the matrimonial regimes provide equal rights and obligations to all spouses relating to custody and care of children, children's religious and moral education rights, and the right to nationality of the parents and the ownership or administration joint or separate of the spouse.<sup>73</sup>

The Protocol of the African Charter on Peoples and Human Rights (The Maputo Protocol)<sup>74</sup> requires parties to adopt and enforce legislative measures guaranteeing women equal opportunities in work, career advancement and other economic opportunities. Parties are required to recognize the economic value of the work of women in the home. In the LMA this is stipulated under section 114(2) (b) and enforced in the case of *Bi Hawa Mohamed v. Ally Seif*.<sup>75</sup> However, the same has not been given a greater economic value compared to direct monetary contribution. In the case of *Hidaya Ally v. Amiri Mlugu*,<sup>76</sup> the Court of Appeal recognized the physical supervision of clearing a plot or construction constitutes a contribution however cemented the lower court decision of 25 % division in respect of the property. In another case, *Helmina Nyoni v. Yeremia Magoti*,<sup>77</sup> the Court of Appeal stated that Section 114 (2) (b) of the LMA enjoins courts to incline towards equal divisions where there is evidence of equal contribution towards acquisition of the matrimonial assets between the parties. But where there is no equal contribution the court should look at the extent of contribution of each spouse

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<sup>69</sup> Ibid, Clause 47.

<sup>70</sup> Ibid, Clauses 43 and 46.

<sup>71</sup> Ibid, Clause 44.

<sup>72</sup> Ibid, Clause 45.

<sup>73</sup> U.N. Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), Clause No. 25,

<sup>74</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6 (2003), Article 13(h).

<sup>75</sup> (*Supra*).

<sup>76</sup> *Civil Appeal No. 105 of 2008, CAT Dar es Salaam. (Unreported)*.

<sup>77</sup> *Civil Appeal No. 61 of 2020, [2022] TZCA 170, 14.*

toward the acquisition of the property.

The Southern African Development Community Protocol on Gender and Development (SADC Protocol) of 2002, requires parties to amend, review and repeal all laws that discriminate on grounds of sex,<sup>78</sup> and eliminate practices which are detrimental to the achieving of the rights of women by prohibiting and sanctioning such practices.<sup>79</sup> Despite this provision and the Maputo Protocol which provides women and children the right before the law to the division of Matrimonial assets<sup>80</sup> and requires reforms of the existing discriminatory laws and practices to promote and protect the rights of women<sup>81</sup> the Land Act section 180(1) (a) and the LMA section 114(2) (a) bring practices impeding the rights of women based on customs.

Under the Maputo Protocol, state parties are required to have legislation that ensures the same rights to women and men on divorce and ensures that divorce is affected by a judicial order.<sup>82</sup> Likewise, a woman, just like a man, has the same right to seek divorce<sup>83</sup> and reciprocal rights and responsibilities towards their children since the interest of the children is paramount.<sup>84</sup> The Protocol requires all spouses' men and women to have equitable sharing of the joint property derived from the marriage.<sup>85</sup> This provision received a judicial determination in various cases to mention but few. In *Perus Lucas v. Shomari Bahabi*,<sup>86</sup> the Court stated that Tanzania has ratified the Maputo Protocol, Article 7 of the Protocol provides 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.

Equitable distribution means the apportionment of marital property in excess of half of the property based on awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.<sup>87</sup> The concept of equitable sharing stipulated embodies

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<sup>78</sup> Southern African Development Community Protocol on Gender and Development, SADC Doc. No. 5/2002 (2002), Article 6(1).

<sup>79</sup> Ibid, Article 6(2) (c).

<sup>80</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), OAU Doc. CAB/LEG/66.6 (2003), Article 8(d).

<sup>81</sup> Ibid, Article, 8 (f).

<sup>82</sup> Ibid, Article 7 (a).

<sup>83</sup> Ibid, Article 7 (b).

<sup>84</sup> Ibid, Article 7 (c).

<sup>85</sup> Ibid, Article 7 (d).

<sup>86</sup> PC Matrimonial Appeal No. 06 of 2021, [2021] TZHC 3403,9; see also *Gerald Manyilizu Deus v. Ester Mang'ero PC Matrimonial Appeal No. 11 of 2021, [2021] TZHC 3790 at 5, Nestory Ludovick v. Merina Mahundi PC Civil Appeal No. 95 of 2020, [2020] TZHC 1792 at 7.*

<sup>87</sup> African Comm'n on Human & Peoples' Rights, General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted at the 27th Extra Ordinary Session (Feb. 19 Mar. 4, 2020).

substantive equality, which recognizes that equality can only be achieved if the relevant government interventions respond to the historical, social, religious, political and economic conditions that affect the exercise and enjoyment of rights by individuals as part of communities to which they belong.

Furthermore, substantive equality requires states to recognize that women are in an unequal position and implement special measures aiming at ensuring their property rights during separation, divorce or annulment of marriage. It entails the provision of entitlements and protections to disadvantaged members of society in addition to the entitlements and protections available to all on an equal basis. Such additional entitlements and protections are meant to rectify the conditions that impede equal enjoyment of rights and enable disadvantaged members of society (women in the context of the Maputo Protocol) to enjoy their rights fully and on an equal basis with others.<sup>88</sup> The purpose is to avoid injustice and ensure equality between men and women taking into consideration all forms of the contribution made towards the acquisition of the marital property.<sup>89</sup>

The implication of equitable sharing as expounded entails giving due recognition to the reproductive role of women involving the contributions that they make through the time, labour and caregiving that they invest in the household. In determining the scope of equitable sharing, an account should be given to the duration of the marriage, whether the couple had children, the cause of the separation, divorce or annulment of marriage and the responsibility that each spouse bears.<sup>90</sup> However, these are not party to the conditions under the LMA

Therefore, to ensure substantive equality, state parties must fully acknowledge and recognize the many forms of women's contribution to the economic well-being of their families and ensure that this contribution is fully recognized in cases of separation, divorce or annulment of marriage. This includes a contribution by the wife to the development of land and properties through their unpaid labour as well as the care of children. The application by states of the community of property regime must align to give effect to the requirements of Article 7(d).<sup>91</sup> This is in line with the feminist legal theory which requires states to remove aspects of disadvantages implied in gender because of historical, social or cultural disadvantages. The aim is to eliminate the gender-related inequalities in policies, laws and social contexts affecting specifically women. In Tanzania Mainland, the concept of equality and equitable distribution is

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<sup>88</sup> Ibid, Clause 40.

<sup>89</sup> Ibid, Clause 43.

<sup>90</sup> Ibid, Clause 44.

<sup>91</sup> Ibid, Clause 47.

subject to section 114(2) of the LMA and is exemplified in the case of *Nestory Ludovick v. Merina Mahundi (supra)*, which requires the court to have due regard to the extent of the contributions made by each party in the form of money, property or work and domestic contribution when exercising the duty of division of matrimonial property.

The forthcoming part explains the legal challenges for the distribution of matrimonial real property to spouses in polygamous marriages upon divorce specifically in Islamic law, customary and the effect of extra divorces among other things.

### **(B) Division of Matrimonial Real Property under Islamic Law**

Tanzania is a secular state that guarantees its people freedom of religion.<sup>92</sup> The LMA recognizes Islamic Marriage<sup>93</sup> which is viewed as an important and sacred union between a man and woman who fulfil half of one's religious obligations.<sup>94</sup> The LMA also recognizes Islamic divorce.<sup>95</sup> Likewise, the Judicature and Application of Laws Act allow any court to apply the rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, *wakf* and similar matters about members of a community who follow that law.<sup>96</sup> The LMA is silent on how matrimonial property can be divided at the time of divorce under Islamic law, the available provision of section 114 of the LMA does not carry on board rules of division of matrimonial real property in Islamic polygamous marriage at the time of divorce of one of the spouses.

Under Quranic teachings, men are not allowed to exploit or gain advantage from the fact that there were no explicit Islamic injunctions on the topic of the division of property in case of separation or divorce.<sup>97</sup> That is why under Islamic law women's property is not divided during a divorce.<sup>98</sup> Whatever a woman earns or is given before and during the marriage remains her property if the marriage ends.<sup>99</sup> This rule is not stipulated in the LMA.

Furthermore, Islamic law does not recognize the concept of marital wealth. Under Islamic law division of matrimonial property makes consideration of the doctrine of the totality of ownership which requires everybody after divorce to take what belongs to him or her without taking another person's property.<sup>100</sup> The term joint property in marriage or others is implicitly

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<sup>92</sup> The Constitution of the United Republic of Tanzania, Cap. 2 R.E 2008, Articles 3(1) and 19(1-2)

<sup>93</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), sections 9(3) and 25(1) (b).

<sup>94</sup> Imani Jaafar-Mohammad & Charlie Lehmann, Women's Rights in Islam Regarding Marriage and Divorce, 4 J. Law & Prac. 2 (2011); See also Quran 30:21.

<sup>95</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 107(3).

<sup>96</sup> The Judicature and Application of Laws Act, Cap 358 (R.E. 2019) (Tanz.), section 11 (1) (c) (ii).

<sup>97</sup> Momal Malik et al., Matrimonial Property: Protecting Women Financially, 8 LUMS L.J. 61 (2021).

<sup>98</sup> Quran 2:229; Quran 4:20.

<sup>99</sup> Imani Jaafar-Mohammad & Charlie Lehmann, Women's Rights in Islam Regarding Marriage and Divorce, 4 J. Law & Prac. 2 (2011)

<sup>100</sup> Hamida O. Hamad, the Law of Divorce in Tanzania: A Conflict between the Law of Marriage Act 1971 and

not found in the Qur'an or al-Hadith which are the sources of Islamic law in matters of marriage and property division.<sup>101</sup> The LMA on the other hand recognize the concept of material in various provisions<sup>102</sup> contrary to Islamic law.

Islamic law also recognizes the contribution of spouses towards the acquisition of the property in which case it allows division of the said property by looking at what has been contributed directly toward the acquisition of the said property.<sup>103</sup> This is quite different from the LMA since it also recognizes indirect contributions in terms of domestic contributions entitling a spouse to division.<sup>104</sup> This was also affirmed by the *Bi. Hawa Mohamed v. Ally Seif*,<sup>105</sup> the Court of Appeal stated 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 a contribution by a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets; and 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."*

Thus a wife's domestic contribution under Islamic law is given less attention as marriage is contracted for marital real relationships, not domestic services as provided for section 114(2) (b) of the LMA. Thus Islam takes the practices of the wives of the Prophet Muhammad who showed that the husband's rights upon his wife is her obligation to take care of the household according to the means of her husband and depending on the background from which the wife comes.<sup>106</sup> So, parse domestic work does not amount to a contribution toward the acquisition of matrimonial assets.

Under the LMA, the bride price is not an important element in the formation of a valid marriage.<sup>107</sup> In Islamic law bride price or dowry must be paid and is very important and decreed in the Holy Quran that, "*Give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease.*"<sup>108</sup> Furthermore, under Islamic law, a divorced wife is given parting gifts sometimes referred to as *mut'ah* or a

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Islamic Law, 1 Open U. L.J., 144-145 2013).

<sup>101</sup> Munir, H. Moch Isnaeni & Endang Prasetyawati, Legal Construction of the Division of Marriage Assets Due to Divorce in Islamic Law Perspective, 7 Int'l J. Multicultural & Multireligious Understanding 440, 437-442 (2020)

<sup>102</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), sections 59 and 60.

<sup>103</sup> Ibid.

<sup>104</sup> Section 114(2) (b).

<sup>105</sup> [1983] T.L.R 32.

<sup>106</sup> Abdulkadir Hashim, Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation, 25 J. Muslim Minor. Aff., 556, 449-460 (2005)

<sup>107</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 41 (a).

<sup>108</sup> Quran 4:4.

differed dowry which is an estimated value. A deferred dowry is payable upon divorce.<sup>109</sup> A parting gift sometimes called *mut'ah* is post-divorce financial support, or post-divorce payment paid by the divorcer to the divorcee, in an attempt to uplift her self-esteem and tone down the negative impact of the social humiliation associated with the term “divorced woman.”<sup>110</sup> In the Qur'an, many verses prove *mut'ah*'s instruction in divorce for some reason. It is also righteous for a man to give a divorced woman a suitable *mut'at*.<sup>111</sup> If the divorce took place after the marriage is consummated, then the divorced wife deserves the entire dowry. It is also recommended that a man marries a woman and then divorces her before touching her, he should grant her *mut'at* and set them free in a handsome manner.<sup>112</sup> Although the rate of a parting gift is not specified in the Quran or Hadith<sup>113</sup> the gift must be of value and can be enjoyed by the recipient as food, property, clothing, vehicle, maid, and others.<sup>114</sup> From the discussion above, one sees that under Islamic law a spouse such as a woman is entitled to a parting gift even at the time of divorce irrespective of the number of wives and it does not recognize domestic contribution or home services of a wife as a contribution toward acquisition of matrimonial property. Islamic law recognizes the direct contribution of the spouses toward the acquisition of matrimonial assets.

There is also an apparent legal conundrum between the LMA and the Judicature and Application Laws Act (JALA). While the JALA allow the application of Islamic law in matters of marriage, divorce, guardianship, inheritance, *wakf* and similar matters concerning members of a community following that law.<sup>115</sup> However, the same law rejects the application of Islamic law in matters emanating from the LMA.<sup>116</sup> The provision of Section 11(4) of the JALA conflicts with the Constitution<sup>117</sup> in respect of the right to religion to restrict spouses from applying Islamic law in marriage issues.

From the foregoing discussion, one notices that there is a divergence between the LMA and Islamic law in the division of matrimonial real property at the time of divorce. Thus it is quite clear that the LMA has changed the Islamic tradition by introducing joint efforts in the division of matrimonial property after divorce, while Muslims only recognize separate property and give

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<sup>109</sup> Bharatiya, V. P., *Syed Khalid Rashid's Muslim Law* (Eastern Book Company, 4th ed. 1996).

<sup>110</sup> El Sheikh, Muḥammad Ādam, "Post-Divorce Financial Support from the Islamic Perspective (Mut'at-al-ṭalāq).

<sup>111</sup> Qur'an, 2:241.

<sup>112</sup> Qur'an, 33:49

<sup>113</sup> Zizan, Siti Norbalqis Binti Ahmad, Wan Khairul Aiman Wan Mokhtar, Asma Afifah Rashid Eusoff Amiruddin & Ahmad Safwan Jamaludin, The Concept of Mut'ah Granting After Divorce in Islam, 11 Int'l J. Acad. Research Bus. & Soc. Sci.601 (2019).

<sup>114</sup> Ibid at 598.

<sup>115</sup> The Judicature and Application Act, Cap 358 (R.E. 2019) (Tanz.), section 11(1)(c)(ii).

<sup>116</sup> Ibid, s 11(4).

<sup>117</sup> The Constitution of the United Republic of Tanzania, Cap 2(R.E. 2008), Art 19.

a parting after divorce. This entails that the *Bi Haw Mohame v Ally Seif (supra)* was not decided in line with Islamic law as it recognized domestic services as contributions toward the acquisition of matrimonial assets while Islamic law does not recognize domestic contribution. Furthermore, some *talak* dissolves a marriage even before the parties have reached the courts in such a situation there is no division of matrimonial property. Under this aspect, there is a conflict of laws because while the court has been decreed as a final body to dissolve the marriage<sup>118</sup> there are other acts which when done under Muslim law amount to the dissolution of marriage in its entirety under Muslim law. This includes the pronouncement of three *Talaks* which in Islamic law means there is no marriage at all. On the other hand the LMA, is silence on application of Islamic law in all matters relating to matrimonial property. The Tanzania can borrow a leaf from the Kenya Matrimonial Property Act and Matrimonial Property Rules<sup>119</sup> which allows the application of Islamic laws in division matrimonial property to all people professing Islamic faith.

### **(C) Challenges of Division of Matrimonial Real Property in Customary Law**

Although property rights of women under customary law are recognized as a constitutional right<sup>120</sup> and protected by judicial pronouncement<sup>121</sup> together with the statutory provision<sup>122</sup> discriminatory practices under customary practice it remains a problem in the division of matrimonial real property during divorce in polygamy. Thus, women's access to and control of land often depends on the will of male relatives, making it harder for them to invest in improving their land.<sup>123</sup> The National Land Policy noted that women's access to land is impeded by customary law and tradition, wherein women's inferior land rights relative to men's access to land is insecure and customary law has continued to discriminate against women in land issues as compared to men.<sup>124</sup> What is important to note is that although customary rules are not legally valid if they violate the constitutional and legal mandates for gender equality, in practice, customary rules generally apply whether or not they violate statutory norms.<sup>125</sup> The LMA

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<sup>118</sup> See the case of *Arabia Mohamed v. Msafiri Seemani Lalikila [2017] T.L.S L.R. 1*, Where Lila J held that “neither part testified to the matrimonial difficult. The issuance of talaka after the board has certified that it has failed to reconcile the parties mandatorily required the court to make finding that the marriage has broken down irreparably and proceed to issue a decree of divorce. Only then as talaka was accepted as evidence that marriage has irreparably broken down. in all other circumstances talaka was only an indication that love, trust and confidence which forms the basis of the married life, had shaken.

<sup>119</sup> Matrimonial Property Act (Kenya) No. 49 of 2013, Section 3, Matrimonial Property Rules, Kenya Gazette Supplement No. 126 (2022) (Kenya), rule 6(2).

<sup>120</sup> The Constitution of the United Republic of Tanzania, Article 24.

<sup>121</sup> *Benardo Ephraim v. Holaria d/o Pastory (2001) AHRLR 236(TZHC) 1990*.

<sup>122</sup> The Law of Marriage Act, Cap 29(R.E. 2019) (Tanz.), section 56 &57.

<sup>123</sup> Sisti J. Mramba, & Klaus Deininger, Land Rights and the Law in Tanzania: Institutional Issues and Challenges 4, (Tanzania Institutional Diagnostic WP18/TID06, Sept. 2018)

<sup>124</sup> National Land Policy (Tanz. 1997) paragraph 4.2.5.

<sup>125</sup> Duncan, Jennifer, *Women's Land Rights Guide for Tanzania* (Landesa Ctr. for Women's Land Rights 2014)



allows the use of customs at the time of division of matrimonial property<sup>126</sup> but the Judicature and Application Act under Section 11(4) rejects the application of customary law in matters emanating from the LMA. Thus, there is of conflict of provision between statutes that is Section 114(2) (a) of the LMA and Section 11(4) of the JALA. Division of matrimonial real property upon divorce under customary law is mainly done under land occupied under customary law.

According to many customary traditions in Tanzania, family land remains in the male bloodline and married women are not part of the bloodline, thus, family land or clan land cannot be allocated to the woman.<sup>127</sup> This is irrespective if a female spouse contributed by her labour to improve such land. Women are expected to settle with their husbands and accordingly, enjoy user land rights. Rwezaura<sup>128</sup> notes that the Local Customary Law Declaration Order<sup>129</sup> did not give women a right to real property upon divorce by their husbands and has not been changed to date. For example, in Mara Rorya and Serengeti region polygamous marriage is a normal aspect. Although all spouses work for the family, a husband decides on property division and is an owner of immovable property.<sup>130</sup> From this, it is noted that marriages are conducted customarily and in most cases, procedures under the LMA are not followed. Under the custom of Jaruo, a woman does not have a right to distribution of immovable matrimonial property during the divorce irrespective she had contributed to the acquisition of that property. She has no right to immovable property from his husband or his parents. If the property was acquired by joint effect, she can get the contribution property, but the husband is the one to decide on what to give to the divorced wife.<sup>131</sup> Women are the sources of labour for their husbands. Man uses polygamous marriage to use women to bring food to their table and to satisfy their sexual desires. The wife has to bring food to the husband's store (Gara la Mume).<sup>132</sup> A woman should find food and necessities for her husband and children<sup>133</sup>.

In Kurya customs and tradition, a man can marry more than one woman and the tradition and customs allow a man to add a wife or wives and no consent is required from the existing wives, it's a man's decision.<sup>134</sup> Kurya and Jaruo's tradition of divorce does not divide assets but rather

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<sup>126</sup> The Law of Marriage Act, Cap 29 (R.E. 2019) (Tanz.), section 114(2) (a).

<sup>127</sup> Kivaria, Amina Kimangano, Assessing the Challenges of Women's Land Rights in Tanzania, 3 Afr. J. Land Pol'y & Geospatial Sci., 131, 128-136 (2020).

<sup>128</sup> Rwezaura, Bart A., Division of Matrimonial Assets Under the Tanzania Marriage Law, *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 188-189, 177-193 (1984).

<sup>129</sup> The Local Customary Law (Declaration Order) 1963, GN 279 of 1963.

<sup>130</sup> Interview with one man in a polygamous marriage at Shirati Rorya conducted on the 17<sup>th</sup> September, 2021.

<sup>131</sup> Noted by one of the interviewee in Shirati Rorya on the 17<sup>th</sup> September, 2021.

<sup>132</sup> Noted by several interviewee interviewed in Serengeti in Mara Region on the 21<sup>st</sup> September, 2021.

<sup>133</sup> The District Executive Director for Seregeti in Mara Region in an interview in his office the 20<sup>th</sup> September, 2021.

<sup>134</sup> Interview with a man aged sixty in Serengeti (Anonymous), with six wives on the 20<sup>th</sup> September, 2021

a refund of the bride price. A woman has no right to have immovable property from her husband's house and does not have the right to immovable property from her parents.<sup>135</sup> A woman may get property after the death of her husband.

Polygamy may also occur as a result of the childless wife (*Nyumba Ntobo*). In *Nyumba Ntobo*, for example, a woman who is brought to bear children for a childless married woman has no right to own property. She has to bear children, especially male children.<sup>136</sup> This woman has no right to get property even if she contributed to its acquisition.<sup>137</sup> If divorce could be under the LMA, it is too complicated since as a woman-to-woman marriage is not recognized under the LMA.<sup>138</sup> There is also a challenge as to who would be sued in case of divorce. Whether one who paid the bride price or one who impregnates her.

In this society, there is also a house of a grave (*nyumba ya kaburi or ghost marriage*) where a son dies before bearing children. The Custom is that a woman should be married by any member of the family who is married to either a wife or wives so that he can impregnate to bear the children belonging to the deceased person so that he is not easily forgotten.<sup>139</sup> In this type of marriage, the woman has no right to own property. Even if she does, she has no right to have real property and her domestic service is wifely duties not entitle her to a share at the time of divorce.<sup>140</sup>

Some Polygamy arises as a result of the inheritance of widows. What is important to note is that a widow can only be inherited by a man who is married to a wife or wives. Those who are not married have no right to inherit a wife. The Inheritance of a widow gives the right to the inheritor to deal with the property of the deceased and those of widows which she contributed by her labour. The widow can also be allowed to join other wives in the man-family compound, thus, affecting the interest of the property to the spouses and hers. The inheritor is allowed to add a wife or wives as he deems fit.<sup>141</sup> It is noted that although these customs have been reduced, they are still practiced in most of the Tanzanian societies.

Although the bride price is not a legal requirement under the LMA,<sup>142</sup> it still plays a significant role in the validity of customary marriage and its termination. Divorce in some tribes is by refund of the bride price. If the bride price was paid, it takes the right of the spouse (wife) to

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<sup>135</sup> *Ibid.*

<sup>136</sup> Interviewee's comments in an interview conducted Serengeti in Mara Region the 21<sup>st</sup> September, 2021.

<sup>137</sup> One of the respondent in an interview conducted Serengeti in Mara Region the 21<sup>st</sup> September, 2021.

<sup>138</sup> Interview with a man aged sixty in Serengeti (Anonymous), with six wives on the 20<sup>th</sup> September, 2021.

<sup>139</sup> One respondent an interview conducted Serengeti in Mara Region in an interview on the 21<sup>st</sup> September, 2021

<sup>140</sup> *Ibid.*

<sup>141</sup> Interview with a man in Serengeti (Anonymous), with six wives on the 20<sup>th</sup> September, 2021

<sup>142</sup> The Law of Marriage Act, section 41(a).

claim the division of matrimonial assets.<sup>143</sup> Tanzania has ratified the CEDAW convention which requires the elimination of cultural practices that impede the right of women to access and use land at the time of division or succession, yet Tanzania still retains laws and customary practices. In *E.S & S.C. v. United Republic of Tanzania*.<sup>144</sup> Following extensive legal proceedings in Tanzania, this communication was submitted before the Committee on Elimination of Discrimination against Women (Committee) in 2012. The case concerns the plight of two widows in Tanzania (E.S. and S.C.) who, under Tanzania's customary inheritance law, were denied the right to inherit or administer the estates of their late husbands. Thereafter they were, along with their minor children, evicted from their homes by their in-laws. The Committee held that Tanzania, by condoning legal restraints on inheritance and property rights that discriminate against women, had violated women's rights, particularly as relates to their inheritance and property rights. Thus, its Tanzania customary law violated several articles under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including, among others, provisions on equality before the law 15 (1), 15 (2), the right to bank loans, mortgages and other forms of financial credit 13 (b) and the same rights for both spouses in respect of the ownership, management, administration and enjoyment of property 16(1) (h). In reaching its conclusion, the Committee urged Tanzania to repeal or amend its customary laws, including on inheritance to bring them into full compliance with CEDAW requirements.

#### **(D) Non-Registration of the Marriage/Extra Judicial Divorces Implication**

There is another challenge in that most polygamous marriages are not registered. So, it falls within the categories of presumption of marriage and should be handled so.<sup>145</sup> It is noted that the provision of Section 160 of the LMA is prone to abuse as it can affect the interest of spouses in a valid marriage by creating rooms for the husband to cohabit with other women who can be taken to have a reputation of husband and wife while the husband is in a valid marriage with other spouses.<sup>146</sup> This can cause effects to property rights between married spouses and those under presumption of marriage, thereby complicating the division on event of divorce or in event a there is a marital dispute in a presumption of marriage relation. The LMA however, is quite and thus 160 LMA can be used to affect property rights in polygamous marriages.

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<sup>143</sup>Gabriel Simeon Mwita, Executive Director of Geitasamo Paralegal Organization, Serengeti Mara, interviewed on 21/09/2021.

<sup>144</sup> .S. & S.C. v. United Republic of Tanzania, CEDAW/C/60/D/48/2013, Communication No. 48/2013 (ruling delivered Mar. 2015)

<sup>145</sup> Phone Interview with Griffin Mwakapaje, Director of Public and Legal Services in the Ministry of Constitution and Legal Affairs, Interview conducted on 13<sup>th</sup> of September, 2021 from the Office in Dodoma.

<sup>146</sup> Interview with Casmir S. Kyuki, at the Law Reform Commission 3<sup>rd</sup> Floor Dodoma on the 08<sup>th</sup> September, 2021.

There are also situations in which a man who legally married a wife divorces the wife without going to court. Such a wife leaves a matrimonial home or starts her own home without legal divorce and distribution of assets looking at her contribution to the matrimonial property acquired by their joint efforts. In these situations, usually, a man takes another wife who may live in same home where the first wife lived. Usually on even of divorce or annulment of the union with the second wife, the first wife loses title and contribution.<sup>147</sup> One Charles Machela noted that he took a second wife after they had separated from his first legal wife. Unfortunately, after several years when her second wife thought of divorce in a primary court of Kisesa, the court did not consider the interest of the first legal wife even though she gave evidence. The first wife lost her rights and the court noted that there was not enough proof on the party of the first wife<sup>148</sup>

### **III. CONCLUSION**

This paper identified significant gaps in the Law of Marriage Act concerning the division of matrimonial real property within the context of customary and Islamic marriages in Mainland Tanzania. While the Act seeks to facilitate equitable property distribution, it inadequately addresses the unique cultural and religious dynamics of these marriage forms. Key challenges include the insufficient legal recognition of non-formalized marriages and conflicting interpretations of property rights in the context of statutory, customary and Islamic laws, which complicate the rights of spouses. Therefore, highlighting the need for a comprehensive review of the legal framework governing polygamous marriages. Through an analysis of relevant case law and literature, it becomes clear that reforms are essential to enhance legal clarity and promote gender equity while promoting the right to profess the religion of the spouses in light of property rights. Ultimately, this study advocates for an inclusive legal approach that respects the diverse marital contexts in Tanzania. Addressing these shortcomings will foster a more equitable environment for the division of matrimonial real property, thereby safeguarding the rights of all individuals involved.

#### **(A) Recommendations**

This paper proposes a series of comprehensive reforms to the Law of Marriage Act (LMA) and related legislation to facilitate the equitable division of matrimonial real property in Islamic and customary marriages at the time of divorce. The following recommendations aim to create a

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<sup>147</sup> An Interview with Mzee William Sollo and Mzee Musa Mahala Mashauri at Kisesa Mwanza on the 12<sup>th</sup> of September, 2021.

<sup>148</sup> An Interview with Charles Machela at Shilabela Ward in Kesesa Mwanza, interview conducted on the 13<sup>th</sup> of September, 2021.

more just framework that respects cultural and religious practices while ensuring fairness:

- i. Amend the LMA to explicitly state that spouses who profess the Muslim faith may elect to be governed by Islamic law regarding the division of matrimonial property. This should apply in any court where claims for rights under Islamic law are made, mirroring the provisions of Kenya's Matrimonial Property Act of 2013<sup>149</sup> and Matrimonial Property Rules<sup>150</sup>. Such recognition would empower Muslim spouses to navigate property issues in a manner consistent with their beliefs.
- ii. Revise the LMA and the Judicature and Application Act to eliminate inconsistencies in the application of Islamic and customary laws relating to marriage and property. This includes clarifying definitions and principles to ensure that all legal frameworks are aligned, promoting consistency and reducing ambiguity.
- iii. Amend the LMA to allow for the initiation of suits aimed at declaring interests, rights, and ownership of matrimonial property before divorce proceedings begin. This reform would facilitate the identification of contributions and ownership rights, providing a clear basis for property division in polygamous marriages. The amendment should outline procedural rules, including time limits, parties involved, necessary documentation, and jurisdiction.
- iv. Repeal LMA section 114(2) (a) and Land Act section 180(1) (b), which impose certain customary considerations during property division. Eliminating these provisions would standardize the division process and prevent the potential for discriminatory practices based on outdated customs.
- v. Ensure that the LMA complies with international human rights standards and regional treaties that govern the division of matrimonial property in polygamous marriages. This alignment would demonstrate Tanzania's commitment to gender equality and the protection of property rights.
- vi. Amend Section 106(f) of the LMA to provide comprehensive regulations for pre- and post-nuptial agreements concerning property rights. Such provisions would empower spouses in polygamous relationships to negotiate and formalize their property rights, thereby minimizing disputes and fostering transparency.
- vii. Introduce mandatory mediation for disputes concerning the division of matrimonial property before court proceedings. Mediation can provide a more amicable and cost-

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<sup>149</sup> The Matrimonial Property Act of Kenya, Act, s 3.

<sup>150</sup> The Matrimonial Property Rules of Kenya of 2022, r 6(2).

effective resolution, encouraging parties to reach mutually agreeable solutions while reducing the burden on the judicial system.

- viii. Implement educational initiatives aimed at raising awareness of the rights and obligations concerning matrimonial property in both Islamic and customary contexts. These programs should target communities, legal practitioners, and judges to ensure a comprehensive understanding of the legal framework.
- ix. Consider the establishment of specialized family courts with judges trained in Islamic and customary law to handle matrimonial property disputes. This approach would ensure that cases are adjudicated by individuals who are knowledgeable about the complexities of both legal systems.
- x. The government to institute a mechanism for the regular review of the LMA and related laws to ensure they remain relevant and responsive to the evolving socio-cultural landscape of Tanzania. This review should involve community stakeholders and experts in family law to address emerging issues effectively

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