

5.0 INCIDENTAL MATTERS IN MATRIMONIAL DISPUTES

In most cases, when the matrimonial proceeding has been determined, apart from the decree of divorce, either party may seek order for further reliefs. The common reliefs given after the matrimonial dispute has been determined include custody of children, division of matrimonial assets and maintenance of the children and the wife.

5.1 Division of matrimonial property;

However, under the Law of Marriage Act, the court is given power to order a division of any property, which was acquired by the spouses during the lifetime of their marriage.

According to section 114(1) LMA, matrimonial assets that are subject to such division are those acquired *during the marriage and through joint efforts*.

In other words, the properties acquired on the send off and kitchen party day will remain to be the separate property of the party responsible and they will not be subject to such division for they have been acquired prior to the marriage.

Furthermore, under section 114(2) LMA in exercising the power of the court to order division of matrimonial assets, the court shall have regard to;-

- the custom of the community from the parties belong;
- to the extent of contribution made by each party in money, property or work towards the acquiring of the assets;
- to the needs of the infant children and
- To any debts owned by the other party which were contracted for their joint benefit.

With all these consideration it shall be the interest of the court to divide the property equally and without any discrimination whatsoever.

Note, the term matrimonial assets acquired during the marriage shall include properties acquire before the marriage by either of the parties which have been substantially improved by their joint efforts as per section 114(3) LMA.

The term “joint efforts” has been the point of controversy for many years till 1983 when it was resolved through a case decision. Before that land mark case the word did not embrace domestic contributions made by the wife towards the acquisition of the property.

In this case of *Bihawa Mohamed V. Ally Sefu*¹ it was stated that *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.

So, it is now clear that domestic contribution counts as contribution towards the acquisition of matrimonial assets though not fifty fifty.

In another case of *Bibie Maurid V. Mohamed Ibrahimu*² it was stated that performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%. The amount to be awarded therefore will normally depend on the *extent of contribution made by each party*.

Precisely, though domestic contribution is taken into consideration by the court when dividing matrimonial assets, the question will however be, to what extent the party contributed.

¹ [1983] TLR 32

² [1989] TLR 162

In this case, the judge noted the importance of extent of contribution made by each party where he said, there must be evidence to show the extent of contribution made by each part toward the acquisition of the assets. Another important thing to note is that the misconduct of any spouse shall not count to the division of the assets but it shall be regarded important during the acquisition of the property.

In Bi Hawa Mohamed's case the judge stated among other things that misconduct of a spouse reduces nothing to her contribution towards the welfare of the family and its consequences to the acquisition will count to reduce her share.

5.2 Custody of children;

In granting or deciding in whose *custody* the child should be placed, the court shall consider the *welfare* of the child, called the *principle of welfare of the child*. Section 125 (1) of LMA is to the effect that the custody of child shall be placed in her or his mother or father. The court shall consider the parents. In some Exceptional circumstances the relative may be considered.

Section 125 (2) of LMA provides that the court shall take into account the welfare of a child and wish of parent or wish of a child if is capable to express his or her independent opinion and custom and tradition of parties. *Welfare of child principle is not confined to only food shelter and cloth it include the aspect of culture of the parties, and more important is the education of child.*

Under the Law of Marriage Act, where the court finds that it is real undesirable to place the infant in the custody of either parent, it can place the infant in the custody of any relative or association of which its objects is the welfare of such child as per section 125(1)LMA.

In making such a decision therefore, the paramount consideration shall be the welfare of the child. Section 125(2) LMA

The welfare principle shall also be accompanied by other considerations to be taken into account by the court; these are,

- the wishes of the parents of the infant;
- where the child is of the age to express his/her independent opinion the court shall have regard to the wishes of such child; and
- the customs of the community to which the parties belong.

The problem arises where parties come from different communities or where the parties have abandoned their customs and have not adopted any custom.

In the case of *Mariam Tumbo v. Harold Tumbo*³ it was stated that in matters of custody the welfare of the infant is of paramount consideration but where the infant is of an age to express an independent opinion, the court is obliged to have regard to his/her wishes.

Note, The law also sets clear that the child under the age of seven years shall be presumed to be under the custody of his mother as per section 125(3) LMA.

However, this is a rebuttable presumption in the sense that where evidence is given to the contrary the said child may be placed under the custody of his father.

Nonetheless, in deciding whether the presumption applies the court shall have regard to the undesirability of disturbing the life of an infant by changes of custody.

³ [1988] TLR 293.

This is actually for the good of such infant as the child of such age needs care of her mother. It is also undisputable that in African families the mother would be important for the upbringing of such a child.

In the case of *Ramesh Rajput V. Mrs. Sunanda Rajput*⁴ it was stated among other things that;

The most important factor in custody proceedings is the welfare of the child and that an infant of two years should be with the mother unless there are strong reasons to the contrary. In the circumstances of this case no strong reasons have been advanced to rebut the presumption that an infant below the age of seven years should be with the mother;

Where there are two or more children of the same union the court shall not be bound to place both or all in the custody of one parent, relative or association as the case may be, rather the court shall consider the welfare of each child independently as per section 125(4) LMA

5.3 **Maintenance**

Under the Law of Marriage Act, the question of Maintenance is two-fold, that is maintenance to the wife or former spouse and to the children of the marriage.

However, this question of maintenance exists in two forms under the Law of Marriage Act.

First of all, there is maintenance during the subsistence of the Marriage. Under section 63 of the Law of Marriage Act, it is the duty of every husband to maintain his wife as it may be reasonable having regard to his means and station of life. Also, this duty exists on the wife who has the means to do so, to maintain her husband if he is incapacitated wholly, or partially, from earning a livelihood by reason of mental or physical injury or ill-health.

⁴ [1988] TLR 96.

Second, there is maintenance given under the order of the court where the marriage comes to an end. This can be an order to maintain the wife or children of the marriage.

This is provided under section 115(1) LMA that the court may order a man to pay maintenance to his wife or former wife-

- a) if he has refused or neglected to provide for her as required by section 63; for spouse
- b) if he has deserted her, for so long as the desertion continues;
- c) during the course of any matrimonial proceedings;
- d) when granting or subsequent to the grant of a decree of separation;
- e) when granting or subsequent to the grant of a decree of divorce;
- f) where the parties were married in Islamic form, for the customary period of iddat following the date on which the divorce takes, or is deemed to have taken, effect;
- g) if, after a decree declaring her presumed to be dead, she is found to be alive:

However, this order of maintenance is subject to one important provision that the wife shall not be entitled to maintenance after dissolution of marriage unless the court finds special reasons to direct so.

In other words, the order for maintenance is not an automatic relief to the divorced woman unless there are special reasons dictating that order.

For instance, it is illogical for a woman to be maintained soon after divorce where there is no child to that marriage.

On the other hand, the court has power to order a woman to maintain her husband where he is incapacitated from earning his livelihood as per section 115(2) LMA.

This section however is discriminatory in the sense that the husband can only be maintained where he is incapacitated. This condition only applies to men and not *vice versa*.

In determining the amount to be paid by the man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties.

In doing so, the court shall have regard to the degree of responsibility which the court has imposed to each party after the breakdown of the marriage and the customs of the community to which the parties belong as per section 116 LMA.

For instance, the amount to be paid for maintenance to the wife who has been given custody of one child out of four children of marriage cannot be compared with the amount to be paid to the woman who has been given custody of the only child of the marriage.

As the law provides, the means and needs of the parties shall be of utmost importance in assessing amount to be paid for maintenance.

The right of the divorced man or woman to receive maintenance from his/her former spouse shall cease upon his/her remarriage as per section 120 LMA.

In the case of *Jerome Chilumba vs Amina Adamu*⁵ it was held that in a case for maintenance, it is important for a trial court to find out the income of the person sued in order to be able to decide the amount to be paid.

Another order of maintenance is that of maintaining children of the marriage. Under the Law of Marriage Act section 130(1), the court may at any time order a man to pay maintenance for the benefit of his infant child.

This maintenance is paid in the following circumstances:

⁵ (1989) TLR 117

- if he has refused or neglected to pay for that infant; if he has deserted his wife and the child is in the charge of the wife;
- pending the matrimonial proceedings;
- when making or subsequent to the making of an order placing the infant in the custody of any other person.

On the other hand, under section 130(2) LMA the court has the corresponding power to order a woman to pay or contribute towards the maintenance of her infant child where the court is satisfied that the woman has the means to do so and that it is reasonable for her to do so.

This is another section that narrows the burden for the woman to maintain her infant. The woman can only be ordered to pay maintenance for the child if she has the means to do so and where there are good reasons for doing so. This relief is not granted to a man as he will be required to pay for maintenance despite his means and station of life.

In *Festina Kibutu vs Mbaya Ngajimba*⁶ it was stated that;

In deciding what amount of maintenance should be paid the court should hold an enquiry as to the means of both parents in order to arrive at a just decision;

where applicable the court should take into account the customs of the parties

and the conditions prevailing at any particular time.

⁶ (1985) TLR 44

6.0 MATRIMONIAL PROCEEDINGS

Matrimonial proceeding is defined as “any proceeding instituted under parts II⁷ and VI⁸ of the Law of Marriage Act or any comparable proceeding brought under any written law repealed by this Act, in any court” as per section 2 LMA. In other words, a proceeding instituted under any other part will not constitute a matrimonial proceeding under the Law of Marriage Act.

6.1 Jurisdiction

Jurisdiction means the power of the court to hear and determine the matter before it. Jurisdiction is the creature of the statute because it is often provided in the statute for the court to have specific powers to deal with specific issues. For instance, the High Court of Tanzania has inherent jurisdiction while other courts have jurisdiction specifically.⁹

Jurisdiction also includes lack of jurisdiction, that is, if the necessary ingredients of the matter are not met. For instance, a court may lack jurisdiction to hear a divorce petition where the certificate from the Marriage Conciliation Board has not been granted.

Currently, matrimonial proceedings shall concurrently be instituted in the Primary Court, District Court, Resident Magistrates’ court and High Court as per section 76 LMA.

The word concurrently under section 76 of the Law of Marriage Act does not mean that all courts have concurrent powers rather original jurisdiction in matrimonial proceedings is vested concurrently in all courts.

⁷ That is, matters relating to the nature of marriage, violation of the restrictions of the marriage such as marrying within the prohibited relationship, failure to observe the necessary preliminaries to the marriage such as failure to notice of intention to marry, contracting of marriage, void ceremonies and voidable marriages.

⁸ That means, matters pertaining to jurisdiction, procedure of matrimonial proceedings, separation and divorce, division of assets and maintenance of the wife, custody and maintenance of children and other reliefs.

⁹ The Constitution of the United Republic of Tanzania of 1977, Article 108(2).

The petitioner may wish to file the petition in any court. Where a party is aggrieved by the decision or order of the primary court or district court shall appeal from that court to the High court as per section 80 LMA.¹⁰

That means, if the matter was tried in the Primary Court the petitioner shall appeal to the District Court and where the matter was tried in the District Court he shall appeal to the High Court.

Under this amendment, the law does mention where should a person appeal to in case is aggrieved by the decision or order of the Resident Magistrates' Court. The logic for excluding the Resident Magistrates' court is blurred. Probably, it aims at discouraging institution of matrimonial proceedings in that court.

It follows therefore that where a person institutes a matrimonial proceeding in the Resident Magistrate's Court he shall have no right of appeal to the High Court.

¹⁰ LMA, Section 80 as amended by the Written Laws (Miscellaneous Amendments) Act, 1980.

