

The Legal Complexities of the Relief in Division of Matrimonial Real Property upon Divorce in Mainland Tanzania: Lessons from Kenya

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Abstract

The Law of Marriage Act, 2019 provides two main reliefs on the division of matrimonial property to spouses during divorce: The division of the property or the sale of property and distribution of proceeds. Division or sale of the property and the distribution of proceeds of the sale affects divorcing and non-divorcing spouses in polygamous marriages. Non-divorcing spouses can prevent the execution of a valid decree since their contribution or interest in the property was not considered during divorce proceedings. Courts are restricted to these reliefs since the Law of Marriage Act lacks other reliefs which take into consideration the convolutions of polygamous marriage and the intricacies of real property in the division. This article examines the legal complexities of reliefs in the division of matrimonial real property in polygamous marriages. The article uses doctrinal and comparative methodologies, exploring Kenya's reliefs during the division of matrimonial property to inform potential reforms in Mainland Tanzania's legal framework. The article asserts that the reliefs in section 114 of the Law of Marriage Act are insufficient to address the challenges of property division in polygamous divorce. The Article advocates for comprehensive legal reforms on reliefs to address the unique dynamics of polygamous marriages.

Keywords: *Polygamous marriage, division of matrimonial real property, reliefs, Kenya*

1.0 Introduction

The Law of Marriage Act¹ (LMA) in Mainland Tanzania provides two primary reliefs for the division of matrimonial property upon divorce. These are the division of matrimonial property itself or the sale of matrimonial property, with proceeds distributed between the spouses. Section 114(1)² empowers the court to divide matrimonial property in

¹ 2019 Revised Edition.

² Ibid.

both polygamous and monogamous marriages, covering both movable and immovable property. However, the reliefs in this provision, are insufficient to effectively facilitate the distribution of matrimonial real property in polygamous marriages. This article examines the adequacy of the reliefs outlined in section 114(2) of the LMA and the challenges they present. Kenya is used as a benchmark for lessons that could inform potential reforms in Mainland Tanzania.

This article employs both doctrinal and comparative legal research methods to explore the legal complexities surrounding the reliefs provided in section 114(1) of LMA in the division of matrimonial real property upon divorce in Mainland Tanzania drawing insights from Kenya. Doctrinal legal research is utilized to examine the foundational legal principles, doctrines, and case law that shape the legal landscape.¹ The method is adopted in the context of reliefs in the distribution of matrimonial real property in polygamous marriages. The reason is that the doctrinal legal research method investigates primary sources such as national laws, international and regional instruments and case laws to identify underlying legal principles.² The examination of these primary sources facilitates uncovering the legal inconsistencies, ambiguities, and gaps in the law thus highlighting areas that may require reforms which are exposed in parts four and five of this article.

A comparative legal research method is used to assess how Kenya's approach to the reliefs in the division of matrimonial real property in polygamous marriages influences Tanzania's legal system. The comparative legal research method is adopted as it helps identify best practices and potential lessons that Mainland Tanzania can draw from Kenya in reforming its legal framework on reliefs.³ Kenya's matrimonial regimes contain more comprehensive legal provisions regarding the reliefs available in the division of matrimonial property during divorce.⁴ This serves as a model for Tanzania, promoting a more structured and

¹ E. M. Al Amaren, et al., An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of Legal Science Research, *International Journal of Multidisciplinary Sciences and Advanced Technology*, 2020, Vol. 1, No. 9, p. 54.

² A. Kharel., Doctrinal Legal Research, 2018, SSRN 3130525 <https://doi.org/10.2139/ssrn.3130525>.

³ C.M Fombad., Comparative Research in Contemporary African Legal Studies, *Journal of Legal Education*, 2017, Vol. 67, No 4, pp 989.

⁴ The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022] and the Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.

enforceable system of relief in polygamous marriages. Additionally, this method facilitates the identification of gaps in Tanzania's legal system, for example, the non-recognition of certain significant reliefs for matrimonial real property division in polygamous marriages for purposes of making reforms.⁵

2.0 Reliefs and Division of Matrimonial Real Property in Polygamy

The Law of Marriage Act⁶ recognizes both monogamous and polygamous marriages.⁷ The Act further regulates the division of matrimonial property between spouses upon divorce.⁸ The primary objective of the LMA in the division of matrimonial property is to achieve a fair and equitable distribution of matrimonial assets between spouses.⁹ The rules of division of matrimonial property in the LMA have however not distinguished between immovable and movable property irrespective of the fact that, in practice, different rules apply to immovable and movable matrimonial property. Still, the Act recognizes both direct and indirect contributions of the spouses towards the acquisition of matrimonial property.¹⁰ The LMA further, require spouses to ensure the needs of dependent children are met.¹¹

Currently, the LMA provides for two distinct types of specific reliefs in cases of matrimonial property disputes during the dissolution of a marriage. These reliefs are outlined under Section 114(1) of the Act and include (a) an order for the equitable division of assets acquired by the joint contribution of the spouses during the marriage, and (b) an order for the sale of such matrimonial property and the division of the proceeds thereof to parties in accordance with their respective entitlements and contribution made.¹² Considering these reliefs, it is evident that while they are intended to apply to both polygamous and monogamous marriages, they introduce complexities in the division or sale of property in polygamous marriages. The application of these provisions to

⁵ M. Paris., *The Comparative Method in Legal Research: The Art of Justifying Choices in Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper (09/16).

⁶ [Cap 29, R.E 2019].

⁷ LMA, sec10 and 25(1).

⁸ *Ibid*, sec 114(1 &2).

⁹ *Ibid*, sec 114(2) (d).

¹⁰ *Ibid*, sec 114(3).

¹¹ *Ibid*, sec 114(2) (d).

¹² *Ibid*, sec 114(1).

polygamous unions raises unique challenges, particularly in determining the equitable distribution and the fair handling of real assets acquired within these marriages.

Tanzania has ratified several international and regional instruments that embody principles relating to marriage and the division of matrimonial property. Notable examples include the International Covenant on Civil and Political Rights (ICCPR) of 1966, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979, the African Charter on Human and Peoples' Rights (1981) also known as the Banjul Charter¹³, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹⁴ These instruments reflect Tanzania's commitment to upholding fundamental rights and ensuring equality in the context of marriage and property division. The examination of these instruments, among others, aims to highlight the general principles they stipulate, particularly to the division of matrimonial property, in the context of the topic of this article.

Notably, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁵ under Article 16 (g) requires state parties to ensure equal rights for both spouses in marriage and divorce. This includes the right to acquire, own, manage, enjoy and dispose of property¹⁶ including equitable division of property. Although CEDAW does not specifically address polygamous marriages, the general principles of equality and non-discrimination imply that women in polygamous marriages should have their rights to property division safeguarded. This principle is intended to protect women from unfair treatment, ensuring that property division upon divorce reflects equitable principles.

The CEDAW committee recommendation concerning polygamy requires states practicing polygamy to enact comprehensive laws regulating the

¹³ *Judith Patrick Kyamba v Tunsume Mwimbe and 3 others*, Probate and Administration Cause No. 50 of 2016, [2020] TZHC 1364, HCT, DSM, J Mlyambian, 13, 14 confirming the ratification of these instruments.

¹⁴ In *Gerald Manyilizu Deus v Ester Mang'ero*, PC Matrimonial Appeal No. 11 of 2021, [2021] TZHC 3790, HCT, Mwanza, p.5, the court confirmed the ratification of this instrument.

¹⁵ The Convention on the Elimination of All Forms of Discrimination against Women of 1979.

¹⁶ *Ibid*, art 16 (h).

division of matrimonial property in polygamy.¹⁷ However, Mainland Tanzania has not enacted this law to date. Additionally, it has not comprehensively defined the term 'contributions' to account for household and family care, loss of economic opportunities, tangible and intangible contributions, and career development, among others, in line with the general comment on Article 16 of the CEDAW.¹⁸

On the other hand, the International Covenant on Civil and Political Rights (ICCPR)¹⁹ Article 23 (4) emphasizes the protection of the family and the equal rights and responsibility of spouses during marriage and dissolution. While it does not explicitly mention polygamous marriages, the emphasis on equality can be interpreted to support fair treatment in the division of matrimonial property. Likewise, the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁰ under Article 10 provides for the protection of family life and economic stability. This principle underpins the right to fair and adequate division of property upon divorce to maintain the economic well-being of family members, including in polygamous marriages.

Additionally, the African Charter on Human and Peoples' Rights (ACHPR)²¹ in Article 18 guarantees the right to equality and protection of family life. It ensures that family members are treated equally under the law²², which can influence how property is divided in polygamy. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), recognises both monogamy and polygamous marriages and calls for their promotion and protection²³. Article 7 of the Maputo Protocol addresses the rights of women in marriage and divorce. It mandates equitable division of marital

¹⁷ United Nations Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 28 on the Economic Consequences of Marriage and its Dissolution* (2000) CEDAW/C/GC/28.

¹⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation 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)*, 2013.

¹⁹ International Covenant on Civil and Political Rights of 1966.

²⁰ International Covenant on Economic, Social and Cultural Rights of 1966.

²¹ The African Charter on Human and Peoples' Rights of 1981.

²² *Ibid*, art 18 (3).

²³ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003, art 6(c).

property and emphasizes protecting women's rights during divorce.²⁴ This includes ensuring that women, regardless of the type of marriage, receive fair treatment during property division. Equitable distribution in this Protocol is defined to mean the apportionment of marital property in excess of half of the property on the basis of 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.²⁵ This includes equal rights between spouses to exercise decision-making over the use, disposal of, mortgage or transfer of the property.²⁶

These International and regional instruments advocate for gender equality and equitable treatment in marriage and divorce. While these instruments provide a broad framework for ensuring fairness in property division. They do not provide for specific reliefs or remedies that can be issued upon the division of matrimonial real property both in monogamous or polygamous marriages. Therefore, specific reliance upon the division of matrimonial real property in polygamous marriages depends significantly on national legislation and local practices. In Tanzania, the LMA aims to ensure an equitable division of property, but customary practices, Islamic practices and court interpretations play a crucial role in how these reliefs are applied in the context of polygamous marriages.

3.0 The Reliefs in the LMA and Lessons from Kenya

The division of matrimonial real property in polygamous marriages involves intricate legal challenges that vary widely. Understanding these challenges requires an analysis of statutory provisions, judicial interpretations, and practical implications of section 114 (1) of the LMA. Various legal challenges arise from the reliefs to be issued regarding the division of matrimonial real property during a divorce in a polygamous marriage. Different reliefs are required, taking into account the following factors: the nature of land holdings between spouses, the different contributions of spouses, the duration of the marriage, and the nature of the proceedings to accommodate all rights and interests of the spouses

²⁴ *Ibid*, art 7(d).

²⁵ 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 of the African Commission on Human and Peoples' Rights, held from 19 February to 4 March 2020 in Banjul, Gambia.

²⁶ *Ibid*, Clause 36.

concerning a particular property, among others. This necessitates the need for specific reliefs in each case, all of which are discussed below

3.1 Division under Section 114(1) and its Challenges in Polygamy

Section 114 of the LMA grants the court the authority to order the division of matrimonial property or sale of the property and division of the proceeds thereof. However, this provision does not fully address the interests of all parties involved. Specifically, it has not considered the proof of contribution of non-divorcing spouses or others who may have an interest in the property. Moreover, non-divorcing spouses are generally not required to prove their contributions to the acquisition of the property under this provision during the divorce proceedings since they are not parties to the divorce. The LMA primarily mandates that only parties seeking divorce substantiate their contributions towards the acquisition of matrimonial property during or subsequent to divorce proceedings,²⁷ potentially leaving out the other co-wives with legitimate claims but no divorce proceedings underway. The complexity of the rights of non-divorcing spouses brings issues and impracticability to section 114 of the LMA because the provision potentially neglects the interests of non-divorcing spouses with their legitimate claims to the property.

This exclusion of non-divorcing rights to an assessment of their contribution towards the acquisition of the property can create complications in polygamous marriages when determining who is entitled to a share of the property. Furthermore, the failure of the non-divorcing spouses to prove their contribution or right towards the matrimonial real property creates an imbalance between divorcing spouses and non-divorcing spouse's contrary to the principle of equality²⁸ and equitable distribution²⁹ between spouses provided under the law which in turn can undermine fair distribution of property. Consequently, Section 114(1) of the LMA, has not sufficiently addressed scenarios or situations where multiple spouses have competing interests in the property. This is because disputes over property ownership and division can arise, complicating the process of equitable distribution.

²⁷ LMA, secs 105 and 106.

²⁸ *Ibid*, sec 57.

²⁹ *Ibid*, sec. 114(2) (d).

Furthermore, dividing property can be challenging, especially when the real property assets are not easily divisible or when there are disagreements on the valuation and distribution of the property. These issues highlight the need for a more comprehensive approach to property division that considers all relevant interests and provides clearer guidelines for fair and equitable distribution. In the case of *Mmbaga v Mmbaga*³⁰ the Court of Appeal of Tanzania emphasized the need for a fair and equitable distribution of property, considering contributions made by both spouses and the practicalities of dividing assets. However equitable distribution would not rise if the above challenges explained in this section are not resolved.

3.1.1 Complexity of Sale and Division of Proceeds of the Sale

The LMA allows the sale of the matrimonial real property and the division of the proceeds of the sale thereof.³¹ This provision does not offer sufficient mechanisms in a polygamous marriage. This is due to the following reasons, section 114(1) of the LMA does not explicitly address how to handle the claims related to the sale of multiple spouses, each of whom may have distinct interests and contributions over the matrimonial property to be sold. Thus, each divorcing or non-divorcing spouse might claim a share based on their contribution to disputes and complicating the sale process. The challenges will be how to balance the interests of multiple spouses considering that, some spouses are not interested in divorce and their contribution toward the property has not been proven. Some spouses might be residing in the matrimonial property with children thus they cannot be rendered destitute.

Furthermore, the requirement of section 114 of the LMA to prove contribution to the acquisition of matrimonial property in polygamy becomes challenging due to the potential lack of clear records and the blending of financial and non-financial contributions, further that non-divorcing spouses have not proved the rights or claims of the matrimonial property to be divided. To add to the discussion, there is a question of valuation of the property and fair distribution. In polygamous marriages, determining the fair share for each spouse involves complex legal and financial considerations but can be difficult to achieve, particularly when there are disputes over the value or when the property market fluctuates.

³⁰ [2002] TLR 228.

³¹ LMA, s 114(1).

Additionally, equitably dividing the proceeds from the sale among multiple spouses, each with potentially different claims and needs, adds another layer of complexity. Consequently, selling real property involves legal and practical hurdles, including obtaining the consent of all spouses to the sale, and disagreements can delay or complicate the process. Much so dividing property and selling real estate can affect the welfare of children and the broader family dynamics. Ensuring that the division does not adversely impact the children or the family structure adds layer of complexity. These complexities require careful judicial handling to ensure equitable outcomes and address the unique challenges posed by polygamous marriages.

Besides, section 114(1) of the LMA brings another challenge in respect of execution by sale of the matrimonial property. According to Section 48(1) (e) of the Civil Procedure Code³², the execution of a decree may be hindered, particularly when it comes to the sale of property that serves as a matrimonial home where spouses and children reside.³³ This provision ensures that such property cannot be sold in the execution of a decree, safeguarding the rights of all family members residing there. This protection implies that a divorcing or divorced spouse may face difficulties in claiming her share through the sale of the matrimonial property, as this could negatively impact other spouses and children living in the home. Questions arise regarding who would be responsible for providing support to the divorced spouse if the property is not sold, whether it would be the husband or other wives, and how the interests of the children will be considered. What is the purpose of the decree is it cannot be executable to give rights provided to the decree holder. These concerns highlight significant uncertainties which have no answers under the LMA.

Additionally, section 114(1) of the LMA and Section 161(1) of the Land Act³⁴ recognize each spouse's claim to property based on their contributions, complicating the sale process. Spouses are protected under Section 59 of the LMA, which allows them to file a caveat to protect their interests. Filing a caveat under Section 59 of the LMA to protect property

³² The Civil Procedure Code, [Cap 33.R.E 2019].

³³ G.N. Mwaisondola., *The Modern Law of Mortgages in Tanzania: The Role of the Land Act 1999*, A Doctoral Dissertation Submitted to the University of Birmingham, United Kingdom, p.309.

³⁴ The Land Act, [Cap 113 R.E 2019].

rights can lead to additional legal complexities fairly because resolving objections from parties who are not directly involved in the divorce proceedings but have an interest in the property can complicate the process. The sale of the property is further complicated by the fact that the interests of non-divorcing spouses may not have been assessed during the divorce proceedings, as they were not parties to the case. This raises concerns about how the proceeds from the sale will be divided and how non-divorcing spouses will benefit if their shares are not considered. Section 114(1) of the LMA aims to address these issues by safeguarding the property rights of spouses in a monogamous marriage during divorce but ultimately does not provide solutions when it comes to polygamous marriages.

Thus section 114(1) of the LMA and Section 161(1) of the Land Act do not delineate how contributions are to be quantified or how property interests are to be divided in practice. This can lead to disputes over what constitutes fair distribution because some spouse's rights over the matrimonial real property have not been heard or proved since they are not parties to divorce because their claims are not formally recognized or assessed during divorce proceedings. This could result in legal conflicts or challenges to the division and sale process if their rights are not clearly defined or protected.

3.2 Lessons on Reliefs from Kenya

Kenya enacted two important pieces of legislation providing relief during the division of matrimonial real property in polygamous marriages. One of these is the Matrimonial Property Act of Kenya³⁵ which carters for both polygamy and monogamous marriage relationships. To facilitate the functioning Matrimonial Property Act, the Matrimonial Property Rules³⁶ were promulgated to facilitate the just, expeditious, proportionate and affordable resolution of disputes relating to matrimonial property.³⁷ Aside from providing relief for the division or sale of property and the distribution of the proceeds to spouses, the two laws offer various other reliefs that Mainland Tanzania can learn from Kenya. These are explained below.

³⁵ The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022]

³⁶ The Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.

³⁷ *Ibid* r 3(1).

3.2.1 Vesting or Partitioning the Property

The LMA is silent on the relief of vesting or partitioning property. It does not address these orders. Additionally, the LMA has not been aligned with the Land Act concerning the ownership regime in the distribution of matrimonial property at the time of divorce. Specifically, the LMA lacks provisions regarding the division of co-owned real property between spouses³⁸ at the time of divorce in polygamy marriages. The provision does provide for the division of interest/shares in real property owned in common. The implication of the lack of alignment is to affect the reliefs relevant to the distribution of co-owned between spouses under the Land Act.

The Matrimonial Property Act and rules³⁹ are very specific to the reliefs aligned with the nature of land ownership between spouses. The Rules provide the relief of vesting the property in one of the spouses.⁴⁰ The rules provide that, where the property is owned by the spouses jointly, the court can give an order vesting the property in common to the spouses in such shares as the court considers just.⁴¹ The court can also make an order vesting or transferring the matrimonial real property, or any part of the matrimonial property, in either spouse.⁴² Likewise, the court can make an order postponing the vesting or transferring of any share in the matrimonial property, or any part of such share, until a future date specified in the order or until the occurrence of a future event specified in the order.⁴³ Of importance to note is that, before the court gives these orders, it must consider the court must consider the rights and claims of the other spouses and how this decision impacts them.

The importance of postponement of vesting of the property in full or in portion to the spouse(s) to a specific date or future event allows the court to account for future needs or developments, ensuring that the property distribution remains fair over time as circumstances evolve. The ability to postpone the vesting of property allows the court to address long-term fairness and accommodate future needs, which is particularly relevant in

³⁸ *Ibid*, s 158.

³⁹ The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022] and the Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.

⁴⁰ Matrimonial Property Rules, 2022, r. 30(1) (a).

⁴¹ *Ibid*, r 30(1) (b).

⁴² *Ibid*, r 30(1) (c).

⁴³ *Ibid*, r 30(1) (d).

polygamous marriages where the dynamics can change over time. In addition, the court can order the partition or vesting of any matrimonial property to⁴⁴ the spouse where the case of matrimonial property owned by one spouse or an order vesting the property in the spouses jointly or in common in shares that the court considers just depending on the nature of ownership.⁴⁵ Furthermore, the court can vest matrimonial property owned by spouses jointly or in common, to one of them.⁴⁶ The LMA and the rules made under lack this specific provision.

Furthermore, the Land Act and the Village Land Act⁴⁷ lack provisions which allow the conveying of real properties from one spouse to the other upon a court order, Likewise, the Land Registration Act,⁴⁸ have not provided any provision compulsorily conveying the title to the spouse who has been given a real property or a share in the matrimonial real property following a court order for execution. The Land Registration Act allows the registration by operation of law including registration by an order of the Court under Section 71. However, the said provision does not apply to real property which has not been registered.⁴⁹ In related matter, the provision of Section 53 of the Land Registration Act requires vertical registration of title as such excluding matrimonial real property interest in condominiums under the Unit Titles Act.⁵⁰ Likewise, the shares acquired by labour under Section 161(2) of the Land Act are not easily registered under Section 45 of the Land Registration Act, since it is impossible to register the same by a deed thus they may not be easily recognizable at the time of transfer since the laws have not declared them as overriding interest in the property. Moreover, domestic contribution or contribution by labour is required to be assessed by the court and not upon a party to decide to register it. Likewise, domestic contribution or contribution by labour requires to be assessed by the court and not upon a part to decide to register it.

⁴⁴ *Ibid*, r 30(1) (e).

⁴⁵ *Ibid*, r 30(1) (f).

⁴⁶ *Ibid*, r 30(1) (g).

⁴⁷ The Village Act, [Cap 114 R.E 2019]

⁴⁸ The Land Registration Act, [Cap 334R.E 2019]

⁴⁹ *Ibid*, sec 46.

⁵⁰ The Unit Titles Act, Act No.16 of 2008.

3.2.2 Payment of Money to the Other Spouses

The LMA has not specifically provided for the relief of paying the other spouses to retain the real property during the division of matrimonial real property. However, in practice, this relief exists. In the case, *Yesse Mrisho v Sania Abdul*,⁵¹ the Court of Appeal ordered the property in question to be subjected to valuation before the finalization of its distribution. Each party was granted the right to purchase the other party's interest in the property, should they have chosen to exercise this option. The Kenyan laws provide statutory provisions for an order to pay a sum of money by one spouse to the other.⁵² In a polygamous context, the application of these provisions might not fully address the complexities and unique needs of each spouse involved, leading to potential legal and financial difficulties. For example, in some cases, some spouses and children may be residing in the matrimonial property. Some spouse's rights over the property may not have been determined by the court since they are not parties to divorce among other complexities.

3.2.3 The Grant of Occupation of the Property

While the LMA does not explicitly provide for this relief, Kenyan courts have the authority to issue an occupation order. This order can grant one spouse, under specific terms and conditions determined by the court, the exclusive right to occupy the matrimonial home or other properties that are part of the matrimonial estate, potentially for designated periods.⁵³ However, the court must comply with the following conditions; - the court may have to pay regard to the interest of any minor or dependent children of the marriage. Sequel to the above the court can make an order vesting in either spouse the tenancy of any dwelling house. This order, however, will be made if the spouse against whom the order is made is or was the sole tenant of the dwelling house, or is or was a tenant holding jointly or in common with the applicant,⁵⁴ the other spouse is a tenant of the dwelling house,⁵⁵ and either spouse is residing in the dwelling house.⁵⁶

⁵¹ [2019] TZCA 597, 13.

⁵² Matrimonial Property Rules, 2022, r 30(1) (h).

⁵³ *Ibid*, r 30(1) (j).

⁵⁴ *Ibid*, r 30(1) (k) (i).

⁵⁵ *Ibid*, r 30(1) (k) (ii).

⁵⁶ *Ibid*, r 30(1) (k) (iii).

In line with other explained relief above, the court can make an order granting, to the person in whose favour an order is made under paragraphs (j) or (k) of rule 30 of the Matrimonial Property Rules, the use of all or any of the furniture, household appliances and household effects in the matrimonial home or other premises to which the occupation order relates, or the dwelling house to which the tenancy order relates.⁵⁷ On top of the above the court can vest the rights and obligations under a hire purchase agreement or conditional sale agreement, or under an agreement to hire or lease, in either spouse or any such order shall have effect notwithstanding anything in any agreement.⁵⁸ This occupational order would assist the spouses in planning their living after the division of matrimonial real property.

3.2.4 The Transfer of Property shares and others

The LMA and the rules made there under lack explicit provisions for transferring various property interests including real property interest as part of marital disputes. However, the law in Kenya allows an order for the transfer of land, or of an interest in land, including a lease, licence or tenancy.⁵⁹ On another note, the court can order the transfer of shares or stock, or mortgages, charges, debentures, or other securities, or of the title or documents of title of any property.⁶⁰

Accordingly, the Court can order the transfer of rights or obligations under an instrument or contract, and an order of this kind has an effect.⁶¹ The significance of a court ordering this kind of relief of the transfer of various types of property interests such as land, shares, and contractual rights lies in its role in ensuring equitable distribution of assets and resolving disputes. Such orders are crucial in legal proceedings like divorce to facilitate the fair division of marital property and financial interests, enforce compliance with the court's decisions, and clarify ownership or obligations under contracts, thereby preventing further disputes and ensuring a just settlement for both spouses and external people.

⁵⁷ *Ibid*, r 30 (1) (l).

⁵⁸ *Ibid*, r 30 (1) (m).

⁵⁹ *Ibid*, r 30 (1) (i).

⁶⁰ *Ibid*, r 30 (1) (o).

⁶¹ *Ibid*, r 30 (1) (p).

3.2.5 Relief after Disposition of Matrimonial Property

In the context of polygamous marriages in Tanzania, the legal landscape surrounding the disposition or sale of matrimonial property presents several intricate challenges. The LMA and the Land Act, while providing some protection for spouses and property rights, do not fully address the complexities that arise when a matrimonial real property is sold or disposed of, especially when non-divorcing spouses or interested parties are involved. Section 114(1) of LMA is designed to protect the property rights of spouses in a monogamous marriage upon divorce. This section ensures that each spouse's contributions to the matrimonial property are recognized and accounted for during the division process. However, in a polygamous marriage, where multiple spouses have claims to the same property, this provision does not fully address the interests of non-divorcing spouses when the property is sold to an outsider.

Section 114(1) of the LMA does not stipulate how the interests of non-divorcing spouses should be handled in such scenarios. The non-divorcing spouses may find themselves with limited recourse or unclear pathways and relief to assert their claims or protect their interests, especially if the property is sold without their knowledge or consent. Section 59 of the LMA allows spouses to file a caveat to protect their interests in matrimonial property, which can temporarily prevent the sale or transfer of the property. While this provision provides some level of protection it not effective in a matrimonial property which the spouses are not residing. Furthermore, the provision does not offer protection once the property is sold to an outsider or when the matrimonial real property is not registered. This creates a significant challenge for non-divorcing spouses who may not have been part of the divorce process but are still affected by the sale. Furthermore, when the property is sold as a result of a valid decree of the court, which did not involve the non-divorcing spouses, the non-divorcing spouses would sue but, the bonafide purchaser's right to property will not be since they claim protection under section 135 of the Land Act. This is because the judgment holder exercised the right in line with the decree.

Additionally, the Land Act governs land registration and ownership but does not directly address the situation of property being sold to outsiders in a polygamous marriage. While the Act includes mechanisms for registering and protecting land ownership, it does not offer specific

remedies or reliefs for non-divorcing spouses whose interests are impacted by such transactions. The lack of explicit legal guidance in this regard leaves non-divorcing spouses with few options for seeking redress. Furthermore, in scenarios where a matrimonial property is sold to an outsider, non-divorcing spouses might need to pursue legal action to recover their share or seek compensation. However, this process can be fraught with difficulties. The LMA is notably silent on the issue of compensating a spouse whose matrimonial property has been disposed of by another spouse. The Act does not provide any clear entitlement or procedure for a spouse to claim compensation for their share or interest in the property if it has been sold or otherwise transferred without their consent. This absence of a mechanism to address such situations means that non-divorcing spouses may find themselves without recourse or remedy if their property interests are compromised.

Establishing a legal claim often requires proving their contributions to the property, which can be challenging, especially if the property's value has already been diminished or if the sale was conducted in a manner that undermines their rights. The remedy of compensation however does not exist in the LMA and the Land Act or Village Land Act⁶² and no clear pathways for recovering compensation or dividing the proceeds from the sale of property. Non-divorcing spouses may find themselves navigating a complex legal landscape, seeking to assert their claims against parties who may not have been directly involved in the initial dispute.

3.2.6 Property Right between spouses before the dissolution of Marriage

The LMA does not address how to defend or protect the rights of spouses in matrimonial property before the dissolution of the marriage. The legal framework does not clearly outline the procedures or courts with competent jurisdiction to handle disputes involving property rights or interests before a divorce is finalized. Section 2(1) of the LMA defines matrimonial proceedings as those instituted under Parts II and VI, including divorce, separation, annulment, maintenance, custody, and declaratory decrees. However, property rights between spouses and interests therein are not separately explicitly included as part of matrimonial proceedings.

⁶² The Village Land Act, Cap 114 R.E 2019.

This omission means that non-divorcing spouses or people with the right to matrimonial property have limited avenues to seek relief or protect their property interests while the marriage is still intact. The Law of Marriage Matrimonial Proceedings Rules⁶³ defines matrimonial proceedings as proceedings which include, on an objection under section 20 of the Act, for divorce, separation, or annulment, for maintenance of a spouse, for custody or maintenance of children of the marriage and for a declaratory decree under section 94 of the Act. From these provisions, one sees that non-divorcing spouses would not claim any relief toward property right before the termination of the marriage or during the termination of a Marriage.

Additionally, the Land Act under section 167 and the Village Land Act⁶⁴ under section 62 establishes land courts but looking at the jurisdiction of the Land Court, especially under the provision of sections 13, 33 and 37 of the Land Disputes Courts Act⁶⁵ these courts appear to have no jurisdiction in the claim of right or interest in the matrimonial property before divorce is issued as such it is challenging. Thus, the matrimonial regimes and ownership of real property regimes are silent on the courts and the procedure to defend the interest or right to the real property before divorce by spouses. This jurisdictional limitation creates a significant challenge for non-divorcing spouses or any person with an interest in matrimonial real property who seeks to assert their claims or defend their interests in matrimonial property before divorce. The Matrimonial Property Act of Kenya have this provision under section 17 of the Act which accord non-divorcing spouses and any other interested parties to who claim right in a matrimonial property to assert his/her right before divorce.

3.2.7 Identification of Marital Property and Its Implication on the Relief

Determining which assets are considered marital property and which are separate can be problematic, especially in polygamous marriages where multiple spouses may have contributed to or held interests in the property

⁶³ The Law of Marriage (Matrimonial Proceedings) Rules, GN No 224 of 1994.

⁶⁴ The Village Land Act, Cap 114 R.E 2019.

⁶⁵ The Land Disputes Courts Act, Cap 216 R, E 2019.

directly or indirectly.⁶⁶ The complexity arises from the fact that the LMA primarily addresses monogamous unions, and while it provides a framework for property division under Section 114, it does not explicitly cater to polygamous contexts. Thus leading to a challenge of appropriate remedy after division in polygamy. The case of *Basil Ndyanabo v. Karamagi*⁶⁷, though not exclusively about polygamy, highlights the challenges of equitable division in complex family structures. Although, Section 114 of the LMA provides for the division of matrimonial property but does not offer specific guidance for polygamous marriages, necessitating judicial discretion in such cases. The case specifically, the case dealt with the difficulty of determining each spouse's fair share of property acquired during the marriage, particularly in a context where contributions and ownership were contested. Furthermore, in polygamous marriages, identifying marital property becomes complex for example it is difficult to determine which property is jointly owned and how it should be divided among several spouses can be challenging.

3.2.8 Settlement of Matrimonial Property as a Relief

The LMA has no provision allowing spouses to use Alternative Dispute Resolution as a method to settle property rights disputes among themselves. Alternative Dispute Resolution can play a significant role in facilitating the division of matrimonial property in polygamous marriages. This allows for solutions that are specifically tailored to the unique circumstances of each polygamous marriage. Mediators or arbitrators can work with the parties to craft agreements that address their specific needs and concerns, which might not be possible through a court-imposed judgment. According to the LMA every divorce petition can have, among other terms, regarding the division of matrimonial property acquired by joint efforts of the parties and where there is no such agreement, the petitioner should provide a petitioner's proposal.⁶⁸ The Act further provides that it is the duty of the court hearing a petition of divorce to inquire into any arrangements made or proposed arrangements regarding the division of any matrimonial property and satisfies that the agreement is reasonable.⁶⁹

⁶⁶ LMA sec 114(2) (a).

⁶⁷ [2000] TLR 356.

⁶⁸ LMA, sec 106 (1) (f).

⁶⁹ *Ibid*, s 108 (b).

The legality of these types of agreements in Mainland Tanzania will very likely depend on the way the pre-nuptial agreement is drafted. The implication of section 108 (b) of the LMA is to allow agreements about the property. However, it has not prescribed the period during which the agreements should be formed i.e., whether before marriage or during the marriage, the condition in which such agreements can be made and the ground for enforceability and how they can be set aside in cases they are made to the detriment of the other spouse(s) who was misrepresented on material facts and conditions among other aspects. Which court can test its validity? Situations or grounds where such agreements are not applicable. Thus, the concept of pre-nuptial and postnuptial agreements are not comprehensively provided under the LMA. Prenuptial agreements would provide clear definitions of what constitutes marital and separate property. This is crucial in polygamous marriages where multiple spouses are involved. For instance, if one spouse acquires property independently, a prenuptial agreement can clarify whether this property is considered part of the marital estate or separate. In *Kabushenga v. Kabushenga*⁷⁰ the court emphasized the role of prenuptial agreements in providing clarity about property rights, which helps in the equitable distribution of assets. Although this case is not from Tanzania, it illustrates the broader principle of clarity that prenuptial agreements can bring. Furthermore, addresses how property is to be divided, prenuptial agreements help prevent conflicts that could arise during divorce. This is particularly significant in polygamous marriages, where disputes among multiple spouses can become complex and contentious.

Furthermore, prenuptial agreements regarding property distribution, thereby simplifying the legal process in case of separation.⁷¹ A prenuptial agreement can protect individual assets that each spouse brings into the marriage. In polygamous marriages, this ensures that the personal assets of each spouse are safeguarded, and the division of matrimonial property is handled by pre-agreed terms. In the case of *Gould v. Gould*,⁷² the court recognized the importance of prenuptial agreements in protecting individual assets, thus ensuring fair treatment and respect for each party's property rights. Prenuptial agreements play a crucial role in the division of matrimonial real property in polygamous marriages by providing

⁷⁰ [2001] HCB 155 (Uganda).

⁷¹ R v R [1987] 1 FLR 267 (UK)

⁷² [2010] EWCA Civ 30 (UK)

clarity, reducing disputes, protecting individual interests, facilitating fair distribution, and encouraging open communication between spouses in polygamous marriages taking interest of first spouses and spouses with significant contributions.

3.2.9 Relief to Protect Spousal Interest in Matrimonial Assets

The LMA appears to lack protection for spouses in polygamy in protecting matrimonial property. All it does is the protection of a matrimonial home from disposition without the consent of the other spouse with an interest in a matrimonial home. The provision specifically addresses protection in monogamous marriage in a matrimonial home.⁷³ The Act provides if a matrimonial home is owned by the husband or wife neither of them. At the same time, the marriage subsists and alienates the matrimonial home by way of sale, gift, lease mortgage or any other form of disposition without the consent of the other spouse.⁷⁴ The protection is not available in other matrimonial properties where the spouses are not residing. This is because, in the matrimonial home, the other spouse with an unregistered title acquires overriding interests.

In the case of *Mugo Muiru Investments Ltd v EWB & 2 Others*,⁷⁵ the court was of the following view concerning beneficial interest, that the equitable beneficial interest of a spouse in a matrimonial home is considered an overriding interest, meaning any transfer of the home's title is subject to this interest. Under common law, overriding interests are those that affect a registered title even if not listed in the register. These interests are binding on both the current owner and anyone who later acquires an interest in the property. Thus, the section does not offer statutory protection on other matrimonial property where the spouses are not residing. Furthermore, the protection exists only in monogamous property. On the other hand, Section 114 of the Land Act only offers protection of matrimonial homes in respect of mortgages, it does not specifically deal with issues of other kinds of disposition such as a sale. The provision allows the protection of spouses both monogamous and polygamous by requiring them to give consent before any disposition by way of mortgage is made.⁷⁶ The provision is silent in respect of consent

⁷³ LMA, sec 59.

⁷⁴ *Ibid*, s 59(2).

⁷⁵ [2017] eKLR.

⁷⁶ Land Act, s 114(1) (a &b).

and in respect of other matrimonial properties owned by spouses both in polygamy and in monogamy where spouses are not residing.

There is also a challenge in of protection of spouse interest in co-occupancy and relationships between spouses. The law requires spouses in co-occupation with other spouses when they undertake a disposition of land or a dwelling house, where a disposition is a mortgage, the lender should make inquiries if the borrower has or, as the case may be, has consented to that mortgage or assignment accordance with the provisions of Section 59 of the LMA. The Land Act is taking us back to Section 59 of the LMA which deals only with matrimonial homes and has no reference to polygamous marriage or other matrimonial property where spouses are not residing. It should also be noted that Section 161 of the Land Act is only relevant in a tenancy in common in a matrimonial home. Thus, may not be applicable to protect the interests of other spouses in other matrimonial assets held under co-occupancy.

In the case of *Habiba Ahmadi Nangulukuta and Others v Hassan Ausi Mchopa and others*⁷⁷, Section 161 of the Land Act was challenged on the grounds that the provision is only applicable where there is co-occupation of the suit property and the property is a dwelling house. The appellant further contended that, in this case, the suit property was not a dwelling house, as the appellants themselves testified that the property was not a dwelling house and that they had not visited it for a period of six years, from 2011 to 2017. Based on this submission, the Court of Appeal confirmed the validity of the provision in paragraph 20 of the decision. In general, the Land Act is silent on the protection of other matrimonial rights, or other interests of other spouses(s) in matrimonial property other than the property where spouses are residing. Meaning that other types of matrimonial property lack proper protection in the statutes. Also, issues of the consent of the other spouse with interest at the time of disposition may have its challenges in a polygamous marriage.

Another important matter not addressed by the Land Act, Land Registration Act, and LMA, is how a family ought to live and plan its affairs. The decisions of where a family is to reside, which land to farm, which land the children should utilize, what exact locations the children

⁷⁷ *Civil Appeal No. 10 of 2022, CAT, Mtwara, [2022] TZCA 15, pp 13 and 20*

should settle at, what and where to set aside for special uses, and such like things, are not answers that you will find when you look at these statutes. Families are dynamic and what works for one family may not work for another. For example, in many of our communities, traditionally and according to custom, the father of the house makes decisions such as where to farm, and where the children are to build their houses among other things. A question that can easily arise in our modern society is whether all spouses have to agree with such family arrangements. The fact of the matter is that in most homes the man is considered to be the head of the house and he thus takes the lead in making a lot of the decisions regarding how his family will live and generally gives direction on such internal family matters.

3.2.10 Designation of Matrimonial Property and Regimes

The LMA does not provide for a situation in which spouses may agree or change the matrimonial system when there is sufficient reason to do so and notice to be given to the creditors of the spouses in case the change will prejudice any person. This requirement is also stated in several instruments elaborated in chapter three yet the LMA has not domesticated this requirement. This would have determined the right to marital property of the spouses and the manner to deal with their future matrimonial relief. Under the LMA matrimonial property includes assets acquired before the marriage by one party which has been substantially improved by the other or by joint efforts.⁷⁸ The matrimonial property regime is usually designated by the spouses before marriage. The spouses would designate the matrimonial regime in respect of movable or immovable property and can choose which property can be used as a matrimonial home or matrimonial property and which would remain as separate property.

This would facilitate the concept of division at the time of divorce. The agreement on the choice of matrimonial regimes should be regulated by the Marriage law however the LMA is silent on the issue. Under the Kenyan Matrimonial Property Act, under section 8(2), the law allows spouses in polygamous marriage by a clear agreement to designate a particular property to be a matrimonial property of a particular wife and her husband separate from that of the other wife, then any such wife shall

⁷⁸ LMA, sec 114(3).

own that matrimonial property equally with the husband without the participation of the other wife or wives.

The lack of designation of the matrimonial regime under the LMA has necessitated the court to divide matrimonial property acquired by spouses during the marriage through their joint efforts by considering the extent of their contribution towards its acquisition.⁷⁹ The term contribution has also not been exhaustively defined in the statute courts have defined it to include domestic works. However, some aspects have been left out such as management of the matrimonial home, child care, companionship, management of family businesses or family and or farm work as part of the contribution toward the acquisition of matrimonial property.

In polygamous marriages, the designation of matrimonial property and regimes is crucial for ensuring clear property rights and responsibilities among spouses. Such designations help manage the division of assets and liabilities, providing a structured approach to property distribution in cases of divorce, separation, or death among the spouses. This legal framework can prevent disputes and conflicts by defining each spouse's share and contributions to the marital estate. Designating these regimes helps in safeguarding individual interests and joint assets and maintaining fairness among multiple spouses. This is because clear property designations aid in the equitable distribution of resources, support, and inheritance, reflecting the diverse and complex nature of polygamous family structures. This legal clarity helps protect the rights of all parties involved, ensuring that the marital estate is managed and divided by agreed-upon principles and legal norms.

3.2.11 Declaration of Rights to Property or Matrimonial Property as A relief

The LMA is silent on the relief of the Declaration of Right to Property or matrimonial property. On the other hand, the Matrimonial Property Act of Kenya provides that a person claiming a right to matrimonial property in dispute between a person and spouse or a former spouse of a person⁸⁰ may make an application for a declaration of interest in matrimonial property following the procedure stipulated⁸¹ or may be made as the part

⁷⁹ *Ibid*, sec 114 (1).

⁸⁰ The Matrimonial Property Act, s 17 (1).

⁸¹ *Ibid*, sec 17(2) (a).

the of the petition in a matrimonial cause,⁸² notwithstanding that a petition has been filed under the law relating to matrimonial causes.⁸³ In the case of *JM v SMK & 4 others*,⁸⁴ the High Court citing Muchelule, J in *N.C.K v. G.V.K [2015] eKLR* at pp9-10 noted that under Section 7 and 17 of the Matrimonial Property Act 2013, a spouse can approach the court to address issues related to property entitlements in two scenarios: either during an ongoing divorce proceeding or when the spouse is no longer living with the other but does not wish to divorce.

The court can issue declaratory orders that clarify the nature of the claimed interest in the property without dividing it in line with Article 45(3) of the Constitution of Kenya 2010. On the other hand, where a declaration of any right in matrimonial property is contested between that person and a spouse or former spouses in a petition made for dissolution of marriage under the Law of Marriage Act 2014, the application can be made as part of the relief sought in the matrimonial cause in accordance of the Matrimonial Property rules.⁸⁵

The Matrimonial Property Rules provide categories of persons who can institute matrimonial proceedings.⁸⁶ These are spouses,⁸⁷ any person against whom a spouse has made a conflicting property claim⁸⁸ and a trustee in bankruptcy, an executor under will and other testamentary grants, administrator or personal legal representatives of the spouse's estate in respect of an order or declaration relating to status, ownership, vesting or possession of any specific property by or for the beneficial interest of a spouse or formal spouse.⁸⁹

This provision allows spouses, third parties and legal representatives to institute proceedings relating to claims of right to or interest in matrimonial property. This kind of stipulation is not availed in the Law of Marriage Act in Tanzania. The provision would allow even ex-spouses to claim an interest in matrimonial property. In the case of *JM v SMK & 4*

⁸² *Ibid*, sec7(2) (b).

⁸³ *Ibid*, sec 17(2) (c).

⁸⁴ [2022] eKLR.

⁸⁵ The Matrimonial Property Rules, r. 7(1).

⁸⁶ *Ibid*, r 4.

⁸⁷ *Ibid*, 4(a).

⁸⁸ *Ibid*, r 4(b),

⁸⁹ *Ibid*, r 4(c),

*Others*⁹⁰ explaining the rule of the Matrimonial Property Rules on who can bring claims, the Court noted as follows.

... It is, therefore, arguable that where a claim is based on the right of the claimant as a wife and co-owner of properties acquired jointly by the husband and the wife, the wife may well seek orders as regards her part of the estate. In other words, where it is alleged that the husband and the wife have separate estates which are capable of being determined by the Court, nothing bars the Court from determining the same whether or not the husband and the wife are still married or are divorced...

In light of the above paragraph claims for the right to matrimonial property made under provision of rule 4(b-c) herein made during the subsistence of the marriage are made by originating summons with necessary modification in form No MPI set out in schedule⁹¹ stating among other things the ground for which the claim is made⁹² any claim made under these rules must be supported by an affidavit⁹³ stating the ground for which a claim is made⁹⁴ whether there have been previous claims relating to matrimonial property in question or whether the attempt to reconcile has been made,⁹⁵ in cases of a claim for a transfer or settlement of assets, the assets in which the claim is made and liability if any,⁹⁶ the assets to which the party against whom the claim is made is entitled either in possession or reversion⁹⁷ in cases of a claim to vary an agreement made before their marriage setting out their property rights or an order of a court made in determination of their property rights, all settlements whether made before or after their marriage⁹⁸, funds brought into settlement by each party⁹⁹ in cases of claim for cancellation of a transfer or other disposition the assets to which the disposition relates,¹⁰⁰ the persons in whose favour the disposition is alleged to have been made.¹⁰¹ In case of a disposition alleged to have been made by a way of

⁹⁰ [2022] eKLR.

⁹¹ The Matrimonial Property Rules, r 7(3),

⁹² *Ibid*, r 7(3)(a-b).

⁹³ *Ibid*, r 7(4).

⁹⁴ *Ibid*, r 7(4) (a).

⁹⁵ *Ibid*, r 7(4) (b).

⁹⁶ *Ibid*, r 7(4) (c) (i).

⁹⁷ *Ibid*, r 7(4) (c) (ii).

⁹⁸ *Ibid*, r 7(4) (d) (i).

⁹⁹ *Ibid*, r 7(4) (d) (ii).

¹⁰⁰ *Ibid*, r 7(4) (e) (i).

¹⁰¹ *Ibid*, r 7(4) (e) (ii).

settlement, the trustee and the beneficiary of the settlement.¹⁰² Tanzania lacks this kind of provision.

Sequel to the above, in proceeding relating to the division of matrimonial property or cancellation of disposition that relates to immovable property, the affidavit in support of the application in addition to particulars stipulated in rule 7(4) must state whether the title to the immovable property is registered or unregistered and if registered the particulars of registration.¹⁰³ Furthermore, it must contain particulars of charge or mortgage of property and any interest therein.¹⁰⁴ Likewise, it should provide particulars of the registered owner(s) of the property and in case of more than one owner, how the property is held, whether joint tenant or tenants in common.¹⁰⁵ All the applications must be supported by an authenticated bundle of evidential documents to be relied upon. List witnesses and witness statements if any among other particulars that may be needed.¹⁰⁶

This provision is very wide to allow any person who has an interest in matrimonial property to have his/her right. This kind of provision is not availed by any law in Tanzania. A spouse or former spouse is required to make the application at any time after the dissolution of marriage by a court decree after the final determination of the marriage process under the Marriage Act,¹⁰⁷ as part of matrimonial cause in line with section 17 of the Marriage Act 2014,¹⁰⁸ in case the applicant seeks a declaration of property right contested between the applicant, the applicant's spouse or the formal spouses,¹⁰⁹ and in respect of claims of interest under Rule (b and c) of the Matrimonial Property Rules the application must be made during the subsistence of the marriage.¹¹⁰

¹⁰² *Ibid*, r 7(4) (e) (iii).

¹⁰³ *Ibid*, r 7(5) (a).

¹⁰⁴ *Ibid*, r 7(5) (b).

¹⁰⁵ *Ibid*, r 7(5) (c).

¹⁰⁶ *Ibid*, r 7(6) (a-c).

¹⁰⁷ *Ibid*, r. 5(1) (a).

¹⁰⁸ This application can be made by way of originating summons to a judge or magistrate court with jurisdiction using form MPI set out in the schedule. This is stipulated under rule 7(2) The Matrimonial Property Rules. The application must state among other things the property rights or beneficial interest asserted in the claim in line with rule 7(2)(e) of the rules

¹⁰⁹ The Matrimonial Property Rules, r 5(1) (b).

¹¹⁰ *Ibid*, r 5(1) (c).

The application made by a spouse or former spouse for the declaration of a right to matrimonial property can be made after a final determination of the proceeding under the Marriage Act shall be made within twelve months from when the decree absolute was made.¹¹¹ The court may for sufficient reasons and grounds extend the time after hearing the applicant and other persons interested in the property or are likely to be affected by the order made and who have the right to be heard.¹¹² The application sought is made in line with the Law of Marriage (Matrimonial Proceeding) Rules¹¹³ under rule 5(4) of the Matrimonial Property Rules.

The Matrimonial Property Rules further stipulate the courts with jurisdiction to enforce the rights relating to matrimonial property.¹¹⁴ Such an application can be made High Court where the value of the matrimonial property exceeds the pecuniary value of the subordinate courts¹¹⁵ and a subordinate court with civil pecuniary jurisdiction to entertain the matter.¹¹⁶

3.2.12 Islamic Law Reliefs in Division of Matrimonial Property

Law of Marriage Act acknowledges Islamic marriage¹¹⁷ and divorce¹¹⁸, it does not explicitly detail the division of matrimonial property according to Islamic principles. Traditional Islamic law does not acknowledge marital wealth as a collective entity; spouses maintain ownership of their respective assets brought into the marriage. Despite this, Islamic law ensures that women receive an equitable settlement upon divorce, recognizing their contributions to the marriage. The doctrine of the totality of ownership dictates that after divorce, each party retains what is rightfully theirs without encroaching on the other's property. Islamic law considers direct contributions to property acquisition when determining the division of matrimonial assets.

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

¹¹¹ *Ibid*, r 5(2) and 5(1)(a).

¹¹² *Ibid*, r 5(3).

¹¹³ Law of Marriage (Matrimonial Proceeding Rules) 2020 Legal Notice No. 112 of 2020.

¹¹⁴ The Matrimonial Property Rules, r. 6 (1).

¹¹⁵ *Ibid*, r 6(1) (a).

¹¹⁶ *Ibid*, r 6(1) (b).

¹¹⁷ LMA sec 9(3); 25(1) (b).

¹¹⁸ *Ibid*, s 107(3).

person's property.¹¹⁹ 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.¹²⁰ This is quite different from the LMA since it also recognizes domestic contributions entitling a spouse to division.¹²¹ In the case of *Bi. Hawa Mohamed v Ally Seif*,¹²² 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."

Even though the law of LMA recognizes Islamic divorce¹²³ it does not have any specific provision in the Act allowing the division of matrimonial property in line with Islamic law. Islamic scholars, however, often note that domestic contributions are less emphasized because marriage is primarily for personal relationships rather than domestic services. The practice of Prophet Muhammad's wives shows that domestic responsibilities are secondary to the marital relationship. Therefore, while domestic work is essential, it is not considered a direct contribution to property acquisition.¹²⁴

In Islamic law, the dowry (Mahr) is a crucial element of marriage, intended to safeguard the wife's financial security. A marriage contract may include provisions for property division in the event of divorce, with the Mahr often serving as financial support for the wife. If the Mahr is nominal, it may not suffice for the wife's needs, necessitating additional gifts or compensation from the husband. Upon divorce, Islamic law entitles the wife to a parting gift (Mut'ah), which is meant to alleviate the emotional and financial strain of divorce. The Mut'ah, which can take

¹¹⁹ H.O Hamad., *The Law of Divorce in Tanzania: A conflict between the Law of Marriage Act 1971 and Islamic Law*, Open University Law Journal, 2013. Vol. 4, No. 1, p. 144.

¹²⁰ Ibid.

¹²¹ LMA sec 114(2) (b).

¹²² [1983] T.L.R 32.

¹²³ LAM sec 107(3).

¹²⁴ A.Hashim., Muslim personal law in Kenya and Tanzania: Tradition and innovation. *Journal of Muslim Minority Affairs*. 2005 Dec 1; 25(3): p 556.

various forms such as money, property, or other valuables, is provided to ensure the wife's well-being and dignity post-divorce.¹²⁵

The Quran emphasizes the importance of this gift, underscoring that it should be appropriate to the husband's means and the wife's needs. "*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.*"¹²⁶ The concept of Mut'ah and the Mahr are supported by both Quranic verses and Hadith. The Quran mandates that a divorced woman should receive a suitable Mut'ah and provides guidance on the appropriate provisions for divorced women. Though the exact amount of the Mut'ah is not specified, it is intended to reflect the husband's capacity and the wife's situation.¹²⁷ Under the Matrimonial Property of Kenya, a spouse who professes the Muslim faith may be governed by Islamic law in all matters relating to matrimonial property.¹²⁸ This applies to any court where a claim to enforce a right of matrimonial property under Islamic law or where the spouses request the court to Islamic law.¹²⁹ This provision recognizes the fact that statutory law may be different from Islamic law and so it gives room for Islamic law to apply. This relief and provision do not exist in the Law of Marriage Act of Mainland Tanzania.

3.2.13 Matrimonial Property of a Surviving Spouse

The LMA and the Probate and Administration of Estate Act¹³⁰ are silent on the division of matrimonial assets by a surviving spouse(s) after the death of the other spouse upon grant of probate or letters of administration. The Court of Appeal has pointed out that in such a situation a claimant should file a case in a probate court. In the case of *Leticia Mtani Ihonde v Adventine Valentina Masonyi*,¹³¹ it was held that,

Where the husband has died the surviving spouse cannot seek distribution of matrimonial assets in a matrimonial cause, and any claims or perceived rights thereto must be sought in a Probate and Administration cause.

¹²⁵ V.P Bharatiya., Syed Khalid Rashid's Muslim Law, Eastern Book Company, 4th Edn., Lucknow, p. 85.

¹²⁶ Quran 4:4.

¹²⁷ Qur'an, Surah al-Baqarah (2): 236, Qur'an, 2:241 and Qur'an 33:49.

¹²⁸ The Matrimonial Property Act of Kenya, Act, s 3.

¹²⁹ The Matrimonial Property Rules, r 6(2).

¹³⁰ Probate and Administration of Estate Act, Cap 352 RE 2019.

¹³¹ [2022] TZCA 347.

The court did not, however, underscore the procedure to be used. Since the surviving spouse claims her interest in matrimonial property. If she is to implead the administrator or executor of the estate. The nature of documents and how the claim should be the law is silent. This is because even the filing of a caveat under Section 58 of the Probate and Administration of Estate Act would not assist the remaining spouses in proving their contribution or interest in the matrimonial property as the executor or the administrator of the estate would not be in a position to know the contribution of each spouse and issues of assessing the contribution of the remaining spouse would not fall in succession courts.

In the case of *Theofrida Mhagama v Njengafibili Mpojoli Mwaikugile*,¹³² the Court of Appeal while dealing with issues of matrimonial property during the succession of a spouse who did not file a caveat said:

“Similarly, the issue of the disputed property being declared a matrimonial property was not among the reliefs sought by the appellant. However, even if that relief was sought, it would have been in a wrong forum because such a matter is ordinarily dealt with upon divorce or separation of spouses.”

4.0 Conclusion and Recommendations

In conclusion, the LMA provides limited reliefs for the division of matrimonial real property during divorce in polygamous marriage primarily focusing on either the division of property or the sale and distribution of proceeds emanating from sale of the matrimonial real property. Furthermore, these reliefs do not adequately address the complexities of polygamous marriages, where non-divorcing spouses may face challenges due to their contributions being overlooked in divorce proceedings. The current framework is restricted by the provisions of Section 114 which has not considered the diverse dynamics and intricacies of polygamous unions, particularly in relation to the nature of the property right involved. This gap results in difficulties in dividing or selling real property, as the Act does not offer clear guidelines on how to equitably distribute the assets among several spouses.

Consequently, the relief mechanisms available are often insufficient, leaving many spouses without fair compensation or recourse to access

¹³² [2021] TZCA 6.

their rights. This article highlights the need for comprehensive legal reforms to better address the unique circumstances of polygamous divorces and ensure a more equitable and inclusive approach concerning the reliefs during the division of matrimonial property. To address these issues, Tanzania could benefit from adopting more detailed provisions similar to those found in Kenya's Matrimonial Property Act, and the rules made there under, which offer a structured approach to handling reliefs multiple for property division. Implementing such reforms could enhance the legal framework in Tanzania, ensuring more equitable outcomes and adequate relief for all parties involved in polygamous marriages. With these remarks, the following are the proposed Solution or reforms.

Amendment of the LMA specifically section 114 (1) of the LMA by enacting compressive reliefs that can be used in the event of property division in polygamous marriages. Tanzania Mainland can adopt the provision of section 17 of the Matrimonial Property Act of Kenya and rule 30 of the Matrimonial Property Rules of Kenya.

Amend the LMA to include Alternative Dispute Resolution (ADR) to be used as a mechanism to settle issues of property division in polygamous marriages. Thus, the LMA should be amended by adding a provision that would allow spouses to go through any form of ADR whether mediation, Conciliation or Reconciliation to come up with a consent agreement between spouses in respect of rights and ownership of interest before any spouse in polygamy is divorced. This would assist all parties to participate and settle their rights toward property division between divorcing and non-divorcing spouses without affecting the interest of either party.

Amend Section 114 of the LMA to allow the protection of co-wives' rights during the division of matrimonial real property in a polygamous marriage, The provision should give rights of non-divorcing wives to defend or make an application for a declaration of interest in the matrimonial real property before the court decides the division between the divorcing spouses as provided under section 17 of the Matrimonial Property Act of Kenya.

It is proposed that Section 114(1) of LMA be amended to explicitly acknowledge and address the rights and contributions of non-divorcing

spouses before the division or sale of the said properties. This amendment aims to afford all individuals with a legitimate interest in matrimonial property the opportunity to be heard and to ensure that their contributions are duly recognized. Additionally, the proposed amendment should include a provision mandating the recognition of contributions made by such interested parties, regardless of their involvement in divorce proceedings.

Amend the LMA to integrate religious law (Islamic) in the division of matrimonial property at the time of divorce, especially for those prophesying Islamic religion. This will allow spouses to claim relief in line with Islamic law.

It is proposed, that there be development of practices and guidelines to assist courts in providing equitable relief in polygamous marriage cases. This will ensure consistent and fair decisions when dividing property in polygamous marriages. The reform should provide detailed judicial guidelines on how to apply the law and make decisions based on the unique circumstances of each case. These guidelines would help judges and magistrates in determining equitable shares and addressing complex family dynamics, ensuring that the relief provided is just and aligned with legal principles.

Amend Section 48(1) (e) of the Civil Procedure Code to provide guidelines for the execution of decrees involving the sale of matrimonial property, especially where it serves as a matrimonial home when several spouses are involved in polygamy. This should ensure that the rights of all family members, including children and non-divorcing spouses, are protected during the execution process

Amend the LMA to align with land ownership and division between spouses as provided for under the Land Act. This will ensure uniformity in reliefs, especially in cases of joint ownership or joint tenancy of spouses in polygamous marriages. The provision should provide clear procedures for the division of real property held in joint ownership, including the mechanisms for partitioning, severance, transferring or dividing shares in property between spouses

Amend the Land Registration Act particularly section 71 to require the registration of property or interests in a property spouse following a court ensuring legal recognition of such transfers following the nature of land whether under the Land Act or ownership in Condominium under the Unit of Titles Act, furthermore, amend section 53 of the Land Registration Act to accommodate matrimonial property interests, including condominiums and other unit titles, ensuring that these interests are properly registered and recognized.

Amend the LMA and the rules made there under to look at all interests in the land, such as lease, mortgage and other contractual obligations on the real property in line with the law of realty at the time of divorce and subsequent division of matrimonial property.

Amend the LMA to provide a relief of compensation. This could assist non-divorcing spouses when their matrimonial property is sold or transferred without their consent or proof of their contribution. Allowing non-divorcing spouses and persons with interest in matrimonial property to file compensation claims based on their contributions or interest to the property will assist in calculating and awarding in proportion to their interests.

Amending the LMA to include provisions related to injunctions to prevent the sale or transfer of property until disputes are resolved and the interest of all spouses and or interest parties in the property is determined. This would include all interest parties in the property whether divorcing or non-divorcing.

Amend the LMA especially section 106 to include provisions that allow for the recognition and enforcement of pre-nuptial agreements in polygamous marriages. Mainland Tanzania can borrow a leaf from section 8(2) of Kenya's Matrimonial Property Act allows pre-nuptial agreements that grant exclusive property rights to one spouse, and this provision has proven valuable in protecting the interests of individual spouses in polygamous unions. By incorporating similar provisions, Tanzania can provide greater clarity and security for spouses who wish to define their property rights before marriage.

By enacting these legal reforms, mainland Tanzania will establish a comprehensive and equitable framework for the distribution of matrimonial real property in polygamous marriages. These amendments will address the current Law of Marriage Act deficiencies, offer more precise guidelines regarding reliefs and procedures for property division, and guarantee equitable remedies for all spouses involved.