FAMILY

LAW AND PRACTICE IN TANZANIA

J. Clement Mashamba

Clement Mashamba is an Advocate of the High Court of Tanzania and the founding Executive Director of the *National Organization for Legal Assistance,* **nola**. He undertook his undergraduate degree in law from the University of Dar Es Salaam. He has also attended extensive training in human rights from the Canadian Human Rights Foundation (CHRF), Montreal, Canada; and the Danish Institute for Human Rights (DIHR), Copenhagen, Denmark. He graduated his LL.M. from the Open University of Tanzania (OUT).

Mr. Mashamba has published several legal and human rights publications, including articles on children rights, economic and social rights and corruption. One of his recent human rights work is entitled: *Human Rights in Pemba: Reflections on the May 2003 Pemba By-Elections* (published in 2006). Amongst his forthcoming publications include: *Enforcing Social Justice in Tanzania: the Case of Economic and Social Rights*.

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TABLE OF ABBREVIATIONS

A.C.	Appeal Cases
Ag. J.	Acting Judge
A.I.R.	All India Reports
All E.R.	All England Reports
Aus.	Australia
BAKWATA	*Baraza Kuu la Waislamu Tanzania* (National Muslim

	Council of Tanzania)
BOT	Bank of Tanzania
Cap.	Chapter of Laws
C.A.T.	Court of Appeal of Tanzania
CC	Constitutional Court (of South Africa).
CCM	*Chama cha Mapinduzi*
CEDAW	Convention on Elimination of all forms of Discrimination against Women
CERD	Convention on Elimination of Racial Discrimination
CHRAGG	Commission for Human Rights and Good Governance
C.J.	Chief Justice
Co.	Company
CPC	Civil Procedure Code
CRC	Convention on the Rights of the Child
c/s	Contrary to Section
DC	District Commissioner
D.C.I.	Director of Criminal Investigation
DP	Democratic Party
D.P.P	Director of Public Prosecutions
d/o	Daughter of
DW	Defence Witness
E.A.	East Africa Law Reports
E.A.C.A.	Eastern Africa Court of Appeal Reports
ECHR	European Court of Human Rights
Ed.	Editor (eds. – editors)
e.g.	*exempli gratia* (for example)
et al	*et alii* (and other people; *et alia* (and other things)
et seq.	*et sequentes* (and the following)
etc.	*et cetera* (and the rest or and all others)
G.N.	Government Notice
H.C.	High Court
H.C.D.	High Court Digest
H.L.	House of Lords
Hon.	Honourable
i.e.	*id est* (that is)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
Ind.	India
ILO	International Labour Organisation

J.	Judge
J.A.	Justice of Appeal
J.K.	*Jaji Kiongozi* (Principal Judge)
K.B.	King's Bench
L.J.	Lord Justice
LL.B.	(*L. Legum Baccalaureus*) Bachelor of Laws Degree
LL.M.	(*L. Legum Magister*) Master of Laws Degree
LRC	Law Reports of the Commonwealth/Law Reform Commission (of Tanzania)
LRT	Law Reports of Tanzania
Ltd.	Limited (normally, a company with limited liability)
M.R.	Master of Rolls
MP	Member of Parliament
N.B.	*Nota Bene*
NGO	Non-Governmental Organisation
No.	*numero* (number)
nola	National Organization for Legal Assistance
OAU	Organisation of African Union
OCD	(Police) Officer Commanding District
op. cit	*opere citato* (in the work mentioned
p.	page (pp – pages)
para	Paragraph
PCE	Permanent Commission of Enquiry
PIL	Public Interest Litigation
Q.B.	Queen's Bench
R.	Rex, Regina or Republic
R.C.	Regional Commissioner
R.C.O.	Regional Crime Officer
R.E.	Revised Edition (of the Laws of Tanzania, 2002)
Rev.	Reverend
RM	Resident/Regional Magistrate
RPC	Regional Police Commander
RPO	Regional Prisons Officer
Rtd.	Retired
s.	Section
S.A.	South Africa
SADC	Southern African Development Cooperation
SALC	South African Law Commission.
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports (Canada and India)

Shs.	Shillings (TShs. – Tanzanian Shillings)
SMZ	*Serikali ya Mapinduzi Zanzibar*
s/o	Son of
Supp.	Supplementary (Law Reports, etc)
TANU	Tanganyika African National Union
TLP	Tanzania Labour Party
T.L.R.	Tanzania Law Reports
TLS	Tanganyika Law Society
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UN	United Nations
URT	United Republic of Tanzania
U.S.	United States of America (also USA)
v.	versus (against)
ZEC	Zanzibar Electoral Commission
Z.L.R.	Zanzibar Law Reports

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THE NATURE AND CONCEPT OF MARRIAGE

Chapter One

UNDERSTANDING THE NATURE AND CONCEPT OF MARRIAGE

1.1 The Nature of Marriage

Marriage is, in many societies, recognised as a kernel of the family. Worldwide, marriage is a relationship that plays a key role in the definition of many families.[1] As an old adage says, human life has got three important stages: birth, marriage

[1] For more details on this subject, visit, http://www.TheFreeDictionary.com

and death. As such, marriage is part and parcel of human life. It is a personal, social, economic, legal, and often religious, relationship between spouses.[2] Marriage is so important that it is common, and diversely understood, in every society in the world. Therefore this Chapter discusses marriage on an historical basis.

Socially, the family is the basic unit of society and the most popular voluntary institution in our modern society.[3] It is the most intimate and important of all social groupings. According to Article 16(3) of the Universal Declaration of Human Rights of 1948 (UDHR),

> 16.- (3) The family is the natural and fundamental group in our society and is entitled to protection by society and the State.[4]

Most people consider family life a private matter, 'and in many ways it is.'[5] So, marriage and family, being microcosms of the life itself, are society's oldest and resilient institutions.[6]

> From the beginning of human life, people have grouped themselves into families to find emotional, physical, and communal support… Family structures may vary around the world, but the value of 'family' endures.[7]

Essentially, 'the word *family* is used to describe many relationships: parents and children; people related by blood, marriage, or adoption; or a group of people living together in a single household, sharing living space and housekeeping. Since the word *family* does not have a precise meaning, many laws define the term when they use it.'[8] For example, laws on insurance, social security, inheritance or marriage may define family in other, thematic ways.

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[2] ARBETMAN, Lee P., et al, *Street Law: a Course in Practical Law*, 5th edition, New York: West Publishing Company, 1994, p. 324.
[3] OLSON, David H. and DeFrain, John, *Marriage and the Family: Diversity and Strengths,* 3rd edition, London: Mayfield Publishing Company, 2000, p. 5.
[4] This right is re-echoed in Article 23(1) of the International Covenant on Civil and Political Rights of 1966 (ICCPR), which contains the same wording as that of Article 16(3) of the UDHR.
[5] ARBETMAN, Lee P., op. cit, p. 320.
[6] Ibid, p. 4.
[7] Ibid.
[8] ARBETMAN, Lee P., et al, *Street Law: a Course in Practical Law*, op. cit.

Black's Law Dictionary,[9] nonetheless, defines a *family* as: (i) 'A group of persons connected by blood, by affinity, or by law, especially within two or three generations. (ii) A group consisting of parents and their children. (iii) A group of persons who live together and have a shared commitment to a domestic relationship.' Accordingly, a family is a group of people who love and care for each other, in a relationship that provides emotional, physical, and economic mutual aid to its members.[10] According to Olson and DeFrain,

> Marriage is by nature a multifaceted institution (which can be defined as) the emotional and legal commitment of two people to share emotional and physical intimacy, various tasks, and economic resources.[11]

From the foregoing exposition, therefore, one may note the nexus that exists between a family unit and marriage. In this sense, marriage is a central component of the larger family unit. And this is particular so in communities that are still blended in customary ways of living, such as traditional African communities or Islamic and Hindu communities. In these communities, unlike the most liberalized western communities, marriage is deemed so mandatory or an essential *samskaras* (sacramental) that it is regarded immoral for an adult to remain unmarried. To Hindus, for instance, marriage is conceived as a sacramental as well as a holy union.[12] To most customary African communities, marriage is a social and economic union meant to enrich the husband's family for the wife is expected to be productive to the family economics. In most African communities, this leads to men paying dowry as anticipatory compensation to the women's families because the latter are expected to contribute much to the former.

1.2 The Concept of Marriage

As we have stated above, marriage is a very essential union to the family unit. And it is a social, economic, legal, and often religious, relationship between dspouses that is as old as society itself. One of the historical and salient characteristics of marriage is its ability to adapt to changing times and new

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[9] GARNER, Bryan A., (ed.), *Black's Law Dictionary,* 8th edition, New York: West Publishing Company, 1999, p.637.

[10] OLSON, David H. and DeFrain, John, *Marriage and the Family: Diversity and Strengths,* op. cit., p. 10.

[11] Ibid, p. 8.

[12] DIWAN, Paras, *Law of Marriage and Divorce*, 4th edition, Delhi: Universal Law Publishing, 2002, p. 18.

challenges.[13] Therefore, defining marriage has always to be done according to the context one chooses and basing on its historical origins. Indeed, precise definitions of marriage vary historically and between and within cultures, but marriage has been an important concept as a socially sanctioned bond between people who (usually) are in a sexual relationship.[14] Religiously, marriage is viewed as a sacramental union, meaning that it is sacrosanct. Amongst Christians, particularly the Roman Catholics, the canon law recognises marriage as a *permanent*, *insoluble* sacrament. It provides that by marriage, man and wife are made one flesh by the act of God – marriage being a holy tie, a sacrament.[15] This is due to the fact that Christians believe that 'marriages are made in heaven;' and, as such, 'what God hath joined together, no man put it asunder.' As Diwan argues that, it is traditional amongst the Catholics that once entered into by mutual consent of the parties and on its being consummated, the marriage becomes complete provided that there are no impediments to it. Thus, the parties to the marriage are treated as 'ministers of the sacrament.'[16]

1.3 The Changing Nature of Marriage

Historically, Christian marriage under the Catholic canon law was not subjected to the jurisdiction of civil courts. When Martin Luther and other reformers propounded that civil courts should have jurisdiction over the Christian marriage, the Council of Trent rejected this opinion. Therefore, it is canon law that,

> Marriage as a conjugal union between man and his wife arises only from the free consent of each spouse, but this freedom relates to the question whether two persons really wish to enter matrimony, but once they decide to do so, the nature of the matrimony is entirely independent from the free will of spouses. Once entered into, it becomes an indissoluble union.[17]

To the Hindu concept of marriage, unlike Christians who believe that marriage is dissoluble only upon death, it is an immutable union, which is a union for all life to come that cannot be dissolved even upon death.[18]

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13 OLSON, David H. and DeFrain, John, *Marriage and the Family: Diversity and Strengths,* op. cit., p.5.

14 See, http://www.TheFreeDictionary.com

15 DIWAN, Paras, *Law of Marriage and Divorce*, op. cit, p. 19.

16 Ibid, p. 21.

17 Ibid.

18 Ibid.

With the coming of the Reformation, though, which brought significant changes in Christianity[19] as well as to the concept of marriage, the indissolubility of marriage was challenged. While the Catholics clung to their traditional indissolubility abstraction of marriage – with the Catholic Church tightening its grip over the jurisdiction of the marriage institution – the Protestants considered marriage as a dissoluble union that could be subject to the jurisdiction of civil courts. As such, once the Protestant world came to consider marriage as a dissoluble union and under the jurisdiction of civil courts, great strides were made with the Industrial Revolution,[20] which firmly took the view that marriage is a civil contract, which should be dissoluble under certain circumstances.

This period was predominated by the concept of accumulation of private wealth (capital), free opportunities for investment and realisation of massive profits in the economic sphere; and the concept of freedom of contract and the sanctity of contract in the legal field. This period, thus, witnessed the emergency of the institution of contract that was a direct response to the demands that cropped up in Northern Europe at a time when the development of commerce and industry depended much on binding nature of contractual relations between parties to contract.

> Commercial transactions required a developed notion of binding promises. The expansion of the institution of contract since the 17th century was intimately related to the commercial revolution in Northern Europe following trade with the East and America. The industrial revolution which ushered in mass commodity production required a very developed institution of contract and laws relating to it.[21]

[19] By these changes the Christian world was divided between Catholics and Protestants.

[20] The Industrial Revolution took place in Europe, beginning in the Great Britain, between the 15th and 18th century. This period was characterized by successful unleashing of the Industrial Revolution that enabled profitable experimentation and the development or 'revolution' in manufacture, transport and communication, developments that – beginning in the 1760s – set in motion a new socio-economic system with new socio-economic dimensions. This kind of experimentation had already been attempted gradually as early as during the 16th century, with remarkable introduction of first paper and gunpowder mills; first cannon factories; first sugar refineries, which in turn gave rise to investment of large sums of capital into these factories, and later industries, leading to unprecedented huge surpluses and profits. For detailed explanation of the Industrial Revolution and its impact on the socio-economic order of Europe, and later the rest of the world, see, NABUDERE, Wadada D., *The Political Economy of Imperialism*, Chapters VI and VII, pp. 68-72.

[21] NDITI, N.N.N., *General Principles of Contract Law in East Africa*, Dar Es Salaam University Press, 2004, p.2. Also see, generally, COHEN, "The Basis of Contract," *Harvard Law Review* (46), 1933, 553.

As such, the institution of contract brought to the fore several fundamental conceptions, including the conception that a developed institution of contract contains two fundamental notions. These are 'freedom of contract and sanctity of contract. Freedom of contract means that persons are free to contract as they wish. Once they have concluded a contract voluntarily that contract becomes sacrosanct in the sense that nobody, not even the state, should interfere with it.'[22] It is important to note that these two fundamental notions are features of a capitalist legal system 'and are necessary legal developments in that society, based as it is upon the economic phenomenon of exchange of commodities, buying and selling; and are also necessary legal features of societies developing towards capitalism, or under the impact of capitalism introduced from without, societies in which some things become commodities, i.e., are capable of being and are bought and sold in particular land and human labour power.'[23] So, at this particular point in time the concept of marriage changed and it adapted to the changed concept of contract, which required that, although it was sacrosanct, a marriage contract would, in certain circumstances, be dissolved.

1.4 Sanctity of Marriage and Freedom of Contract

It was at this particular point in time when the English law of marriage evolved; and, as such, it could not escape the predominant concept; and, indeed, the psycho-social impact, of sanctity of contract and freedom of contract. The institution of marriage was, to a certain extent, influenced by the advent of the Reformation in Christianity whereby the Protestants argued irresistibly that marriage was a civil contract as such all matters surrounding it, or consequential thereto, were subject to the jurisdiction of the civil courts; and, therefore, ecclesiastical courts had no jurisdiction over them. Thenceforth, the marriage institution 'came to be regarded as a dissoluble union. Thus the Reformation brought about a fundamental change of attitude toward marriage among the Protestants.'[24]

> The Industrial Revolution's lofty ideas of liberty, equality and pursuit of happiness gave a further impetus to liberate marriage from the fetters of the Church. Once marriage was accepted as a contract it was next logical step to consider it as dissoluble union. Marriage came to be recognised as a human institution based on the free volition of men and women who were undoubtedly responsible tough not infallible individuals. They can err; they can blunder.[25] They should be given the right and liberty to get over the burden that had

[22] Ibid, p. 3.
[23] Ibid.
[24] DIWAN, Paras, *Law of Marriage and Divorce*, op. cit, p. 22.
[25] FRIEDMAN, *Law in a Changing Society*, 1970, p. 175.

> become intolerable, and which was sapping the vital energy and moral fibre of the spouses to a marriage that had failed. As in other human affairs so in marriage, people should have the opportunity to rectify their errors.[26]

As Diwan correctly points out, the dissolubility of marriage is a clear manifestation of the individualistic philosophy – the pursuit of happiness.

> This philosophy propounds the notion that each individual is entitled to live his life as cheerful and happily as he or she chooses. He has the right to develop those conditions and situations which tend to help him to live happily and to develop his personality, talent, capacity, capability and potentialities. This freedom implies freedom to correct his errors; to rectify his blunders in choosing his or her life partner, by getting a marriage dissolved which has failed; he has liberty not to enter into matrimony and he has liberty to get out of it. The propounders of this philosophy hold that *marriage is no doubt a bond, a civil contract, but it is not a bondage, a slavery in the garb of superimposed sacramentality and indissolubility of marriage bond*.[27] [Emphasis supplied].

Although the Protestants came to regard and believe in the contractuality and dissolubility of contract of marriage, they considered marriage as a special contract. 'It was not equated with a commercial contract. They asserted that marriage being a social institution, there was social interests in its preservation and protection.'[28] They believed, and still believe, that marriage 'though dissoluble can be dissolved only in those cases where a party to the marriage by his act or omission fundamentally undermined it.'[29]

> The marriage thus became dissoluble in case of an inevitable failure of marriage on account of recurring mischief or atrocitious conduct of the one party to the marriage against the other party. These … later on came to be known as grounds of divorce.[30]

1.5 The Muslim Conception of Marriage

To the contrary, Muslims have, from the beginning of Islam, regarded their marriage as a contract; and a Muslim marriage has, thus, been defined as a civil contract[31] 'the objective of which are two: (i) legalization of sexual intercourse and (ii) procreation of children.'[32] Although the Muslim marriage is solemnised

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[26] DIWAN, Paras, *Law of Marriage and Divorce*, op. cit, p. 23.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] SIRCAR, Shama Charan, *Mohammedan Law*, Tagore Law Lectures, 1873, 30, referred to in ibid.
[32] WILSON, *Anglo-Muhammadan Law,* 94.

by recitation of verses from the Koran, it is not treated as a sacrament;[33] and, as such, Islam does not prescribe any religious service, ceremonies or rituals as essential for the solemnisation of Muslim marriage.[34] A Muslim marriage is, therefore, both in the nature of *ibadat* – devotional act – and *muamalat* – a dealing among men.

This Muslim conception of marriage is founded on the fundamental concept of individual liberty and responsibility, 'which is a cornerstone of Muslim jurisprudence.'[35] As such,

> In Muslim law, marriage depends upon the free volition of the parties concerned, so does its dissolution, though the wife's volition in this regard is subordinated to that of the husband, since the Muslim jurists subscribe to the notion that of the two partners, the husband, on account of his physical and intellectual superiority, has to play a dominant role, and the wife is therefore, subordinated to him, so much so that she practically enjoys no marital freedom. Some theorists treat the dower as consideration for the alienation of her marital freedom.[36]

Therefore, in the Muslim jurisprudence, unlike in Christianity, the husband enjoys absolute power of divorcing his wife. The wife can successfully claim divorcing her husband only where the husband agrees to her proposal, 'and she either foregoes her dower, or gives him something in return for his consent, to release her from the marital bond.'[37] This justifies the contention that marriage in the Muslim jurisprudence 'is a contract of civil law, and it shows trace of having developed out of the purchase of the bride; the bridegroom concludes the contract with the legal guardian (*wali*) of the bride, and, he undertakes to pay the nuptial gift (*Mahr sadak*) or 'dower' … not to the wali as was customary in the pre-Islamic period, but to the wife herself.'[38]

The foregoing elucidation justifies our contention that we advanced at the outset of this account that marriage is a very important nucleus of the family unit in every social grouping for it is a personal, social, economic, legal, and often religious, relationship between spouses. We have seen, in the main, that at certain stages of the development of the marriage institution, human beings have gone as far as to refer to it as a sacrament, a permanent, indissoluble as well as a

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[33] FITZGERALD, *Muslim Law*, 37.
[34] Per Mahmood, J., in *Abdul Kadir v. Salima*, ILR (1886) 8 All 149.
[35] DIWAN, Paras, *Law of Marriage and Divorce*, op. cit, op. cit.
[36] Ibid.
[37] Ibid.
[38] Ibid, referring to Schacht, 160.

sacrosanct union. We have also seen that while the Muslim world recognised marriage to be a civil contract capable of being dissolved at, absolutely, the husband's will as soon as Islam emerged, in the West this concept developed only when the Reformation took place in Northern Europe during the Industrial Revolution.

1.6 The Changing Concept of Marriage: From Heterosexuality to Homosexuality

In most countries of Western Europe and America, however, the concept of marriage has changed and marriage as an institution has started to crumble. Many people choose to live together in a *cohabitative* relationship rather than as married couples.[39] In England, for example, marriage is demographically on the decline and cohabitation is increasing.

> Divorce is common (there were 148,000 divorces in 2002 in England). Increasing numbers of families are lone-parent families. In Britain a quarter of all children are brought up by a single parent and Britain has a greater proportion of single parents than any other European Union country. More children are being born outside marriage.[40]

This means that, in Europe and North America,[41] cohabitation is gaining ground, in the process undermining the marriage institution. This has necessitated the emergency of a more liberal approach to divorce where more laissez-faire grounds for divorce are threatening the institution of marriage. Thus, there is discussion about reforming the law governing the property rights of cohabitants on the breakdown of the cohabitation relationship. There has also emerged a new trend where parties to a marriage or cohabitative relationship sign pre-nuptial agreements, which is being challenged by some *conservative* sections of the Western society who believe that 'such agreements might encourage parties to believe that marriage is a short-term option.'[42] With this trend, the Western world has witnessed recognition of same-sex partners and transsexuals to marry a person of opposite sex to the transsexual's post-operative gender.

However, according to the British Home Office Consultation Document, entitled: *Supporting Families* (1998), although many lone parents and unmarried couples raised their children as successfully as married parents, marriage was still the

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[39] STANDLEY, Kate, *Family Law*, 4th edition, New York: Palgrave Macmillan, 2004, p. 19.
[40] Ibid, p. 6.
[41] OLSON, David H. and DeFrain, John, *Marriage and the Family: Diversity and Strengths,* op. cit.
[42] Ibid, p. 19.

'surest foundation for raising children and remains the choice of the majority of people in Britain.' For this matter, the British government has decided to support the institution of marriage for it believes that marriage 'creates stability in society and is the best environment in which to bring up children.'[43] The British government is, therefore, now strengthening the institution of marriage by helping more marriages to succeed.

In African societies, though, there are different and diverse conceptions of marriage depending on the customary laws and traditional norms involved. Before colonialism was extended to Africa, most customary laws in Africa favoured monogamous forms of marriage. But with the introduction of Christianity, and later the colonial administration, European conceptions of marriage – based on Christianity – were introduced as well; meaning that most African countries had to have a complex system of marriage within their respective legal systems.

1.7 Marriage and Human Rights

With the advent of human rights, family life has become a nexus of several human rights categories.[44] The basic human rights that are part of family law to day include the right of every married person to life;[45] the right of a spouse not to be subjected to torture or to inhuman or degrading treatment;[46] the right of a spouse to a private and family life;[47] the right to freedom of thought, conscience and religion accorded to every spouse;[48] the right of men and women of marriageable age to marry and found a family;[49] the right of a spouse to an effective remedy;[50] and the right against discrimination.[51]

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[43] Ibid, p. 20.

[44] Also, see, *Johnson and Others v. Ireland* (1987) 9 EHHR 203; also reported as [1986] ECHR 9697/82.

[45] See, for instance, Article 14 of the Constitution of the United Republic of Tanzania, 1977.

[46] Ibid, Article 13(6)(e).

[47] Ibid, Article 16.

[48] Ibid, Article 19.

[49] Ibid, Article 16(1).

[50] Ibid, Article 13(6)(a).

[51] For a detailed account on this aspect, see, STANDLEY, Kate, *Family Law*, op. cit, pp. 11-15.

Chapter Two
LEGAL RECOGNITION OF MARRIAGE

2.1 General Overview

It is historically acceptable that parties to a marriage always seek both legal and social sanction; and this has led to most societies requiring official approval of a religious or civil body. Worldwide, sociologists, thus, distinguish between a *marriage ceremony* conducted under the auspices of a religion and a state-sanctioned *civil marriage*.[52] In most jurisdictions, religious marriages are officiated by a priest, a minister or a religious authority that acts as an agent of the state in that regard. Whereas in most American states the marriage may be officiated by a priest, a *minister* or a religious authority, which acts simultaneously as a religious authority as well as an agent of the state, in Russia and French it is necessary for a marriage to be contracted before the state before having a religious ceremony.[53] The historical rationale for this situation is thus:

> Marriage is not a contract which can be created and terminated at the will of the parties. It is a tripartite arrangement, in which the state has an interest. For this reason, there are legal rules governing the creation of a marriage (e.g., formal pronouncements of vows in public and registration of the marriage and legal rules governing dissolution of marriage.[54]

Some countries, of late, have recognised marriages that are not recognised by some religions, such as *same-sex marriages* or civil marriages. Some countries have even brought about marriages created by operation of the law, like *common-law marriages*.[55] Conversely,

> [T]here are examples of people who have religious ceremony which is not recognised civilly. Examples include widows who stand to lose pension if they remarry and so undergo a marriage in the eyes of God, homosexual couples, some breakaway sects of Monomism which recognise polygamy, retired couples that would lose pension benefits if legally married, Islamic men who wish to engage in polygamy that is condoned in some situations under Islam and immigrants who do not wish to alert the immigration authorities that they are

[52] http://www.TheFreeDictionary.com.

[53] Ibid.

[54] STANDLEY, Kate, *Family Law*, op. cit, p. 20.

[55] In many jurisdictions, common-law marriage is a legal provision whereby two people who are eligible to marry, but who do not obtain a legal marriage, are nevertheless considered married under certain conditions. In other words, this is a marriage created without legal ceremony by a couple living together and publicly presenting themselves as husband and wife, under specified conditions for a specified period of time. In other jurisdictions, the couples are required to have actually stated their mutual intent to be presently married. Depending on the jurisdiction, a common-law marriage may provide special benefits, such as affiliation and adoption, inheritance, and division of matrimonial property. See ibid, and ARBETMAN, Lee P., et al, *Street Law: a Course in Practical Law*, op. cit, p. 612. Also see section 29 of the Ontario Family Law Act, which imposes a requirement for parties to live together for at least three years or having a child in common and having 'cohabited in a relationship of some permanence.' In Canada, following the decision of the Supreme Court in 1999 in the case of *M v. H.*, the Supreme Court decided that same-sex partners would also be included in common-law relationships. This kind of matrimonial relationship is similar to the *presumption of marriage* in Tanzania. Also, see, section 160 of the Law of Marriage Act, 1971.

> married either to a spouse they are leaving behind or because of the complexity of immigration laws that may make it difficult for their spouse to visit them on a tourist visa.[56]

Therefore, with the raise of strong notions of nationalism and liberty and freedom of men, many states in Europe widely started to legally recognise civil marriage. In the 1890s, the then German Chancellor Otto von Bismarck introduced, through a legislation, the *Zivilehe* (civil marriage), which required couples intending to marry to make a declaration of the marriage before an official clerk of the civil administration with 'both spouses affirming their will to marry.'[57] It also provided for the procedure to make a marriage legally valid and effective, thereby reducing the clerical marriage to a mere private ceremony.

2.2 Marriage as a Contractual Arrangement between Spouses

It is almost settled, particularly under all jurisdictions founded on the common law, that in legal terms marriage is a contract between two persons who agree to live together as husband and wife. 'It creates legal rights and duties for each party. Anyone who wants to get married must meet certain legal requirements.'[58] Under the Law of Marriage Act,[59] (henceforth, the Act) marriage is defined simply as 'the *voluntary* union of a man and a woman, *intended to last for their joint lives*.'[60] In the case of *Ramadhani Said v. Mohamed Killu*[61] Lugakingira, J., (as he then was) held that: "According to s. 9(1) of the Law of Marriage Act, 1971...a marriage means the voluntary union of a man and woman intended to last for their joint lives."[62]

The facts of this case are thus: In December 1978 the appellant contracted a customary marriage with one Mwanaidi Mwiru and cohabited with her at her parent's home on payment of two head of cattle. In May 1980 he left on a business safari to a place called Endasak. In his absence, his in-laws were overwhelmed by greed. On 9.7.80 they wedded Mwanaidi to the respondent according to Islamic rites and received three head of cattle. But this latter union did not endure. In or about October 1980 Mwanaidi returned to her parents and there were indications that the respondent was refunded his cattle.

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56 http://www.TheFreeDictionary.com.

57 Ibid.

58 ARBETMAN, Lee P., et al, op. cit, p. 326.

59 Cap. 29, R.E. 2002.

60 Ibid, section 9 (1).

61 [1983] TLR 309.

62 At p. 310.

In November 1980 the appellant returned home and learnt of what had been happening to Mwanaidi. He did not wish to litigate; instead, he proceeded to Mwanaidi's home, collected her and took her to his own home. In April 1982 the respondent sued the appellant in adultery claiming seven head of cattle. The Primary Court dismissed the suit. It held that there were two valid marriages but that the appellant's marriage being earlier, took precedence. The respondent appealed to the District Court and this court had a different view. It observed that Mwanaidi's marriage to the appellant had not been accompanied with "shangwe za harusi" whereas her marriage to the respondent was announced for 21 days and became public knowledge. In the view of that court it is the second marriage which was thus valid. It, therefore, found adultery established and allowed the respondent's appeal. Aggrieved by that finding, the appellant appealed to the High Court, where the basic question before the court was: which of the two unions was a valid marriage.

Having defined the meaning of marriage in accordance with section 9 of the Act, as above cited, His Lordship held that:

> In this case, the appellant and Mwanaidi voluntarily contracted a marriage in customary form. That was testified to not only by the appellant and corroborated by two other witnesses, one of whom was the "*mshenga,*" it was also confirmed by Mwanaidi who was called by the trial court. She then added that her subsequent union with the respondent was forced on her by her parents. On this evidence, I am of the view that the appellant's marriage was valid notwithstanding absence of notice or "*shangwe za harusi*."

2.3 Types of Marriage

The type and functions of marriage vary from culture to culture. While in most European States, in the US and China[63] legally sanctioned marriages are *monogamous*, in the Islamic world a man, in certain conditions, is allowed to

[63] This is so common in the early 21st century Chinese society; though there are some pockets of society still sanctioning polygamy socially. In Imperial China, formal marriage was sanctioned only between a man and a woman, though a man could take several concubines and the children from the union were considered legitimate.

marry up to four wives.[64] In most African societies, *polygamous* marriage is permitted, in which a man could have multiple wives, although even in such societies some men have only one wife. There are few societies, though, where *polyandrous* marriage can be allowed in contemporary jurisdictions.[65] *Polyandry* is a situation where a woman could have multiple husbands. It is interesting to note that,

> [While] in the 21st century Western cultures… *bigamy* and sexual relations outside marriage is generally socially or legally frowned-upon, divorce and remarriage has been relatively easy to undertake. This has led to a practice which some have called *serial monogamy*. In particular some have argued that the pattern of the rich divorcing their first wives and then taking on a *trophy wife* is similar to patterns of polygamy in other societies.[66]

In Tanzania, the Act categorises marriage into monogamous and polygamous relationships.[67] Whereas a 'monogamous marriage is *a union between one man and one woman to the exclusion of all others*,'[68] a polygamous marriage 'is a union in which the *husband may*, during the subsistence of the marriage, be married to or marry another woman or women.'[69] Under the Act, a marriage contracted in Islamic form or according to rites recognised by customary law in Tanzania is presumed to be polygamous or *potentially* polygamous, 'unless the contrary is proved.'[70] The Act also provides that all other forms of marriage that are contracted in either Islamic form of under customary law, are presumed to be monogamous, 'unless the contrary is proved.'[71]

Under section 11 of the Act, a marriage contracted in Tanzania may be converted from monogamous to polygamous,[72] or from potentially polygamous to monogamous[73] 'by a declaration made by the husband and wife, that each, of their own free will, agree to the conversion.'[74] However, the law prohibits conversion of a marriage between two Christians celebrated in a church in

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64 See Chapter 4 of the Holy Koran.
65 http://www.TheFreeDictionary.com.
66 Ibid.
67 Op. cit., section 10 (1).
68 Ibid, section 9 (2).
69 Ibid, section 9 (3).
70 Ibid, section 10 (2) (a).
71 Ibid, section 10 (2) (b).
72 Ibid, section 11(1)(a).
73 Ibid, section 11(1)(b).
74 Ibid, section 11(1).

Christian form from monogamous to polygamous, 'for so long as both the parties continue to profess the Christian faith.'[75]

The law of marriage in Tanzania is, essentially, built on the notion that marriage is a permanent union between the couples; and, as such, it subsists until determined-

> (a) by the death of either party thereto;
> (b) by a decree declaring that the death of either party thereto is presumed;
> (c) by a decree of annulment;
> (d) by a decree of divorce; or
> (e) by an extra-judicial divorce[76] outside Tanzania which is recognised in Tanzania under the provisions of section 92.[77]

2.4 Presumption of Marriage

Presumption of marriage[78] is yet another important matrimonial relationship that exists in Tanzania. This kind of matrimonial relationship is provided for in section 160 of the Act, which states categorically that:

> 160.- (1) Where it is proved that a man and woman *have lived together for two years or more*, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married. [Emphasis supplied].

In *Zaina Ismail v. Saidi Mkondo*,[79] Kapoor, Ag. J., (as he then was), observed that under section 160 of the Act parties can raise a presumption of marriage if they

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[75] Ibid, section 11(5).
[76] An extra-judicial divorce is a divorce obtained by a person from a court in a foreign country. See, section 92 of the Act.
[77] Ibid, section 12.
[78] The notion of presumption of marriage in Tanzania's jurisdiction seems to be similar to the *common-law marriage* concept in some other jurisdictions. In the US, for example, ten state jurisdictions currently recognize common-law marriages. In these jurisdictions, generally if a couple lives together and are reputedly married, a rebuttable presumption arises that they are husband and wife. This must be proved through a three-prong test. That is, there must be at least three elements amongst the following: (i) the spouses must hold each other out to society as husband and wife; (ii) this relationship cannot be inadvertent or unintentional; (iii) this relationship must be proved via name change, consistent public address as spouse, tax records, etc; (iv) in some states, a decree must be signed for an informal marriage to exist; (v) the spouses must agree to be presently married; (vi) agreement to be married in the future, i.e., engagement, is proof that they are not currently married; (vii) the agreement is known to the public; (viii) the spouses cohabitate for a significant period of time; and (ix) usually three years at a minimum; this varies as a requirement due to various circumstances, death, etc.
[79] [1985] TLR 239.

have stayed together for a period of over two years; but the presumption is rebuttable and the intention of section 160(1) is not to create an alternative procedure of contracting a valid marriage.

In *Zaina Ismail* the parties had lived together for nearly 5 years - but they were not lawfully married. The District Magistrate gave custody of the child to the respondent. His reasons for reversing the judgment of the Primary Court were that anyone who sires a child adulterously cannot be held to claim the child. The District Magistrate reasoned that since the parties had lived together for nearly five years, as husband and wife, they were to be treated as duly married. However, the authorities that he cited were relevant to those parties who were lawfully married. To this point, Kapoor, Ag. J., had this to say:

> With respect to the District Magistrate, I cannot agree with his reasoning, which made him to consider that the respondent and appellant were lawfully married. Under the Law of Marriage Act, parties can raise a rebuttable presumption of marriage if they were staying together - for a period of over 2 years, in such circumstances as to have acquired the reputation of being husband and wife. This presumption may be rebutted if it can be proved that the parties had never gone through a ceremony of marriage recognised under the Act.[80]

The learned judge went on to point out that,

> The intention of the legislature under section 160(1) of the Law of Marriage Act is not to give a general licence of Legal Marriage Status to parties who live together for two years and above in such circumstances. The Law of Marriage Act lays down strict procedure through which a man and woman capable of contracting a marriage can contract a valid marriage. Section 160(1) of the Law of Marriage Act only creates a rebuttable presumption of Marriage. It does not create another method of contracting a Lawful Marriage under the Act.

His Lordship then pointed out that 'the only method of contracting lawful marriage in Tanzania is by following the laid-down provisions under Part II of the Law of Marriage Act. In this case the parties themselves agree that they have not been lawfully married. They just lived together. The rebuttable presumption is adequately rebutted by the parties themselves. The Primary Court Magistrate had framed this question as an issue No. 4 and reached the conclusion that the parties were not lawfully married; they were just living together.'

2.4.1 Ingredients of Presumption of Marriage

[80] *Francis s/o Leo v. Paschal Simon Maganga* [1978] LRT n.22.

In practice, courts have developed several elements manifesting the existence of presumption of marriage. In *John Kirakwe v. Iddi Siko,*[81] Mwalusanya, J., (as he then was), held that there are 'only three important elements to constitute a presumption of marriage:'

(i) That the parties have cohabited for over two years;
(ii) That the parties have acquired the reputation of husband and wife; and
(iii) That there was no formal marriage ceremony between the said couples.

In this case, the appellant, one John Kirakwe, successfully sued the respondent, Iddi Siko, at Shirati Primary Court in Tarime District, Mara Region, in a claim of payment of bride price amounting to twelve head of cattle, two goats and cash to the tune of TShs. 2,650/=. Earlier on 8th October 1986 the respondent's son had eloped with the daughter of the appellant; and two years later, that is on 23rd August 1988, the appellant, with some elders went to the respondent's home to negotiate about the bride price payable. Eventually, it was agreed that the bride price payable be pegged as set out above. The respondent agreed to pay six head of cattle and cash amounting to TShs. 2,650/= on the spot as his first instalment. However, he later changed his mind, prompting the appellant to sue in the said primary court. The primary court found, as a fact, that the respondent's son had married the appellant's daughter and so the respondent was obliged to pay bride price as agreed.

On appeal, by the respondent, the Tarime District Court held that there was no marriage between the respondent's son and the appellant's daughter; and so the question of payment of bride price did not arise. In addition, the Tarime District Court said that even if there was a marriage, no order for payment of bride price could issue as the parties had never agreed on the amount of bride price payable. Consequently, the appellant appealed to the High Court of Tanzania, at Mwanza, which held, *inter alia*, that (i) under the Kuria customary law, to which the parties belonged, marriages contracted by elopement are recognised; and (ii) the fact that the respondent's son and the appellant's daughter lived together for over two years as husband and wife raised the presumption of marriage that the respondent had failed to rebut.

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[81] [1989] TLR 215.

In practice, presumption of marriage is always raised when one party to such a matrimonial relationship has asserted that there is indeed no such relationship. And, in that case, the party rebutting the presumption is required to prove that the parties have not qualified to have the reputation of husband and wife. In *Zacharia Lugendo v. Shadrack Lumilang'oma*,[82] Chipeta, J., (as he then was), held:

(i) That the presumption of marriage may be rebutted if it can be proved that the parties had never gone through a ceremony of marriage recognized under the law;

(ii) That where a man and woman live as husband and wife under the belief that they are legally married their cohabitation amounts to concubinage; and

(iii) That marriage, unlike concubinage, is a solemn and serious institution. There ought to be evidence of customary law marriage to constitute marriage, such as handing over ceremony by parents of the girl to the boy, or evidence of certain rites recognized by the relevant customary law of that tribe like a festival of *pombe* or other like ritual.[83]

In *Zacharia Lugendo*, the appellant Zacharia s/o Lugendo sued the respondent Shadrack s/o Lumilang'oma at Magu Primary Court for a claim of five head of cattle as damages for adultery. The appellant succeeded at the trial but was unsuccessful at the District Court and hence appealed to the High Court at Mwanza, whereby Mwalusanya, J. (as he then was) agreed with the District Court that 'there was no proof of marriage between the appellant and the woman Tabitha d/o Yakobo and therefore the suit for damages for adultery could not stand.' His Lordship, further, observed that:

> The parties were just staying in concubinage. For the benefit of the trial court, marriage is a solemn and serious institution more than mere concubinage. Although s. 41 (a) of the Law of Marriage Act No. 5 of 1971 says that payment of dowry is not necessary to validate marriage, yet there ought to be evidence of customary law marriage to constitute marriage. For example there ought to be evidence of certain rites recognized by the relevant customary law of that tribe like a festival of *pombe* or any other ritual - see s. 25(1)(d) of the Law of Marriage Act No. 5 of 1971. But I cannot agree that mere act of enticing a girl to your home and staying with her in concubinage, could constitute marriage. Something more is required for sure!!

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[82] [1987] TLR 3.

[83] Section 25(1) (d) of the Act.

His Lordship also pointed out that the view taken by the trial court that s.160 (1) of the Law of Marriage Act created a marriage where a man and woman had cohabited as husband and wife for over two years was totally wrong; instead thereof, His Lordship held that:

> Since 1978 this court has clarified as to the meaning of that section, for which see the case of *Francis s/o Leo v. Paschal Simon Maganga*[84] (Mfalila, J.). It was held therein that, the presumption of marriage may be rebutted if it can be proved that the parties had never gone through a ceremony of marriage recognized under the law. In the case at hand the appellant concedes that he never went through any ceremony of marriage with the woman Tabitha d/o Yakobo, and therefore there cannot be any marriage even if they have stayed over two years. It is not the law that staying with a woman for over two years creates a marriage where there was none.

2.4.2 Legal Consequences of Rebuttal of the Presumption of Marriage

Under the provisions of section 160(2) of the Act, if the marriage is rebutted, the woman is entitled to apply for maintenance for herself and for every child of the union 'on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefore, either by the woman or the man, to grant such reliefs, including custody of children.'

Although the Act is silent on whether parties living under a matrimonial relationship that is capable of being presumed as a marriage can petition for divorce, in practice it is common ground that parties under such a relationship cannot petition for divorce.[85] This means that once a couple is living in a relationship that can be presumed as a marriage, divorce cannot be issued, except that the presumption of marriage is used when the court is called upon to determine whether or not the parties to such a relationship have acquired a matrimonial status in determining their matrimonial rights upon the dissolution of their relationship.

This was the view of Korosso, J. (as he then was) in *Harubushi Seif v. Amina Rajabu,*[86] which was an appeal lodged by the appellant against the decision of the Primary Court of Nyalikungu in its Civil Case No. 44/86 and that of the District

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[84] [1978] L.R.T. n. 22.

[85] Even in those jurisdictions where there is a common-law marriage, there is no such a thing as a common-law divorce.

[86] [1986] TLR 221.

Court of Maswa in its Civil Appeal No. 23/1986. Before the Primary Court, the respondent petitioned for separation between her and the appellant by whom she purported to have been legally married. In the course of the trial it became obvious that though the appellant and the respondent had cohabited as husband and wife for about 15 years and had even been blessed with 4 children, they hadn't been formally married. The Primary Court having been satisfied that the appellant and the respondent had indisputably lived together for about 15 years, it felt satisfied that the presumption under section 160(1) of the Act had not been rebutted. Consequently, it invoked the provisions of section 160(1) of the Act and granted the petition for separation. The appellant was aggrieved by this decision; hence, he appealed to the District Court of Maswa. At the same time, the respondent cross-appealed. After hearing both parties, the District Magistrate dismissed both the Appeal and the Cross-Appeal.

The appellant, then, appealed to the High Court. In the course of the appeal, Mr. Ntabaye, for the appellant, submitted that the appellant and the respondent, having not been legally married, the respondent had no legal right to petition for separation. Citing the case of *Francis Leo v. Paskali Simon Maganga,*[87] the learned advocate submitted that at best, the appellant and the respondent lived in concubinage. The cited case propounded on the purport of the provisions of section 160(1) of the Act.

In *Francis Leo v. Paskali Simon Maganga*, the appellant sued the respondent and claimed from the respondent the sum of TShs.2,400/= being payment to be paid by the respondent for legitimating the respondent's five (5) children who were begotten by the respondent with the appellant's daughter called Magdalena. The appellant claimed the sum of Shs. 2,400/= under the customs and usage of Wanyamwezi. It would appear that the respondent and Magdalena had lived in concubinage for a period of over 2 years. Mfalila, J. (as he then was) observed, in his judgment on appeal, thus:

> Being duly married means going through the forms and procedures as provided for under the provisions of (the) Marriage Act.

His Lordship went on to observe that:

> When the presumption has been rebutted under the provisions of section 160 of the Marriage Act, the children of the presumed Marriage are illegitimate. The father of the illegitimate children may legitimate them according to Customary

[87] [1978] L.R.T. No. 22.

> Law in order to bring them to the paternal side. The Respondent should have either surrendered the five children or taken legal steps to legitimate the 5 children to bring them to the paternal side.

In *Harubushi*, Justice Korosso respectfully agreed with Justice Mfalila when he observed that the phrase 'duly married' in section 160(1) of the Marriage Act means, 'and indeed should be taken to mean, that only parties concerned who have gone through all the statutory formal procedures as provided for in the Marriage Act No. 5/71. This should, of course, include getting the marriage certificate which crowns all the many preceding formalities.' However, Justice Korosso did not agree with Justice Mfalila thus:

> [F]or compulsive reasons, I do hold different views from those held by the Honourable Judge Mfalila (as he then was) in the above cited case. In my serious study of section 160(1) and 160(2) of the Marriage Act which must or need to be read and considered collectively, I am of the settled mind that where a man and woman who have cohabited together in concubinage for over two years or upwards but whose presumption of their having married has been rebutted, because the man and woman have been proved to have not been duly married; still the woman assumes a special legal status if she can satisfy a Court of competent jurisdiction that she has in fact lived with the man as man and wife for a continuous period of two years or more. By virtue of the provisions of section 160(2) of the Marriage Act, *once the woman has satisfied the Court of her continuous cohabitation with the man then she automatically becomes entitled to claim for maintenance for herself and every child of the union. It is noteworthy that such concubinage acquires the title of a union and the children are referred to as children of the union. The woman becomes entitled to apply for maintenance and for custody of children.* The children of such parties are neither for the maternal side nor for the paternal side. They are under the Marriage Act vested with the status of being a man and woman of the union. Either the woman or the man may apply for custody of the child or children, and undoubtedly in granting custody to either of the parties, the Court will apply the principles as provided. *In other words, the child or children of such union are deemed legitimate children and not illegitimate children*. Thus the children of the Appellant and Respondent are deemed legal children. [Emphasis supplied].

Justice Korosso was of the view that 'under the provisions of section 160(2) of the Marriage Act if a woman has satisfied the Court that she has lived with the man for two years or more; then the Court is statutorily vested with the jurisdiction to grant or make orders to the parties in the same way as it has jurisdiction to make orders consequent on divorce or separation of the duly married spouses under the provisions of the Marriage Act. Where a woman has proved to the satisfaction of the Court of her having cohabited with a man for two years, (then the) woman is only deprived of the right to petition for divorce or separation.

Otherwise such a woman has all the rights which a divorced woman has under the Act. The referred to application of other reliefs which a woman may make would definitely include application for division of property if any which has been acquired by joint efforts.'

In the view of Justice Korosso, the rationale of this law is:

> [To] *emancipate the women and to prevent their exploitation*. As in this case the Appellant and the Respondent are said to have cohabited together for 15 years. *She was 36 years when they started to live together. She has used all her youth while staying with the Appellant. If during the 15 years she contributed her labour, energy and materially towards the acquisition of certain property then the good law must protect her interests whatever that may be*. There is another reason why section 160(2) of the Marriage Act is of tremendous importance in this country. There is no doubt that with the enactment of the Marriage Act every Tanzanian contracting a Christian marriage, Muslim marriage, Civil marriage and Customary law marriage was, and still, is required to contract his/her marriage according to the express provisions of the Marriage Act. It would be a great surprise if all the people in the rural communities are contracting their marriages in strict compliance with the express provisions of the Marriage Act. The majority of them are not (even) aware of the existence of the Marriage Act. They purport to marry customarily the way they used to. If the provision of section 160 is interpreted in the terms of the case of *Francis Leo* cited *'supra'* what will be the legal status of the children of such relationships? [Emphasis added].

By way of conclusion, Justice Korosso held the view that 'if the presumption of marriage provided for in section 160(1) of the Marriage Act has been rebutted but the woman has satisfied the Court of competent jurisdiction that she in fact cohabited with the man for 2 years and more, then under the provisions of section 160(2) of the Marriage Act the woman would become a deemed legal wife devoid only of the legal right to petition for divorce or separation. But at the same time she becomes vested with the legal right to apply for maintenance for herself and the children of the union. The woman also becomes vested with the legal right to apply for custody of the children of the union and some other reliefs which may include division of matrimonial property acquired by joint efforts.'

Justice Korosso also opined that 'the children of such relationship become deemed legitimate children for whom either the woman or the man may apply for custody. The question of who between the woman and the man should have custody must be resolved on the principles provided in the Marriage Act. There is no question of legitimation of children begotten of a man and woman who have cohabited together for two years or more in circumstances in which they acquire the reputation of being husband and wife.'

In this case, it was clear that the respondent and the applicant were not duly married in accordance with the formalities and procedures provided for in the Marriage Act; thus, the Court held that the respondent had no legal right whatsoever to petition either for divorce or separation. It further held that it was incorrect for the lower Courts to hold that the appellant and the respondent were duly married. 'But it having been satisfactorily proved that the Appellant and Respondent have lived as husband and wife for about 15 years the Respondent shall be entitled to file an application for maintenance, for herself, for custody of the 4 or any other children and also for other reliefs which includes application for division of property for which she may feel she is entitled to a share.'

Therefore, when the presumption of marriage is positively established the court proceeds to determine and issue orders that are consequential upon issue of the decree of divorce. That is to say, maintenance, custody and division of matrimonial property. In *Hemed Tamim v. Renata Mashayo,*[88] where the Court of Appeal of Tanzania had to consider the question: whether parties who have cohabited and accrued matrimonial property have the right to division of matrimonial property after rebuttal of presumption of marriage. The Court held that where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under section 160(1) of the Act, the courts have power, under section 160(2) of the Act, to make consequential orders as in the dissolution of marriage or separation, including division of matrimonial property acquired by the parties during their relationship.

In that case, the appellant had sought divorce and division of matrimonial assets in the form of a dwelling house that was acquired in the course of cohabiting with the respondent for a period of eight years. That was the third appeal, for he had launched his petition from the Primary Court, where his claims were established and reliefs granted – dissolving the marriage and equal division of matrimonial dwelling house. Subsequent thereto, the District Court and the High Court found the presumption of marriage to have been rebutted; but the High

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[88] [1994] TLR 197. This case was quoted with approval in the case of *Jonas Kimario v. Sophia Mashema*, Civil Appeal No. 86/2001, High Court of Tanzania, Dar Es Salaam District Registry (unreported).

Court went further to hold that 'following this rebuttal the court had the power and jurisdiction to make the same consequential orders as in the case of the dissolution of marriage or separation.'

In addition, the Court of Appeal of Tanzania was of the view that:

> Having found that the parties were not duly married, the learned judge should not have ordered the restoration of the Primary Court order regarding the dissolution of marriage, for quite obviously there was no marriage to dissolve.[89]

Consequently, the Court of Appeal set aside the order of dissolution of marriage upheld by the High Court.

2.5 Restrictions on Marriage

Almost every society in the world has imposed certain restrictions on marriage in certain circumstances and/or conditions, though the degree of restrictions varies, equally, from culture to culture and society to society.

2.5.1 Minimum Age

Many legalistic societies in the contemporary world impose specified restrictions on marriage for certain ages. In Tanzania, section 13 of the Act provides, in lucid terms, that:

> 13.-(1) No person shall marry who, being male, has not attained the apparent age of *eighteen years*, or being female, has not attained the apparent age of *fifteen years*. [Emphasis supplied].

However, the court may use its discretion, on application, to allow a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) of section 13 of the Act if:

> (a) each party has attained the age of fourteen years; and
> (b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

In England, the minimum age for marriage for both female and male partners is sixteen years.[90] But the law requires that where any of the parties to a marriage is

[89] Ibid, at p. 199.

[90] Section 2 of the English Marriage Act of 1949, and section 11(a)(ii) of the Matrimonial Causes Act of 1973.

aged 16 or 17 consent – of parents with parental responsibility, a guardian or any person with whom the child lives under a residence order – must be obtained.[91]

Worldwide, there is an unprecedented movement for rising the age of marriage. Diwan argues that this movement is gaining ground at the moment for two reasons: firstly, to prohibit child marriage; and, secondly, rising the age of marriage as an instrument of population control.[92] In this respect, on December 12, 1962, the United Nations passed the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, which required States parties thereto to rise the minimum age for marriage. On this point, Mashamba, for one, argues that:

> When men and women marry, they take on important responsibilities. Therefore, marriage should not be permitted before they have reached full maturity and capacity to act as well as consent without undue influence upon them. When setting a minimum age for marriage, it is important to take into account not primarily the physical/bodily development, but rather the psychological and intellectual development and mental and emotional maturity of the parties to a marriage.[93]

Quoting the WHO, Mashamba argues that 'it can adversely affect the health of minors, especially girls, when they marry and have children before maturity, and it could also impede their education. An argument often heard is that, a low marriage age for girls could rarely be an advantage for them, as a girl is then able to marry in case of pregnancy in order to legitimise her relationship.'[94] He goes to say that 'if an option for dispensation to marry before 18 under special circumstances – in the interest of the intending spouses – is kept in the law; consent from parents/guardian of the minor should be required. In any case, it would be incompatible with the non-discrimination provision in Article 2 of the United Nations Convention on the Rights of the Child of 1989 to specify different ages of marriage for subscribers to different religious denominations.'[95]

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[91] Section 3 and 24 of the Marriage Act, 1949.

[92] DIWAN, P., op. cit, p. 123.

[93] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," in MASHAMBA, C.J., (ed.), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business – Articles and Working Papers,* Dar Es Salaam: National Organization for Legal Assistance (**nola**) 2004, p. 138.

[94] Ibid.

[95] Ibid, p. 169.

2.5.2 Prohibited Relationships

Section 14 of the Act prohibits marriage between parties who have close blood relationships. It categorically provides that:

> 14.-(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, as the case may be.
>
> (2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.
> (3) No person shall marry the former spouse of his or her grandparent or parent, the child or grandchild.
> (4) No person shall marry a person whom he or she has adopted or by whom he or she was adopted.

Whereas the Act[96] refers the relationship of persons in the foregoing to as a prohibited relationship, the Penal Code[97] creates an offence known as *incest* to blood-related persons having sexual intercourse. There are two categories of incest offences under the Penal Code: incest by male and incest by female. According to the provisions of section 158(1) of the Penal Code,

> 158.-(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction –
>
> (a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;
> (b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.

When this kind of incest is committed 'it is immaterial that the sexual intercourse was had with the consent of the woman.'[98] Even an attempt by a male person to commit this kind of incest amounts to an offence under section 158(3) of the Penal Code.

According to section 160 of the Penal Code,

> 160. – Any female person of or above the age of eighteen years who with consent permits her grandfather, father, brother or son to have carnal knowledge of her

[96] Section 14(7).
[97] Cap. 16, R.E. 2002.
[98] Ibid, section 158(2).

(knowing him to be her grandfather, father, brother or son as the case may be) commits the offence of incest and is liable to imprisonment for life or for imprisonment of not less than thirty years and shall, in addition, be ordered to pay compensation of an amount determined by the court to the victim in respect of whom the offence was committed.

Provided that if the male person is below the age of ten years, to imprisonment of not less than thirty years.

In contrast, the English Marriage (Prohibited Degrees of Relationship) Act of 1986 prohibits only the following blood relatives: a parent, a grandparent, a child, a grandchild, a brother or sister, an uncle or aunt, a nephew or niece. However, the law does not prohibit a person from marrying the following relatives created by marriage (affinity): a step-child, a step-parent, a step-grandparent, or a parent in law. However, as Kate Standley points out,

> There are certain restrictions in respect of marriages between those (parties) related by affinity. Thus, a person can only marry a step-child if both parties are at least 21, and the step-child has not at any time before the age of 18 been brought up by the other party as a step-child. A man can only marry his daughter-in-law if both parties are aged 21, and his wife and son are dead (the same applies for woman and her son-in-law). Adopted children are generally in the same degrees of prohibited relationships in respect of their birth parents and other relatives, but fewer restrictions apply to relationships acquired by adoption. Thus, for example, a person can marry an adopted brother or sister.[99]

In essence, the rationale for prohibiting parties who have blood relationships from marrying is to discourage incest and inbreeding.[100]

2.5.3 Subsisting Marriage

In Tanzania, the law of marriage prohibits a man, who is under a monogamous marriage to contract another marriage.[101] The law also prohibits a man who is under a polygamous marriage to contract any monogamous marriage.[102] In terms of section 15(3) of the Act a woman who is under any form of marriage contract, 'while that marriage subsists,' is not allowed to 'contract another marriage.' However, according to the provisions of subsection (4) of section 15 of the Act,

[99] STANDLEY, Kate, op. cit, p. 21.
[100] Ibid, p. 20.
[101] Section 15(1) of the Law of Marriage Act.
[102] Ibid, section 15(2).

> (4) Nothing in this section shall be construed as preventing the parties to a marriage to go through another ceremony of marriage:
>
> Provided that where parties are already married go through another ceremony of marriage, such subsequent ceremony shall not, subject to the provisions subsection (5) of section 11, affect the status or the legal consequences of their first marriage.

In *Abdallah Hamid Mohamed v. Jasnena Zaludova,*[103] Msumi, J., (as he then was), held that:

> In common law, the general view is that a second marriage ceremony after the parties have validly married is of no legal importance. The main argument advanced in favour of this view is that since the parties have already acquired the marital status, which is the purpose of a marriage contract, any subsequent ceremony purporting to do what has already been accomplished is legally redundant. In the case of *Thynne v. Thynne*[104] the parties, after secretly but validly being married, subsequently went through another marriage ceremony. After long cohabitation the wife petitioned for divorce and in her petition she referred to the second marriage ceremony. The court granted a decree of divorce on the understanding that it was dissolving the marriage cerebrated on the day shown in the petition. However, when the court discovered the true fact, it amended the divorce decree to indicate that the dissolved marriage was the one contracted before the second ceremony.[105]

In contrast, though, in *Abdallah Hamid Mohamed*, the parties did more than just going through another ceremony of marriage. Before undergoing the second ceremony, the wife willingly changed her religion and became a Moslem. As such, they contracted a Muslim marriage in Zanzibar as second to a civil one contracted back in Prague, Czechoslovakia in 1974. In this case, Msumi, J., held that conversion to Islam followed by a second marriage ceremony in Islamic law only has the effect of formalising the religious and marital status of the parties.

The provisions of section 11(5) of the Act, on the other hand, prohibit parties to a valid Christian marriage to convert it to any other form, while they still profess the Christian faith.

2.5.4 No Marriage without Free Will

As we have stated above, the Tanzania's marriage law regime is founded on the common law rules of contract centred on the free will of parties to a marriage

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[103] [1983] TLR 314.
[104] [1955] 3 All ER 129.
[105] Op. cit, at 317.

contract. In that respect, section 16 (1) of the Act prohibits marriage to be contracted in the absence of consent, which is freely and voluntarily by each party thereto. This rule is in accordance with Article 16(2) of the UDHR, which provides that,

> 16.- (2) Marriage shall be entered into only *with the free* and *full consent* of the intending spouses. [Emphasis supplied].[106]

By virtue of subsection (2) of section 16 of the Act, consent is said not to be given voluntarily and freely if the party who purported to give it:

(a) was influenced by coercion or fraud, or
(b) was mistaken as to the nature of the ceremony, or
(c) was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony.

The foregoing, indeed, are grounds for nullification of marriage. The rationale of the requirement of voluntary and free will or consent in a marriage contract is that parties to it are required to enter into it with sufficient amount of reasonableness that enables them to understand the meaning, implication and import of the marriage ceremony so that they can take an intelligent part in it.

2.5.5 Requirement of Consent of Parents of Court

In terms of the provisions of section 17(1) of the Act, where a girl who has not attained the apparent age of eighteen years is to be married, she *must* obtain the consent:

(a) of her father; or
(b) if her father is dead, of her mother; or
(c) if both father and mother are dead, of the person who is her guardian.

However, if all of the above named persons are dead, then there will be no need for consent of anybody.

To be frank, the application of this rule of the Act has caused a lot of anomalies, as some parents, acting in the guise of the existing negative customary laws, have been abusing it by compelling their younger daughters to be married in that way.

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[106] Also, see, Article 23(3) of the ICCPR.

In terms of subsection (2) of section 17 of the Act, where the consent of any of the persons mentioned above is *unreasonably* withheld or that it is *impracticable* to obtain such consent, the court, upon application, may give the said consent where it is satisfied to that effect. In effect, such consent has the same effect as if it had been given by the person whose consent is required by subsection (1) of section 17 the Act.

Section 17(4) of the Act goes further to give power to the kadhi, or minister of religion, or the Registrar of Marriage, to refuse to perform the marriage ceremony, where such ceremony is to be contracted in Islamic form or in accordance with the rites of any specified religion or in accordance with the customary law rites, if any requirement of the relevant religion has not been complied with.

2.6 Does payment of bride price *per se* constitute a valid marriage?

In most customary communities in Tanzania it is a common practice for a male intending to marry to pay bride price. However, under section 41 of the Act non-payment of dowry does not invalidate a lawful marriage. Indeed, case law has determined this matter in several occasions. For instance, in *Ahmed Ismail v. Juma Rajabu,*[107] the High Court held that: 'It must be conceded that under the Law of Marriage Act both payment and non-payment of dowry and failure to register the marriage do not affect the validity of marriage.'[108] In *Ramadhani Ramadhani v. Sungi Andalu*[109] Maina, J. (as he then was) had to determine the issue: whether payment of bride price *per se* constitutes a valid marriage. In the latter case His Lordship held, *inter alia*, that:

(i) that payment of bride price, even if proved, is not evidence of marriage – there must be clear evidence of a marriage ceremony;
(ii) that the onus of proving the existence of a marriage is upon the party who alleges its existence; and
(iii) that without proof of marriage, there can be no basis for damages for inducing a spouse to desert the other spouse.

In *Ramadhani Ramadhani*, the appellant filed a suit in the Primary Court claiming from the respondent, who was his father in law, four head of cattle being what the appellant said was damages for inducing his wife to desert him. The Primary

[107] [1985] TLR 204.
[108] Also, see section 41(a) and (h) of the Act.
[109] [1984] TLR 158.

Court held that the respondent had wilfully married his daughter to another man while the marriage between the appellant and the daughter was subsisting. As such, the respondent was ordered to pay the damages as claimed. Consequently, the respondent appealed to the District Court, which held that there was no marriage at all between the appellant and the daughter of the respondent; and, as such, the respondent had a right to marry his daughter to another man. Aggrieved by that decision, the appellant appealed to the High Court, where the issue before the court was whether the appellant and the respondent's daughter were ever married.

While the appellant contended that he had married the daughter in 1973 under customary law and that he had paid three head of cattle as bride price, the respondent vehemently denied the allegations that his daughter married the appellant, countering that the appellant had actually eloped with his daughter to Arusha and when she later returned back home, she married to another man. The respondent's evidence to that effect was supported by the daughter herself.

Thus, apart from holding that payment of bride price is not evidence of existence of marriage, the High Court held also that the appellant had an onus of proof that he had actually married the said daughter under customary law. To that end, the court said that: 'If the appellant claimed that he had married Zainabu (the respondent's daughter) by customary law, he had to prove that there was such marriage by calling even one witness who was present at such ceremony.' Therefore, the appeal was dismissed.

In *Salum Athumani v. Mwamini Hamisi,*[110] Salum Athumani who was the respondent in the lower court appealed against the judgment and order of the Primary Court at Magole Kilosa District. In the said Primary Court Mwamini the respondent brought a suit against the appellant herein, claiming to be granted divorce because of, *inter alia*, cruelty. The respondent told the lower court that the appellant used to beat her very much and would not maintain her properly. The two had been to the Conciliation Board often and the appellant would not change his ways. The respondent called her father as a witness, who said that he was aware of the unsatisfactory way the appellant and the respondent were living. He had witnessed the respondent running away from her husband due to troubles she experienced with her husband. He also said that the appellant and respondent had been to the Conciliation Board and even to the courts quite often.

[110] [1983] TLR 107.

At one time the appellant filed a suit against the respondent for the return of his dowry but the matter was not pursued.

At the close of the respondent's case the appellant said this:

> *Mimi sitaapa lolote tena sitaeleza lolote natosheka na ushahidi wa mke wangu na wa baba yake.*

In English the above is equivalent to this:

> I will not swear to anything nor will I say anything. I am satisfied with the evidence of my wife and her father.

The lower court unanimously found that there was evidence that the marriage had broken down irreparably and proceeded to grant the divorce. The court was also of the unanimous view that according to Muslim Law which governed the parties no dowry was returnable where the offending party was the husband. The court, therefore, ordered that no dowry would be returned. The appellant was thus aggrieved by this judgment, and especially the order that no dowry would be returned to him; consequently, he appealed to the High Court. The appellant's memorandum of appeal was in the form of a letter giving the facts of the case in the lower court and even giving other facts not on record in the case file of the lower court, which made it not really easy for the High Court to decipher what the appellant's argument was.

It was apparent, nonetheless, that the appellant had originally filed a suit against the respondent in Mvomero Primary Court apparently to recover his dowry. Since the respondent could not repay the dowry or appeal against the decision ordering her to repay the dowry if she wanted to leave the appellant, the respondent had no alternative but to live with the appellant again. When the respondent filed the present suit, the appellant told the Primary Court Magistrate that his matter had already been decided in Mvomero Primary Court Morogoro District. Since the Magistrate went on to hear the case all the same the appellant went to the District Magistrate Kilosa to complain and the District Magistrate wrote a letter saying that the matter was *res judicata.* However, and that the Primary Court Magistrate did not follow these instructions; thus, he proceeded to grant divorce to the respondent without any evidence. To this end, the High Court observed that:

> It should be borne in mind here that this court is to be guided by the record of the Primary Court. It would appear from the record of the Primary Court that at

> the outset of the case in answer to the suit the appellant who was then the respondent said that he disputed the claim of the respondent who was the petitioner in that case. The appellant went on to tell the Primary Court that the matter before the court had been decided at Mvomero Primary Court civil cases No. 26/79 and No. 22/79. The first case was in respect of a suit by the appellant for the compulsion of his wife to live with him. The second case was for claim of dowry but the court did not order return of dowry because the marriage was still subsisting. Following this statement by the appellant the Primary Court ordered the appellant to bring a copy of the judgment in each case from Mvomero Primary Court. The record goes on to show that the appellant told the court that he did not want to bring any copy of judgment from the Mvomero Court. That is when the present case proceeded to hearing.

Therefore, Bahati, J. (as he then was) opined that,

> I should pause here and say that if ever there were such suits before filed by the appellant in Mvomero court they would not affect this case. The case to compel cohabitation would be contrary to section 140 of the Law of Marriage Act and the second case for the return of dowry would be premature because the marriage was still subsisting. The letter referred to by the appellant in his address to the court does not in any way instruct the Primary Court Magistrate at Magole to dismiss this case. I need not say more than this here with regard to the letter from the District Magistrate Kilosa.

As such, the High Court concurred with the Primary Court, which had held that there was evidence that the marriage had broken down irreparably and it granted the divorce. But because the appellant was interested in the return of his dowry, the High Court had to consider whether he was entitled to the return of his dowry in the circumstances of this case. So, Justice Bahati reasoned that,

> According to the Law of Persons as stated in the Government Notice No. 279 of 1963 there is no refund of bridewealth where the guilty party is the husband. But I should hasten to add that this is not the law applicable here. It is mentioned here simply to provide some comparison with the Islamic Law which is applicable in this case. Now, according to Islamic law dowry is paid to the wife unlike bride-wealth in customary law which is paid to the father or other relatives of the wife. This is clearly stated by Sheikh Ali Hemed El Buhriy in his book *Kitabu cha Nikahi* under the heading "Mahari".

Before the High Court, thus, the issue was whether the appellant was entitled to the dowry he paid in consideration of the marriage. To this issue the High Court opined that it was not clear what the appellant had paid for dowry. The Court was of the view that 'it is permissible under Islamic Law to pay the dowry to the wife and then bride-wealth to the relatives of the wife.' The Court used the authority of *Hussein Mbwana v. Amiri Chongwe,*[111] where Spry, J. (as he then was) had this to say on the subject of bride-wealth in Islamic marriages:

> In Islamic law the wife is absolutely entitled to the dowry as her own personal property. On the other hand, in African customary law the brideprice goes not to the woman but to members of her family. Islamic law does not recognize bride price, but on the other hand I am not aware of any provision which expressly forbids it. I see no reason, therefore, why brideprice should not be paid under customary law at the time when an Islamic marriage takes place just as it frequently is on the celebration of an African Christian marriage.

Therefore, the Court was of the firm view that any question concerning brideprice, however, would be decided under customary law, since the matter is outside the sphere of Islamic law. As such, the Court dismissed the appeal with costs.

So, it is the law that whether or not brideprice is mandatory to constitute a valid marriage depends on the customary or Islamic law under which a marriage has been contracted. But, under the Act non-payment of dowry does not invalidate a lawfully contracted marriage.

2.7 Cohabitation and Premarital Pregnancy

Another important aspect of the of marriage law regime in Tanzania, regarding the validity of marriage, is the issue: whether cohabitation and public admission of responsibility for pregnancy are enough to constitute marriage under customary law. This issue, fortunately was given judicial consideration by Sisya, J., (as he then was), in the case of *Ahmed Ismail v. Juma Rajabu*.[112] In that case, Sisya, J., held that, cohabiting, as the plaintiff did with the defendant's daughter and with the defendant's acquiescence from December 1980 to June 1981, is, in the absence of evidence of marriage, not sufficient to raise any presumption of marriage under section 160(1) of the Act.

The facts of this case are simply as follows: the plaintiff impregnated Maimuna, the defendant's daughter who was a student at a Teachers' Training College. As a result, her college training was cut short. The plaintiff admitted to have impregnated Maimuna and was consequently made to pay some money at an elders' *baraza* which convened and proceeded according to local customs and traditions. Maimuna remained with her parents at Same until four months after

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[111] This case was reported in *A Digest of Appeals from Local Courts* (1963) Vol. X.
[112] [1985] TLR 204.

delivery. She then joined the plaintiff at Tanga and they lived together and cohabited for six months after which she, along with the baby, went back to her parents. Some weeks later, the defendant refused to allow Maimuna to re-join the plaintiff, insisting that his daughter was not married to the plaintiff. The plaintiff then filed this suit in the High Court at Tanga, where he was residing, claiming against the defendant damages to the tune of TShs. 21,000/= for enticement of his spouse. The defendant counter-claimed TShs. 3,500/= as 'damages for loss of expectation' and expenses incurred on his daughter's education until it was cut short. He also raised a preliminary point that the plaintiff ought to have filed the suit at Arusha Registry of the High Court which is the registry for the area in which he, the defendant, was resident and the cause of action arose.

In determining the issue: whether parents can claim damages following their daughter's education being cut short due to pregnancy, in this case, the High Court held that maintaining and educating a child is always the responsibility of the parent and in educating his daughter the parent was simply discharging his duty; and as such, there was no loss upon which the defendant's counter-claim could be based.

PART TWO

LEGAL ASPECTS OF MARRIAGE

Chapter Three
CONTRACTING A VALID MARRIAGE

3.1 Preliminaries to Marriage

3.1.1Notice of Intention to Marry

Under section 18(1) of the Act, the parties intending to get married are obliged to give a notice of their intention, to that effect, to the registrar of marriages of a registration officer, *at least twenty-one days before the day they propose to marry.* The contents of the notice are as follows:

(a) the names and ages of the parties and the places where they reside;
(b) the names of the parents of the parties and the places where they reside;
(c) a statement that the parties are not within the prohibited relationship;
(d) where the intended wife is below the apparent age of eighteen years, the name of the person, if any, giving consent to the marriage or the reason why no such consent is being given;
(e) a statement in relation to each party that he or she is a bachelor or spinster, married, a widower or widow, or divorced, as the case may be and where either party is divorced, particulars of the divorce;
(f) a statement that the marriage is intended to be monogamous or polygamous or potentially polygamous in character, as the case may be;
(g) where the marriage is intended to be polygamous, the names of the wives of the husband;
(h) the date when and the place where the parties the parties desire to marry; and
(i) where both the parties are Christians and it is intended to celebrate the marriage in a church in Christian form, a declaration by the intended husband that he is not already married to another woman.[113]

Besides, both parties to the intended marriage must sign on the notice. Where 'the consent of the court to the intended marriage has been obtained, the notice shall be accompanied by a certified copy of the order giving that consent.'[114]

When the notice is complete as aforementioned, the registrar of marriage or the marriage registration officer to whom the notice of intention to marry has been lodged has a duty 'to cause the intention to be made known locally by such means as may be prescribed and by such means as are customarily used to make known matters of public importance and by any other means he may consider desirable.'[115] The tradition, to date, is that the notice of intention to contract a marriage is placed on a public notice board of the office premises belonging to the authority or religious body; say a church or mosque, which is going to officiate the marriage ceremony.

[113] Section 18 of the Act.
[114] Ibid.
[115] Ibid, section 19.

It should be noted, however, that failure to give notice of intention to marry does not affect the validity of a marriage if in all other respects it complies with the express requirements of the Act.[116]

3.1.2 Notice of Objection

The law, under section 20(1) of the Act, allows any person to give notice of objection to the registrar or registration officer to whom the notice of intention was given if that person 'is aware of facts which, under the provisions of this Act, constitute an impediment to the intended marriage.' Subsection (2) of section 2 of the Act gives more weight on this point. It provides that:

> (2) Where a man married under a polygamous marriage has given notice of an intended marriage, his wife or, if he has more than one wife, any of his wives may give notice of objection to the registrar or registration officer to whom the notice of intention was given, on the ground that –
>
> (a) Having regard to the husband's means, the taking of another wife is likely to result in hardship to his existing wife or wives and infant children, if any; or
>
> (b) the intended wife is of notoriously bad character or is suffering from an Infectious or otherwise communicable disease or is likely to introduce grave discord into the household.

Under the provisions of subsection (3) of section 20 of the Act, a person who has given notice of objection is at liberty to withdraw the same, provided that such withdraw is effected in writing bearing his or her signature.

3.1.3 Procedure on Notice of Objection

When the registrar or registration officer receives the notice of objection he or she must transmit the same together with the notice of intention:-

> (a) where the notice of objection was given under subsection (1) of section 20, to the court; and
>
> (b) where the notice of objection was given under subsection (2) of section 20, to the Board.[117]

Under subsection (2) of section 21 of the Act, the registrar or registration officer who has received the notice of objection is not allowed to celebrate or participate in the intended marriage 'and shall take all lawful action within his power to

[116] See, *Ramadhani Said v. Mohamed Kilu* [1983] TLR 309.
[117] Ibid, section 21(1).

prevent it from being contracted, pending notification that the objection has been withdrawn or dismissed.'

3.1.4 Determination of Objection

When the court or board receives the notice of objection and the notice of intention transmitted to it under section 21, it has the duty to summon the parties to the intended marriage and the objector with a view to hearing them on the said objection. The parties and the objector are allowed to call witnesses, if any, on their aid. The board or court may also, where it deems necessary, call any other person who it thinks it is important 'to hear for a just determination of the objection, and shall make findings on the facts alleged in the notice of objection and shall either, by order, direct that the intended marriage is not to be conducted or shall dismiss the objection.'[118] In terms of section 22(2) of the Act, upon so finding, the court or board, as the case may be, must send certified copies of its decision to the registrar or registration officer to whom the notice of intention to contract a marriage was given.

3.1.5 Power of the Registrar-General to Dispense with the Requirement of Notice

In some cases, it may happen that there circumstances calling for dispensing with the requirement to give notice as mandatorily required by section 18 of the Act. In those cases, the Registrar-General may, subject to the provisions of section 24 of the Act, by licence in the prescribed form, dispense with the giving of notice.[119] Pursuant to the provisions of section 23(1) of the Act, the Registrar-General may do so on proof to his satisfaction –

(a) that the parties are not within the prohibited relationships;
(b) that there is no impediment of a subsisting marriage;
(c) that the parties are not below the minimum age of marriage;
(d) that any consent required under section 17 has been obtained; and
(e) that there is some good and sufficient reason for dispensing with the giving of notice.

Under subsection (2) of section 23 of the Act, the required proof under subsection (1) must be in the form of a statutory declaration. However, the Registrar-General 'may require such further or other evidence as may deem necessary.'

3.1.6 Lodging of Objections with the Registrar-General

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[118] Ibid, section 22(1).
[119] Ibid, section 23(1).

The law, under section 24 of the Act, also allow any person to give a notice of objection to the Registrar-General if that person has reason to believe that there are grounds for believing that a valid objection could be made to any intended marriage under section 20 of the Act. Where such an objection is made to the Registrar-General, 'the Registrar-General shall not, unless such notice has been withdrawn, exercise his power under section 23 to dispense with the giving of the notice.'[120]

3.2 Contracting a Valid Marriage

3.2.1 Manner of Contracting a Valid Marriage

As observed in Chapter Two, the manner in which marriage is contracted in Tanzania varies, and largely depends on the choice of the parties to the intended marriage as to which form should their marriage be celebrated. In the main, section 25(1) of the Act sets out the forms under which marriages are contracted in Tanzania. It provides that:

> 25. – (1) A marriage may, subject to the provisions of this Act, be contracted in Tanzania –
> (a) in civil form; or
> (b) in civil form or, where both parties belong to a specified religion, according to the rites of that religion; or
> (c) if the intended husband is a Muslim, in civil form or Islamic form; or
> (d) where the parties belong to a community or to communities which follow customary law, in civil form or according to the rites of the customary law.

The practices of the manner through which marriage may be contracted some time do cause some problems, particularly in the last form: marriage according to customary law. The issue is always how do we often describe our customary laws in a country where there are more than 120 tribes, meaning that there more than 120 sets of customary laws. This is often aggravated by the fact that most Tanzanians to day have intermarried beyond tribal lines. This matter was, however, given judicial consideration in the case of *Jonas Kimario v. Sophia Mashema.*[121] In that case, the issue before Hon. Luanda, J., was: whether spouses from two distinct tribes can contract customary marriage in terms of section 25(1)(d) of the Act. Having considered the facts before him, Luanda, J., had to this say:

> My understanding of this section is this in order for parties to contract a customary marriage they must either belong to a Community or to Communities

[120] Ibid, section 24.
[121] Civil Appeal No. 86/2001, High Court of Tanzania, Dar Es Salaam, (unreported).

> which follow customary law. However, the word Community is not defined in the Law of Marriage Act, 1971. The *Oxford Advanced Learners' Dictionary* defines thus:
>
>> The people living in one place, a district or country considered as a whole; a group of people of the same religion, race, occupation, etc, or with shared interests.
>
> The words "belong to a Community" mean for the purposes of contracting customary marriage to my view, includes same tribe or same customs, but does not include same religion because if it also includes religion it will render marriages contracted according to religious rites as meaningless.[122]

In that case, the Kinondoni District Court, having heard the parties, granted divorce and ordered the division of matrimonial property between the parties therein. The respondent had then petitioned in that court for, *inter alia,* divorce and division of matrimonial property. After the grant of divorce and division of matrimonial assets, the appellant appealed to the High Court, raising the ground, *inter alia*, that: the trial Magistrate had erred in fact and law in reaching at the conclusion that there was a lawful marriage between the appellant and the respondent.

The material facts of this case were thus: the respondent, a Nyiramba by tribe from Singida Region, and the appellant, a Chagga by tribe from Kilimanjaro Region, started to cohabit in 1992. The two rented a house belonging to Mariam Ally Uliza's late husband. Some time later, there were some marriage arrangements, but it was not disclosed in the trial court if the negotiations for dowry were ever concluded. But what is apparent is the fact that the parties to that case 'celebrated' a Chagga customary marriage at some point of the existence of their marriage.

However, some time in 1996, their marriage started to undergo constant misunderstandings, which led to the appellant chasing out the respondent on allegations that the latter did not bear children. Upon reference to a (ten) cell leader and further to their *mshenga*, the parties were reconciled and resumed cohabitation until some time in 1997 when the respondent went to Shinyanga. When she returned back to their matrimonial home in Dar es Salaam in 1998, she found the appellant living with another woman in their matrimonial home-cum-matrimonial property. Once again, the respondent sought the assistance of the cell leader and elders whose intervention led to the appellant to agree to remove

[122] Ibid, pp 4-5 of the typed judgment.

the said woman from the matrimonial home. However, when the cell leader and the elders left, the appellant refused to remove the said woman; consequent to which the respondent reported to the Marriage Reconciliation Board, which failed to reconcile the parties. Hence the respondent petitioned for the reliefs stated herein above.

In an interesting turn of events, the appellant denied to have married the respondent, alleging before the trial court that the respondent was his house girl from 1993 to 1997. He also denied to have engaged some one as his *mshenga* in that matter. Regarding the issue of the alleged matrimonial house, the appellant said that the construction of the said house began in 1991 and that even at the time of testifying in the trial court the construction of the same was still in progress.

When arguing his appeal in the High Court, the appellant replicated what he said in the trial court regarding his marital status with the respondent, but this time he went as far as to argue that Chagga customs and Nyiramba customs were quite different; and, as such, there could no be customary marriage as between spouses coming from Chagga and Nyiramba customs. On her part, the respondent maintained that there was a customary marriage between the parties as provided under section 25(1)(d) of the Act, which was contracted according to Chagga customs.

The issue coming from the foregoing competing arguments of the parties was: were they of the same community to qualify to contract a customary marriage as envisaged by section 25(1)(d) of the Act? Hon. Luanda, J., was of the view that the parties to that case were not people coming from the same community to meet the criteria for contracting a customary marriage under section 25(1)(d) of the Act. His Lordship further observed that:

> Chagga and Nyiramba customs are quite different. Even if for the sake of argument that they are the same, was the purported marriage contracted in accordance with the rites of Chagga custom? The Respondent did not attempt to indicate what kind of rituals was performed.
>
> From the foregoing, I am not convinced at all that the two contracted customary marriage. So I hold that there was no marriage recognised by law.[123]

3.2.2 Time for Contracting Marriage

[123] Ibid, p. 5.

According to the provisions of section 26 of the Act, the time for contracting a marriage must be at least twenty-one days after the giving of the notice of intention to marry and the contracting of the intended marriage. However, this requirement does not apply in case the Registrar-General has dispensed with the requirement to give notice of intention to marry in terms of the provisions of section 23 of the Act.

3.2.3 Witnesses

In terms of the provisions of section 27(1) of the Act, every marriage must be contracted in the presence of *at least two witnesses*. The practice is that every party to the marriage must have at least one witness. Any person can be a witness to a marriage, but the law prohibits some categories of persons to be witnesses to a marriage, such as children below the age of eighteen years or persons who are not able to understand the nature of the ceremony by reason of mental illness or intoxication or who do not understand the language in which the ceremony is conducted, unless the whole of the ceremony is interpreted into a language known to, or understood by, the respective witness.[124] The District Registrar of Marriages in whose presence a marriage in civil form is contracted is not allowed to be a witness to that marriage.[125] If the District Registrar witnesses the said marriage, such marriage shall be a nullity in terms of section 38(1)(g) and section 40 of the Act.

3.2.4 Marriage to be Public

The legal regime governing the contracting of marriages in Tanzania is crafted on the traditional view that is prevalent around the world, which suggests that a marriage, being a sacrosanct institution, needs to be made public. This means that, in order for the 'publicity' of marriage to be effective, it needs to be celebrated in the presence of members of the community in which the parties belong, who can be members of the religion to which the parties confess and under which the ceremony is celebrated, or members of the customary community to which the parties belong. In Tanzania, some believe that when a marriage ceremony is made public, it creates some religious or public recognition as well as protection of the parties to the marriage against possible or potential 'intruders' to the sanctity of that union.

As such, the provisions of section 28 of the Act allow, and egg on, any person to attend a marriage ceremony. The construction of this section is, to a larger extent,

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[124] Section 27(2) of the Act.
[125] Ibid, section 27(3).

reflective of what our diverse communities view the essence and sanctity of marriage as opined in the foregoing paragraph. It provides, in essence, to the effect that:

> 28. – (1) Any member of the public *may* attend a marriage in civil form so far as the accommodation in the office of the district registrar *may* reasonably permit.
> (2) Any person who is a follower of the religion according to the rites of which a marriage is contracted *may* attend that marriage.
> (3) Any member of the community to which the parties or either of them belong *may* attend a marriage contracted in Islamic form or according to rites recognised by customary law. [Emphasis supplied].

It is important to note that the use of the word 'may' in all the above subsections indicate that the attendance of person or member of a given community or public at a marriage ceremony is not mandatory. This gives rise to a question: is marriage that has been contracted in the absence of members of the public or of a given religion invalid? To my understanding of the foregoing position of the law, the relevant answer to this likely question is no. Marriage is valid even if contracted in the absence of members of the public. What is important is the presence of the mandatory witnesses, and the fulfilment of all the prerequisites for a valid marriage.

3.2.5 Procedure for Marriages in Civil Form

Under section 29 of the Act, a marriage may be contracted in civil form in the presence of the District Registrar in his office or in such other place as may have been authorised by licence issued under section 31. In this regard, a civil marriage may be contracted in the following manner:

> (a) the intended husband shall say to the intended wife words to the following effect either in English or Kiswahili–
> "I (giving his name) take you (giving her name) to be my wife"
> and the intended wife shall say to the intended husband words to the following effect either in English or Kiswahili–
> "I (giving her name) take you (giving his name) to be my husband";
> (b) the marriage shall thereupon be complete but the parties shall be at liberty to add any additional rite.

In terms of section 29(c) of the Act, 'the parties may, if they so wish, request the district registrar to make an entry in the register whether the marriage shall be monogamous or polygamous, and upon such request being made and upon satisfying himself that both the parties have freely and voluntarily made the request, the district registrar shall comply therewith.'

3.3 Marriage According to Religious Rites

According to section 30 of the Act,

> 30. – (1) A marriage may be celebrated according to the rites of a specified religion in any place habitually used as a place of public worship or a place of gathering by the followers of that religion, by a minister of that religion who has been licensed in that behalf by the Registrar-General:
>
> Provided that no minister of religion shall be compelled to celebrate any marriage.

The power to license a minister to officiate religious marriage ceremonies is vested in the Registrar-General under subsection (2) of section 30 of the Act. The Registrar-General can only license a minister to celebrate religious marriage on the application of the proper authority of any specified religion, by notice published in the Gazette. The Registrar-General has powers under the same section to cancel any such licence.

Under subsection (3) of section 30 of the Act, a marriage celebrated in Islamic form is officiated by any kadhi or by a registration officer who is a Muslim. In terms of section 30(4) a 'Muslim priest or preacher may, on application made by him, be licensed as a kadhi either generally or for any specified community.'

By virtue of the provisions of section 31 of the Act, the Registrar-General may, if he is satisfied that there is some good and sufficient reason, by licence in the prescribed form, authorise first, the contracting of a marriage in civil form, in a place other than the office of the district registrar; or second, the celebration of a marriage according to the rites of a specified religion, in a place other than one habitually used as place of public worship or gathering.

According to section 32 of the Act, every kadhi to whom a notice of intention to marry has been given has the duty to attend that marriage so as to ensure that the intended marriage is to be contracted in Islamic form. This duty is also vested on every registration officer to whom notice has been given to the that a marriage is intended to be contracted according to rites recognised by customary law.

3.4 Issue of Marriage Certificate

In terms of section 33(1) of the Act: "When a marriage has been contracted in the presence of a district registrar or kadhi or celebrated by a minister of religion, the district registrar, kadhi or minister, as the case may be, shall forthwith complete in duplicate a marriage certificate in the prescribed form and sign the same and cause it to be signed by the parties and by two witnesses to the marriage and shall hand one part to the parties and retain the other." Under subsection (2) of section 33 of the Act,

> (2) When a marriage has been contracted in the presence of a registration officer, he shall forthwith complete a statement of particulars relating to the marriage in the prescribed form and shall sign the same and cause it to be signed by the parties and by two witnesses and shall send the same to the district registrar, if the marriage was contracted according to rites recognised by customary law, or to the kadhi, if the marriage was contracted in Islamic form.

Under subsection (3) of section 33 of the Act: 'On receipt of a statement of particulars from a registration officer under subsection (2), the district registrar or kadhi, after registering the marriage in accordance with section 43, shall issue a marriage certificate in duplicate, retain one part and send the other to the registration officer for transmission to the parties.'

3.5 Recognition of Marriages Contracted Abroad

Section 36 of the Act recognises as valid all a marriage contracted outside Tanzania, other than a marriage contracted under section 34, if (a) such marriage was contracted in a form required or permitted by the law of the country where it was contracted; (b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile; and (c) both parties freely and voluntarily consented to the marriage or, where either party did not freely and voluntarily consent to the marriage, the parties have freely and voluntarily consummated the marriage. Where either of the parties is a citizen of the United Republic or is domiciled in Mainland Tanzania, both parties had capacity to marry according to the Act.

It is the law that for marriages contracted abroad to be recognised in Tanzania it should satisfy the following criteria:

> (a) that at least one of the parties is a citizen of the United Republic (of Tanzania);
> (b) that each party has capacity to marry according to the provisions of this Act;
> (c) that in the case of the intended wife who is a citizen of the United Republic or is domiciled in Tanzania, any consent required by section 17 has been obtained;
> (d) where either party is not domiciled in Tanzania, that the proposed marriage, if contracted, will be regarded valid in the country where that party is domiciled;
> (e) that notice of the proposed marriage has been given at least twenty-one days previously in accordance with the requirements of section 18 and that no notice to objection has been received;

(f) where a party is not a citizen of the United Republic and the law of the country of which he or she is a citizen provides for the issue of certificates of no impediment that certificate has been issued in respect of that country.[126]

Indeed, such marriage has to be conducted in the presence of the registrar in an Embassy, High Commission or Consulate of the United Republic of Tanzania in any country so designated by the Minister responsible for legal affairs in accordance with section 8(2) of the Act. However, the registrar must make sure that the above conditions are met.[127]

Under section 36 of the Act, a marriage that has been contracted abroad can be recognised as valid for all purposes of the law, if:

(a) it was contracted in a form required or permitted by the law of the country where it was contracted;
(b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile;
(c) both parties freely and voluntarily consented to the marriage or, where either party did not freely and voluntarily consent to the marriage, the parties have freely and voluntarily consummated the marriage; and
(d) where either of the parties is a citizen of the United Republic or is domiciled in Mainland Tanzania, both parties had capacity to marry according to this Act.

The practical question that often arises in respect of the recognition of a marriage contracted abroad is: whether parties who married abroad, and upon returning back to the United Republic of Tanzania they formalize their marriage under Islamic law, are bound by Islamic law in matrimonial proceedings. This issue was given due judicial consideration in the case of *Abdallah H. Mohamed v. Jasnena Zaludova.*[128] In that case, the petitioner was a citizen of Tanzania while the respondent was a citizen of the defunct Czechoslovakia. On 19th September 1974 they contracted a civil marriage in Prague, Czechoslovakia. Few months after the marriage they came to Tanzania and lived in Dar es Salaam; and shortly afterwards they shifted to Zanzibar. While in Dar es Salaam the respondent changed her Christian religion and became a Moslem. Her conversion into Islam was solemnised by a BAKWATA Sheikh one Abdallah Chaurembo; and consequent to it the respondent assumed a new name of Salama. Soon after the respondent's conversion into Islam, the parties went through a second marriage ceremony in accordance with Islamic Law.

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[126] Section 34(1) of the Act.

[127] Ibid.

[128] [1983] TLR 314 (Msumi, J.), HC Zanzibar.

While the parties were still living together in Zanzibar, the petitioner decided to get married to another wife. On hearing this, the respondent decided to leave for her home country where she was still living at the time of the trial. In some of her letters to the petitioner the respondent informed him that she was not going to resume cohabitation with him unless he divorced his second wife and then join her in Czechoslovakia. Hence in his petition, the petitioner contended that the respondent had been guilty of desertion since 1979; and, thus, requested the court to grant him a decree of divorce.

The suit proceeded *ex-parte* after efforts to serve the respondent in Czechoslovakia had proved to be fruitless. In any case, there was ample evidence showing that in fact the respondent was not interested in defending this suit. However, the court was satisfied that this suit was not filed in collusion. Despite the fact that the respondent made no defence, still the court was bound to consider the petitioner's case in detail and decide whether it was supported by law and the available evidence.

It was evident that the respondent was a citizen of Czechoslovakia and that the parties first acquired their marital status through a civil marriage performed at Prague, Czechoslovakia. It was also not in dispute that at the time when this suit was filed in the court the respondent had already left the country for about three years. The court then observed that:

> In these circumstances, the immediate legal question is whether this court has jurisdiction to entertain this suit. Put it in another form, the issue here is whether the respondent falls within the jurisdiction of this court. It is an internationally-recognised principle of law that a woman acquires the domicile of her husband on marriage. In this case, the petitioner is domiciled in Zanzibar, it therefore follows that the respondent is also domiciled here. Generally, parties in a matrimonial suit are subject to the jurisdiction of the court of the country of their domicile. On this basis, therefore, it was proper for this suit to be filed here. Furthermore, I am of the opinion that the fact that the matrimonial home of these parties is still in Zanzibar adds more weight to the propriety of this court assuming jurisdiction over this suit.

The court, further, stated that:

> Apart from the above mentioned general principles of Private International Law there is a local statute which deals with the question of jurisdiction in civil suits which have foreign elements like the present one. Section 15(c) of the Civil Procedure Decree Cap. 8 give jurisdiction in civil matters to court in whose

territory the cause of action arose. In the case of *Dedhor v. Janmohamed* (1946) 8 ZLR 52 the parties were husband and wife married in Zanzibar under Islamic Law. Soon after their marriage they went to live in Tanganyika which was the domicile of the husband. Later on the wife left the husband in Tanganyika and came to live in Zanzibar. She then filed a suit in this court for maintenance alleging that due to her husband's acts of cruelty, she was forced to leave the matrimonial home. This court, while being presided over by my learned brother Chief Justice Robinson held that since the cause of action viz the alleged acts of cruelty by the husband, occurred in Tanganyika, according to S. 15(c) of Civil Procedure Decree this court lacked jurisdiction to entertain the suit. In the present case the petitioner's prayer for divorce is based on the allegation that the respondent has deserted him. The alleged desertion consists of the respondent's act of leaving the matrimonial home in Zanzibar and her refusal to return. This means that the cause of action arose in Zanzibar. By virtue of section 15(c) of Civil Procedure Decree as rightly interpreted in the case of *Dedhor v. Janmohamed* this court has jurisdiction to entertain the suit.

3.6 Recognition of Marriages Contracted in Embassies outside Tanzania

The law in Tanzania recognises marriages contracted in Tanzanian Embassies or celebrated by other authorised authorities abroad. Under section 34(1) of the Act a marriage 'may be contracted in the presence of the Registrar in an Embassy, High Commission or consulate of the United Republic in any country which has been designated by the Minister in accordance with subsection (2) of section 8.' When this applies, such kind of marriage ceremony shall be subject to the following conditions; that is to say that the registrar shall be satisfied–

(a) that at least one of the parties is a citizen of the United Republic;
(b) that each party has capacity to marry according to the provisions of this Act;
(c) that in the case of the intended wife who is a citizen of the United Republic or is domiciled in Tanzania, any consent required by section 17 has been obtained;
(d) where either party is not domiciled in Tanzania, that the proposed marriage, if contracted, will be regarded as valid in the country where that party is domiciled;
(e) that notice of the proposed marriage has been given at least twenty-one days previously in accordance with the requirements of section 18 and that no notice to objection has been received;
(f) where a party is not a citizen of the United Republic and the law of the country of which he or she is a citizen provides for the issue of certificates of no impediment that such certificate has been issued in respect of that party.[129]

[129] Also, see, section 37 of the Act.

Subsection (2) of section 34 of the Act lays down the procedure for the contracting of marriage in a Tanzania Embassy, High Commission or Consulate, which is similar to that for the contracting of civil marriages under this Act. At the same time, the provisions of this Act relating to the issue of marriage certificates and to the registration of marriages apply to marriages contracted in Tanzanian Embassies abroad 'as if the registrar appointed for that foreign country were a district registrar and the marriage shall be valid for the purposes of this Act accordingly.'

Under section 35(1) of the Act, 'if a citizen of the United Republic domiciled in Tanzania desires to contract marriage in any foreign country in accordance with the law of that country and the law of that country requires him or her to produce a certificate that no legal impediment to the intended marriage is known to the responsible authority in Tanzania, he or she may apply to the Registrar-General for the issue of a certificate.' Upon receipt of an application under this section, the Registrar-General shall cause all such inquiries to be made as are practicable and, if no impediment is shown, he shall issue the required certificate of no impediment.[130]

3.7 Void Ceremonies, Voidable Marriages and Legitimacy

3.7.1 Void Marriage Ceremonies

Under section 38 of the Act, void marriage ceremonies are those falling within the following ceremonies which are purported to be marriage ceremonies:

(a) where either party to a marriage is below the minimum age for marriage, unless leave has been granted under subsection (2) of section 13 of the Act;
(b) where parties to a marriage are within a prohibited relationship;
(c) where either party to a marriage is incompetent to marry by reason of an existing marriage;
(d) where the court or the Marriage Conciliation Board, in the exercise of the power conferred on it by section 22 of the Act, has directed that the intended marriage is not to be contracted;
(e) where the consent of either party to a marriage was not freely and voluntarily given thereto;
(f) where either party was not present in person at the ceremony;

[130] Ibid, section 35(3) of the Act.

(g) where both parties knowingly and wilfully acquiesce in a person officiating thereat who is not lawfully entitled to do so; and
(h) where the ceremony is conducted in the absence of two competent witnesses.

3.7.2 Voidable Marriages

Under section 39 of the Act,[131] a marriage is voidable if–

> (a) at the time of the marriage–
> (i) either party was incapable of consummating it;
> (ii) either party was subject to recurrent attacks of insanity or epilepsy;
> (iii) either party was suffering from venereal disease in a communicable form; or
> (iv) the wife was pregnant by some person other than the husband; or
> (b) the marriage has not been consummated owing to the wilful refusal of one party to consummate it;
> (c) the wife had not attained the age of eighteen years and consent to the marriage as required by section 17 had not been given and the court sees good and sufficient reason to set the marriage aside.

However, under section 40 of the Act, a voidable marriage is a valid marriage until it is annulled by a decree of the court under section 96 of the Act, which provides, in extenso, that,

> 96. – (1) The court shall have power to grant a decree of annulment in respect of any marriage which is voidable under the provisions of section 39:
>
> Provided that–
> (a) where the petition is founded on an allegation that at the time of the marriage the respondent was subject to recurrent attacks of insanity or epilepsy or was suffering from venereal disease in a communicable form or was pregnant by a person other than the petitioner, the court shall not grant a decree unless it is satisfied–
> (i) that the petition was filed within one year of the date of the marriage; and
> (ii) that at the time of the marriage the petitioner was ignorant of the fact alleged; and
> (iii) that marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner of that fact;
> (b) where the petition is founded on an allegation that at the time of the marriage the intended wife was below the age of eighteen years and that

[131] Subject to sections 97 and 98 of the Act.

> consent as required by section 17 was not given, the court shall not grant a decree unless it is satisfied that the petition was filed before that party attained the age of eighteen years.

Under subsection (2) of section 96 of the Act, the court has 'power to grant a decree of annulment in respect of any marriage contracted outside Tanzania or in any foreign embassy, High Commission or consulate in Tanzania where the court is satisfied that any of the conditions specified in section 36 or, as the case may be, section 37 has not been complied with.'

3.7.3 The Legal Effect of Void and Voidable Marriages

A void or voidable marriage is valid until one party to such a marriage petitions to the court seeking an order declaring it either void *ab initio* or voidable. In *Amida d/o Shaabani v. Alfan Mtenga*[132] Kisanga, J. (as he then was) held that a decree of annulment is relevant only to a voidable marriage which remains valid for all purposes unless; and until one of the spouses opts to avoid it and the court duly annuls it.

Where the marriage is void *ab initio* the court grants declaratory decree that the marriage was not valid for want of capacity to marry. Under section 97(1) of the Act, a petition for annulment of a marriage 'may only be brought by one of the parties to the marriage and where the petition is founded on an allegation of facts of which one party was ignorant at the time of the marriage may only be brought by that party and where the petition is founded on the wilful refusal of one party to consummate the marriage, may only be brought by the other party. According to section 97(2):

> (2) A petition for annulment of a marriage on the ground that one of the parties was below the age of eighteen years and that the consent of his or her parent or guardian or of the court to the marriage had not been given may be brought by the parent or guardian of that party.

The legal effects of decree of annulment are provided for in section 98 of the Act, which provides that,

> (1) The parties to a marriage which has been annulled by a decree of the court shall be deemed never to have been married:
>
> Provided that a decree of annulment shall not–
> (a) render any child of the marriage illegitimate;
> (b) render lawful anything which was done unlawfully during the

[132] [1981] TLR 243.

marriage or render unlawful anything which was done lawfully during the marriage;

(c) affect the competence or compellability of either spouse as a witness in respect of anything done or any privilege in respect of communications made during the marriage; or

(d) relieve the husband of any debt properly incurred on his behalf by his wife during the marriage.

(2) A decree of annulment shall be effective as from a date thirty days from the date of the decree if no appeal or notice of appeal, as the case may be, has been filed within that time and in any other case on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.

3.7.4 Matters not Affecting Validity of Marriage

According to section 41 of the Act, a marriage ceremony which in all other respects complies with the express requirements of this Act is valid for all purposes, notwithstanding–

(a) any non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage;

(b) failure to give notice of intention to marry as required by this Act;

(c) notice of objection to the intended marriage having been given and not discharged;

(d) the fact that any person officiating thereat was not lawfully entitled to do so, unless that fact was known to both parties at the time of the ceremony;

(e) any procedural irregularity; or

(f) failure to register the marriage.

3.8 Prohibition of Polyandry

Under section 15 (1) of the Act: "No man, while married by a monogamous marriage, shall contract another marriage." In accordance with subsection (2) of section 15 of the Act,

> (2) No man, while married by a polygamous or potentially polygamous marriage, shall contract a marriage in any monogamous form with any other person.
>
> (3) No woman who is married shall, while that marriage subsists, contract another marriage.
>
> (4) Nothing in this section shall be construed as preventing the parties to a marriage to go through another ceremony of marriage:
>
> Provided that where parties who are already married go through another ceremony of marriage, such subsequent ceremony shall not,

subject to the provisions of subsection (5) of section 11, affect the status or the legal consequences of their first marriage.

In the case of *Ramadhani Said v. Mohamed Kilu,*[133] Lugakingira, J., (as he then was) held that, in terms of section 15(3) and section 152(1) of the Law of Marriage Act, 1971, no woman who is still married, while that marriage subsists, can contract another marriage. His Lordship, further, observed that it is an offence for a married woman to be a party to a ceremony of marriage whereby she purports to marry another man. According to Justice Lugakingira,

> On the other hand, our law does not permit polyandry but punishes it. Section 15(3) of the Act provides that no woman who is married shall, while that marriage subsists, contract another marriage and under s. 152 (1) thereof it is an offence for a married woman to be a party to a ceremony of marriage whereby she purports to marry another man. In other words, in reference to the instant case, as long as Mwanaidi was still validly married to the appellant she could not contract a valid marriage with the respondent. Neither the notice nor the "shangwe," not even the certificate issued, could render valid that union with the respondent. Besides, Mwanaidi was forced into it. There was therefore no marriage with the respondent but he had risked being sued in adultery.

According to His Lordship: "This is sufficient to show that the Primary Court had reached the correct decision although it did not direct itself correctly on the status of the two unions. I consider it unnecessary to go into the other features of the case."

Chapter Four
MATRIMONIAL RIGHTS AND LIABILITIES OF SPOUSES

4.1 Fundamental Matrimonial Rights

4.1.1 Introduction

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[133]Op. cit.

As we discussed in Chapter Two, marriage has recently become one of the centre stages of human rights. As per Article 16(1) of the UDHR,

> 16.- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Thus, this Chapter discusses at some length matrimonial rights and liabilities as are set out in the Act and as per Tanzanian caselaw.

4.1.2 Rights and Liabilities of Married Women

Under section 56 of the Act married women and men have the right 'to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise. '

In terms of section 57 of the Act, 'where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.' Therefore, the Act gives spouses an equal status in law in respect of their basic rights and liabilities while the marriage subsists.

4.1.3 Separate Property of Husband and Wife

The law recognises separate ownership of property between married couples.[134] In terms of section 58 of the Act,

> Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

This implies that a spouse has the right to ownership of property s/he acquired before the marriage; or s/he has the right to acquire or dispose of his or her separate property during the subsistence of the marriage.

4.1.4 Matrimonial Home and Assets

Section 2(1) of the Act defines a "matrimonial home" as "the building or part of a building in which the husband and wife ordinarily reside together and includes–

[134] This is also the legal position in England and Wales. See, STANDLEY, Kate, *Family Law*, op. cit, p. 56.

(a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and (b) where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use."[135]

Under paragraph 1064 of Lord Hailsham's *Halsbury's Laws of England*[136] it is stated:

> The phrase "family assets" has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it and (2) those which are of a revenue producing nature such as the earning power of husband and wife.

Section 59(1) of the Act sets out special provisions relating to matrimonial home. It provides that,

> 59. – (1) Where any estate or interest in the matrimonial home[137] is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.[138]

In *Leons Challamila v. Mayalla Edward Masunga*[139] Manento, J. (as he then was), referring to the provisions of section 59(1) of the Act, held that 'no spouse can dispose of the matrimonial property jointly acquired during the marriage without the consent of the other spouse.' In this case, the respondent had

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135 Also see, *NBC Limited v. M/S Konje Multi Traders Co. Ltd and 2 Others*, High Court of Tanzania at Dar es Salaam (Commercial Division), Commercial Case No. 284 of 2002 (unreported).

136 4th Edition, p. 491.

137 The position in England is that spouse's entitlement to a right to matrimonial home arises only in respect of a dwelling house which is, or was, intended by the spouses to be their matrimonial home. See, section 30(7) of the U.K. Family Law Act of 1996; and STANDLEY, Kate, ibid, pp. 57-58.

138 Also, see, *Paola Abdullah v. Mohamed Norman Bin Abdullah*, High Court of Tanzania at Dar Es Salaam, Matrimonial Cause No. 3 of 2001 (unreported).

139 High Court of Tanzania at Dar Es Salaam, Civil Appeal No. 150 of 1999 (unreported).

purchased a piece of land at Kurasini from one Nakembetwa sometimes in 1992 and he started building a house on the suit plot. When the house reached at the lintel, he was involved in a criminal case consequent of which he spent his time in prison for nine months in 1993. While he was in prison, his wife, one Easter, sold the partly built house to the appellant for a consideration of TShs. 500,000/=. The appellant then demolished the said house and built a new house.

During the trial, it emerged that after the sale of the said house, Easter left to her home area in Tabora where she later died. When the respondent came out of prison, he found the appellant living in the house he had started building before his imprisonment. He subsequently instituted a civil suit at Temeke Primary Court where judgment was entered in his favour and the respondent ordered to vacate. The basis of the primary court's decision was that the said wife of the respondent had no mandate to dispose of a matrimonial property in the absence of the consent of her husband, which both the District Court and High Court upheld.

Under subsection (2) of section 59 of the Act, where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until–

> (a) the marriage is dissolved; or
> (b) the court on a decree for separation or an order for maintenance Otherwise orders,
>
> unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.

In *Leons Challamila v. Mayalla Edward Masunga*[140] the High Court, interpreting the provisions of section 59(2)(b) of the Act, held that the evidence in the Primary Court did not reveal that the respondent had given his consent in relation to the sale of the matrimonial property. What was in record was mere speculation that the appellant was told by some person that the respondent had consented, 'an information he could not ascertain.'

However, in *NBC Limited v. M/S Konje Multi Traders Co. Ltd and 2 Others*,[141] Kalegeya, J., found a spouse to have given consent to her husband when he

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[140] Ibid.
[141] Op. cit.

mortgaged a matrimonial home. One of the relevant passages of His Lordship's decision in this case is to the effect that,

> [W]hile appreciating the handicap lying with most of our female citizens on family properties, the best way to protect their interests (relating to a matrimonial home) is to register a caveat.

Indeed, this reasoning was based on the decision of Lugakingira, J. (as he then was) in *Hadija Mwere v. Ally Mbaga*,[142] where His Lordship held that,

> [A] prudent spouse would seek to protect (her) interest (in a matrimonial home) by actually causing a caveat to be registered … in other words subsection (1) [of section 59 of the Act] should not be read in isolation but in conjunction with any law for the time being in force relating to registration of titles to land or deeds. In accordance with the provisions of Section 33(1) of (the) Land Registration Ordinance, Cap. 334, the owner of any estate holds the same free from all estates and interests … other than encumbrances (such as a caveat duly) registered…

As Justice Lugakingira opined, in this case, a spouse has a registrable interest in a matrimonial home, which could be protected by a caveat. According to His Lordship, the caveat serves as a warning to a bona fide buyer that the house is a matrimonial home; and, so, anything done over it, if it has legal effect such as mortgage and sale, should get a prerequisite consent of each spouse.

According to subsection (3) where any estate or interest in the matrimonial home is owned by the husband or by the wife and that husband or wife, deserts his or her spouse, the deserted spouse shall not be liable to be evicted from the matrimonial home by or at the instance of the husband or the wife, as the case may be, or any person claiming through or under him or her, except: "(a) on the sale of the estate or interest by the court in execution of a decree against the husband or wife, as the case may be; or (b) by a trustee in bankruptcy of the husband or wife, as the case may be."

The rationale behind the provisions of section 59 of the Act was expounded by Muro, J. (as she then was) in *Paola Abdullah v. Mohamed Norman Bin Abdullah*,[143] in the following regards,

> The whole of the Law of Marriage Act seems to assume that the husband and wife will be sharing a matrimonial home; there is no specific provision, which

[142] High Court of Tanzania at Mwanza, Civil Appeal No. 40 of 1995 (unreported).
[143] Op. cit.

provides for an order for injunction against one of the spouses in respect of the occupation of the matrimonial home.

In England, though, it is the law that the court can grant injunction straining a spouse from entering the matrimonial home in order to protect the other spouse from potential injury by the other. [144]

4.1.5 Presumptions as to Property Acquired during the Subsistence of Marriage
According to the provisions of section 60 (a) of the Act, where during the subsistence of a marriage, any property is acquired in the name of the husband or of the wife, 'there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse.' In terms of section 60(b) of the Act, where during the subsistence of a marriage, any property is acquired, 'in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.'

4.1.6 Gifts between Husband and Wife
In terms of section 61 of the Act, where, during the subsistence of a marriage, either spouse gives any property to the other, 'there shall be a rebuttable presumption that the property thereafter belongs absolutely to the donee.' This presumption may be rebuttable if it is proved that there was an agreement to the effect that the ownership of the gift might be retained by the donor if the donee breached certain conditions.

4.2 Liability for Antecedent Debt
By virtue of section 62 of the Act, 'no person shall be liable for any debt contracted by his or her spouse prior to their marriage.' This means that a spouse is only liable for debts contracted by his or her partner during the subsistence of the marriage. This also applies to debts contracted after the breakdown of marriage.

4.3 Duty to Maintain a Spouse
Under section 63(a), the Act imposes a duty on 'every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life.' Under section 63(b) of the Act, every wife who has the means to do so, has a duty to provide in similar manner for her husband if he is incapacitated, wholly or

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[144] See, for instance, *Silverstone v. Silverstone* [1953] All E.R. 556; and *Boyt v. Boyt* [1948] 2 All E.R. 436.

partially, from earning a livelihood by reason of mental or physical injury or ill-health. However, the duty to maintain a spouse can be relinquished where the parties are separated by n agreement or by a decree of the court or if there is any subsisting order of the court to that effect.

4.4 Presumption of Wife's Authority to Pledge her Husband's Credit, etc.

Subject to the provisions of subsections (2) and (3) of section 64 of the Act, a wife is presumed, unless the contrary is proved, 'to have authority to pledge her husband's credit, or to borrow money in his name, or to use any of his money which is in her possession or under her control, or to convert his movable property into money and use the same, so far as such credit or money is required for the purchase of necessaries for herself and the infant children of the marriage, appropriate to the husband's means and way of life.'[145] Under subsection (2) of section 64 of the Act, such authority is presumed only–

> (a) where the husband and wife are living together;
> (b) where the husband and wife are separated under an agreement which provides that the husband will pay maintenance to the wife and he has failed to comply with that agreement;
> (c) where the husband has deserted his wife or by his conduct has compelled her to leave him.

Where it is proved that the wife is living openly in an adulterous association, the foregoing authority shall be presumed where.[146] So, the presumption of authority set out in subsection (1) of section 64 of the Act may be rebutted by evidence–

> (a) that the wife was already receiving a sufficient allowance or sufficient maintenance or had sufficient means;
> (b) that the wife already had a sufficiency of the goods so purchased; or
> (c) that the goods so purchased were excessive in quantity or extravagant having regard to the husband's means, and it is immaterial that the person giving credit or lending money may have been unaware of the fact.[147]

4.5 Husband and Wife and the Law of Tort

The Act, under the provisions of section 65(a), prohibits a husband to be liable for the torts of his wife by reason only of his being her husband. The Act provides, further that, 'a husband and wife shall have the same liability in tort towards each other as if they were unmarried.'[148] According to section 65(c)

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145 Section 64(1) of the Act.
146 Ibid, section 64(3).
147 Ibid, section 64(4).
148 Ibid, section 65(b).

'neither a husband nor a wife shall be entitled to claim damages, in an action arising out of any negligent act or breach of duty, in respect of the loss or impairment of consortium.'

4.6 No Right of Spouse to Inflict Corporal Punishment

In terms of section 66, no person has any right to inflict corporal punishment on his or her spouse. This is an absolute right that cannot be subrogated by virtue of the existence of a customary rule to the contrary. In *Mariam Tumbo v. Harold Tumbo*[149] the parties to this case were married under Christian rites in 1958 and had seven issues of the marriage. The petitioner sought dissolution of marriage alleging adultery, cruelty and desertion. She also prayed for custody of the youngest five children and for the division of matrimonial assets. The respondent had cross-petitioned for divorce, alleging cruelty and desertion. He also prayed for custody of the youngest three children. The High Court held that it is one thing to tolerate a spouse's misconduct; and it is another to put up with the consequences thereof. In contemplation of this cardinal principle of the law of marriage the legislature enacted section 85 of the Act to the effect that evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground that the misconduct was condoned by the aggrieved spouse.

The High Court, therefore, held that it is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be the deserter; it is imperative for there to be some conduct which amounts to dismissal from the consortium. The Court was of the view that: "Cruelty is (some) conduct having the effect of producing actual or apprehended injury to physical or mental health." The Court also observed that: "In any case, to find cruelty, the court will not wait to see injuries on the petitioner's person nor will it wait to see the petitioner in hospital." In the words of Lord Pearce in *Gollins v. Gollins*,[150]

> It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to tolerate it.[151]

[149] [1983] TLR 293.
[150] [1963] 2 All E.R. 966.
[151] At p. 992.

It was also the Court's view that: "there is no need for the injury to be actually suffered: a reasonable apprehension that injury will result if the conduct is persisted in will suffice, for the court will not wait for the petitioner to be actually injured before affording him (or her requisite) relief."

4.7 The Right of Spouses to enter into an Agreement to live apart

By virtue of the provisions of section 67 of the Act, the parties to a marriage may, by writing signed by each other, 'agree to live apart and any such agreement, including any provisions as to maintenance, matrimonial property and the custody of the infant children, if any, of the marriage shall be valid and enforceable.' However,

> [T]he court shall have power, whether the agreement was made before or after the coming into force of this Act and notwithstanding any provision to the contrary in any such agreement, on the application of either party at any time and from time to time to vary or set aside any such provisions–
>
> (i) where it is satisfied that the circumstances have changed in any material respect; or
> (ii) where it is satisfied that the agreed arrangements are not in the best interests of the children.

In practice, though, few couples, whose marriages have reached the stage of irreparably breaking down; have been entering into such agreements. Indeed, the agreement to live apart is one of the best ways to amicably solve matrimonial mishaps where marriage has proved fruitless. This saves time, money and further quarrels between the disputing spouses, as compared to resorting to court redress.

4.8 Status of Widows[152]

A woman whose husband has died shall be free (a) to reside wherever she may please; and (b) to remain unmarried or, subject to the provisions of section 17 of the Act, to marry again any man of her own choosing.[153] In case the parties were married in an Islamic form the widow shall not be entitled to remarry until after the cessation of the customary period of *iddat*.[154]

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[152] A recent study has found that even girls have been referred to as widos. See, MAGOKE-MHOJA, Monica Elias, *Child-Widows Silenced and Unheard: Human Rights Sufferers in Tanzania*, Dar es Salaam: Children's Dignity Forum, 2006.

[153] Section 68 (a) and (b) of the Act.

[154] Ibid, proviso.

4.9 Family Property on Death

It is the law that when a person dies his estate must be wound up and assets and liabilities settled. Such estate must be closed, with heirs getting their due shares of the estate.[155] In Tanzania, like all jurisdictions under the common law, there are two categories of devolution of deceased persons' assets: devolution of property where the deceased leaves a will and where the deceased leaves no will (i.e., he dies intestate).

4.9.1 Devolution of Property by Will

In Tanzania, as is the case in England,[156] any adult person of sound mind may make a will,[157] disposing of his or her property to whomever he or she chooses.[158] A valid will drawn up by a literate person must be attested, besides the wife (or wives), by at least two persons of whom one must be a relative of the deceased. In *George A. Mmari and Anande A. Mmari*,[159] the deceased's will was not attested by a relative of the deceased. So, the High Court held the will to be defective for want of proper attestation. This case was an appeal arising from the decision of Kinondoni District Court in respect of an appeal from Manzese Primary Court concerning Probate and Administration Cause No. 57 of 1993. This appeal principally revolved around a dispute over the legality of the deceased's written will that purported to bequeath the deceased's house situated at Sinza within the City of Dar es Salaam to the respondent, one Afra Fuime. The two appellants, namely George Anael Mmari and Anande Anael Mmari, were the children of the deceased, one Anael Kikoka Mmari.

According to the evidence that was adduced before the trial court, the two appellants were the only children surviving the deceased, born of him with two different mothers who were not cohabiting with the deceased at the time of his death. He died on 30th April 1993 while cohabiting with the respondent who had then lived with him for about fifteen years. During his life time the deceased had managed to acquire various assets including the house in dispute. It was while the deceased was sick and admitted at Hindu Mandal Hospital within the City of Dar es Salaam that on 25th January 1995, he was said to have drawn up his will

[155] See, *Simon Mlelema v. Ningistiiwa Kachwele* [1989] TLR 115.
[156] STANDLEY, Kate, op. cit, p. 93.
[157] Under section 2 of the Probate and Administration Act, Cap. 352, R.E. 2002, a "will" is referred to as a 'legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death.'
[158] See, STANDLEY, Kate, op. cit.
[159] [1995] TLR 146.

by which he purported to bequeath his various properties to his two children and the house in dispute to the respondent. Such will was attested by the respondent who was the deceased's wife and one Dr. Gloria, only. It was this Doctor Gloria who was then attending the deceased while hospitalized at Hindu Mandal hospital. Besides the respondent, the deceased's wife, the will was actually attested by one witness only, the doctor. This was, indeed a contravention of the provisions of Rules (5) and (19) of the Local Customary Law (Declaration) Order of 1963,[160] which provide to the effect that a will drawn up by a literate person, for it to be valid it must be attested besides the wife (or wives), by at least two persons of whom one must be a relative of the deceased. In this case, Mwaikasu, J. (as he then was) held that,

> As pointed out earlier the deceased's will is clearly defective, for want of proper attestation. It lacked one more witness who ought to have been a relative of the deceased. As such it cannot be effected. It is null and void.

Therefore, when a will is declared defective, as in this case, 'the deceased is to be taken to have died intestate and therefore administration of his estate is to be done in accordance with the applicable law, as if he had died intestate.' As held by Msumi, J. (as he then was) in *John Ngomoi v. Mohamed Ally Bofu*,[161] the requirement that at least half of the number of witnesses to a will executed under customary law must be related to the testator, is intended to act as a safeguard against fraud against the testator and the lawful heirs to the estate.[162] In this case, the respondent petitioned the Primary Court for letters of administration in respect of the estate of the deceased Hadija Manzi. The deceased left a house situated along Uhuru Street, Dar es Salaam. While the respondent's petition was pending, the appellant filed an objection claiming that the said house was given to him by the deceased in her will executed before her death in the presence of witnesses who testified before the court in his favour. The genuineness of the will was disputed, hence dismissed in both the primary and district courts. On appeal to the High Court it was held that,

> But even if deceased had no relatives at the material time, the need to dispel the possibility of fraud on the Will still remains. For this reason, I totally associate with the lower courts' suggestion that in the absence of the deceased's relatives, her ten cell leader ought to have been included as among the witnesses to the alleged Will. This requirement was particularly necessary in this case bearing in mind the fact that deceased was a very old illiterate woman and at the time when

[160] No. 4 of 1963, GN 436/63, Third Schedule.
[161] [1988] TLR 63.
[162] Also see, *Thomas Matondane v. Didas Mawakalile & 3 Others* [1989] TLR 210.

> she allegedly executed the Will she was bedridden with long time illness. This fact reasonably explains why Mr. F.S. Mbuya, the learned advocate who drew the Will had to go to the house of the appellant where the deceased was staying to get the Will executed.

Under Rules 19 and 21 of the Local Customary Law (Declaration) (No. 4) Order of 1963, if a testator is illiterate, a will executed by him must be attested by a minimum of two clan members and two non-clan members. As the testator in this instance was illiterate, the will presented by the appellant was not properly attested.[163]

4.9.2 Devolution of Property on Intestacy

When a spouse dies intestate, the law provides that after payment of debts and expenses, an administrator or administratrix[164] appointed by the court under sections 33 and 34 of the Probate and Administration Act,[165] to distribute the estate according to the rules of intestate succession provided for in the Act. Amongst the heirs of the estate include the surviving spouse, children and dependants of the deceased.

4.9.3 Islamic Law of Succession and the Principle of Proximity

As was held in *Sofia Said and Yusuf Mohamed Musa v. Awadh Ahmed Abeid and 3 Others*,[166] the Islamic law of succession the principle of proximity is of great importance because within the limits of each class the nearest of blood relationship excludes the remote. In this case, Fatuma d/o Sefu who was a Sunni - Shaffii Moslem died intestate in 1983. After an application in the Kariakoo Primary Court by the could be heirs the Court appointed the fourth respondent as the administrator of the deceased estate. On the same day the court made an order that the assets of the deceased be sold by auction. There was no dispute that under Islamic law Mgeni Hemedi, the surviving husband of the deceased, was entitled to take half of whatever fell to be decided. The issue was the method to be adopted for the distribution of the remaining part of the estate. Several relatives from the uterine and agnate sides competed for a share. The matter was taken to the District Court. The District Court held that since there were no Koranic heirs other than Mgeni Hemedi, heirs on the uterine side were entitled to

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[163] Also see, *Abdul Sadiki v. Wilfred Rutakunikwa* [1988] TLR 167.

[164] In appointing an administrator or administratrix the court has discretion powers to do so, but 'having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered.' See, section 33(4) of Cap. 352.

[165] Cap. 352, R.E. 2002.

[166] [1992] TLR 29.

inherit along with those on the agnate side. The appellants were, consequently, aggrieved by this decision and appealed to the High Court, which upheld the decision of the District Court on the same reasoning. They further appealed to the Court of Appeal.

In the Court of Appeal, Mapigano, Ag. JA (as he then was); Ramadhani, JA; and Mnzavas, JA (as he then was), held that,

> The first principal class is called "Sharers" or "Koranic heirs" of which, as stated, there is only one in this case, i.e. Mgeni Hemedi. The second is called "Residuaries" or "Asabah" and looking at the Table of Residuaries in Mulla's Principles of Mohamedan Law, 14th edition at page 69A, there is only one such heir among the claimants in this case i.e. the second appellant Yusuf Mohamed Musa, he being an agnate nephew of the deceased. The third class is commonly referred to as "Distant Kindred" and this is the class to which the rest of the claimants, including the first appellant Sofia Saidi, belong.

The learned Justices went on to observe that,

> Germane to these classes is the rule of exclusion or postponement. The rule prescribes that Residuaries are called to succession only where there are no Sharers or where the inheritable estate is not exhausted by the Sharers; and the Distant Kindred are called to succession only where there are no Sharers of Residuaries: See Mulla, sections 65 and 67 (1).
>
> Accordingly, in as much as there is only one Koranic heir and there will be a residue left after satisfying his claim, the residuary, i.e. the second appellant, should be called to succession. And inasmuch as there is a residuary, nothing can devolve upon the rest of the claimants. That is the legal position, and much as we may appreciate the affection and generosity which some of the claimants had displayed toward the deceased, there is nothing we can do.

Their Lordships concluded by making an observation to the effect that: 'it is a wrong thought that (the appellants could) stand in the place of the mother of the deceased, for the doctrine of representation is alien to Islamic intestacy. So it matters not that the mother of the deceased would have been called to the succession of the estate, if she had survived the deceased, and that upon her death the claimants would have partition in her inheritance. As Wilson points out in his Digest at page 64, the case of Prophet Mohamed himself poignantly exemplifies the true legal position.' He writes:

> Thus, in Muhammad's own case, his father Abdullah having predeceased him (in fact, having died before he was born) while the grandfather was still living, the other sons of the grandfather divided the whole of the latter's inheritance to his

> total exclusion, and he owed his maintenance and start in life to the kindness of one of his uncles.

Wilson presumes that 'this system satisfied the Prophet's sense of justice though he personally suffered by it, since he did not alter it when he was in a position to do so. So, the learned Justices in *Sofia Said* concluded that it was beyond their 'competence to change that system.'

4.9.4 Where the Deceased Spouse Leaves a Widow with Debts

As was held in *Maagwi Kimito v. Gibeno Werema,*[167] the law stipulates that a surviving heir is liable to pay in full the debts which the deceased spouse was liable to pay. In this case, Nyalali, C.J. (as he then was) held that:

> It is clear from these rules,[168] especially rule 12, that an heir is liable to pay in full the debts where the deceased's estate are insufficient to pay all the debts in full. It is clear from the provisions of rules 11, 12 and 13 that a three-stage procedure will be involved in satisfying the liabilities. Firstly, payment in full is made in respect of important debts. Secondly, if the important debts are fully discharged from the assets, the remainder of the debts are paid out proportionately. Thirdly, in any event, the balance of the debts [is] paid out in full by the heirs from their own property.

His Lordship, though, held that: "This position is undoubtedly startling to anyone used to the English system." For instance, such a situation happened to Spry, J. in the case of *Abdallah Kombe v. Said s/o Leveri,*[169]where His Lordship was dealing with a similar matter among members of the Wapare Community. In that case, His Lordship held that:

> The assessors who sat with me expressed the opinion that under Pare customary law, an heir is liable for the debts of his predecessor even though he inherits no property; and that such debts will pass from one generation to another … Under the provisions of section 15 of the Local Courts Ordinance (Cap 299) the law to be applied is the customary law prevailing in the area, so far as it is not repugnant to natural justice or morality. The customary laws to which I have referred are certainly not repugnant to morality; indeed, I am much impressed by the high sense of obligation which they reflect. I think, however that it is repugnant to justice that a person should (not) be saddled with a debt which he has not himself incurred, the incurring of which he may not have approved and from

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[167] [1985] TLR 132.

[168] These rules are found in the Second Schedule to the Local Customary Law (Declaration)(No.4) Order, 1963.

[169] Local Court Civil Appeal No. 47 of 1962 reported in A Digest of Appeals from Local Court (1962) Vol. X at page 11.

> which he had derived no benefit. I think it is utterly wrong that a child may be born with a burden of debt which he may never be able to discharge. I hold therefore, that this customary law is one which the Court will not enforce.

In *Maagwi Kimito v. Gibeno Werema* the appellant instituted a suit in a Primary Court for refund of thirty six head of cattle which he had paid in respect of his marriage to one Nyamohanga d/o Makongo, which marriage was subsequently dissolved. The cattle were received by her brother. By the time of the suit the brother had died, so that suit was filed against the respondent, the widow and sole heir of the deceased estate in accordance with Kuria customary law. The appellant was successful in both the Primary and District Courts, though the latter court reduced the number of refundable cattle from 36 to 20. On appeal to the High Court, both decisions of the two lower courts were overturned on the ground that the payment, receiving and refunding of bride price is a clan affair and should not be saddled on a poor widow. On further appeal to the Court of Appeal of Tanzania, the Court considered the place of customary laws in Tanzania, generally, and the propriety of the High Court decision, and held that the customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary.

The Court of Appeal also held that since under Kuria customs the respondent was the sole heir to her deceased husband's property and nobody else, likewise she was liable to pay the deceased's debts. It further held that it is not only correct in law; but proper in principle that the respondent, who is the sole heir of her deceased husband, be liable to refund the bride price which her husband received in respect of the marriage of his sister to the appellant.

4.9.5 Where the Deceased Spouse Leaves a Childless Widow

Under Rule 77 of the Customary Law Declaration Order,[170] the right of a childless widow to a share in assets of the marriage is not contingent upon any considerations but is one secured by statute. A relevant judicial authority on this contention is *Elizabeth Saiwa v. Yohana Mpahi*.[171] In this case, the appellant was

[170] G.N. No. 279 of 1963.
[171] [1984] TLR 56.

married to the respondent's brother for twenty years and had no child of the marriage. In January 1984 the husband died in circumstances evoking local suspicions and the appellant was expelled from the village where she lived with her deceased husband. She then sued the respondent, the administrator of the deceased's estates for her share in the property acquired during her marriage. In the absence of evidence as to the nature and quantity of assets, the District Court had reduced the lower court's award of nine head of cattle, thirteen goats, one sheep and Shs. 1,500/- to four head of cattle and 1,500/- as reasonable marriage gratuity. Then the appellant appealed to the High Court challenging that award.

Although Lugakingira, J. (as he then was) dismissed the appeal, he held that,

> [T]he right of a childless widow to a share in assets of the marriage is not contingent upon any considerations - superstitious considerations least of all - but is one secured by statute.[172]

So, it does not matter whether or not the widow is childless for her to inherit; because the right to inherit by a widow is secured by statute.

4.10 Matrimonial Rights of Action

4.10.1 The Right to Damages for Breach of Promise of Marriage

The right to damages for breach of promise to marry is provided for under section of 69 of the Act, which lucidly stipulates that,

> 69.- (1) A suit may be brought for damages for the breach of a promise of marriage made in Tanzania whether the breach occurred in Tanzania or elsewhere, by the aggrieved party or, where that party is below the age of eighteen years, by his or her parent or guardian:
>
> Provided that–
> (a) no suit shall be brought against a party who, at the time of the promise, was below the age of eighteen years;
> (b) no damages shall be awarded in any such action in excess of loss actually suffered as a result of expenditure incurred as a direct result of the promise.

Under the provisions of subsection (2) of section 69 of the Act, a suit 'may similarly be brought in respect of the breach of a promise of marriage made in any other country but only if such an action would lie under the law of that

[172] See, para. 77 of the Customary Law Declaration Order, G.N. No. 279/63.

country as well as under this Act.' However, the Act prohibits a suit to 'be brought for specific performance of a promise of marriage.'[173] Under section 70 of the Act, the time of limitation of suits for damages for the breach of a promise of marriage is one year after the date of the breach.

4.10.2 The Right to Return of Gifts Given in Contemplation of Marriage

The provisions of section 71 of the Act allow a fiancée to bring an action for return of gifts given in contemplation of a marriage that fails to take place. In the main, section 71 provides that:

> 71. A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise.

In *Generoza Ndimbo v. Blasidus Yohanes Kapesi*,[174] the High Court of Tanzania was faced with the question: whether gifts given in contemplation of marriage which fails to take place can be claimed back under section 71 of the Law of Marriage Act, 1971. Kazimoto, J., held that a suit may be brought for the return of any gift made in contemplation of marriage which has been contracted His Lordship also observed that the petitioner must prove to have given the gifts to the respondent on the condition that the parties intended to marry.

In that case, the respondent successfully sued the appellant in the Primary Court for breach of promise to marry and the return of gifts allegedly given to her in contemplation of marriage. She appealed to the District Court but lost with costs. In the court of first instance, the respondent claimed six bags of beans, ten bags of maize one sponge mattress, a bamboo basket, a sieve and several other things. The parties cohabited in concubinage from 1984 to 1986. Aggrieved by decisions of lower courts the appellant appealed to the High Court. Allowing the appeal, Kazimoto, J., held that this was not a fit case for the return of gifts as what the respondent was claiming was not gifts, but assets obtained by the parties jointly during the subsistence of their concubinage. His Lordship observed, in lucid terms, that,

> It is therefore clear from the evidence on record that these were not gifts. These were what they earned through their joint efforts. (The respondent) is trying to apply for division of what they had earned together. There was no evidence

[173] Ibid, section 69(3).
[174] [1988] TLR 73.

> before the trial court that the respondent gave gifts to the appellant with an intention that the respondent would marry the appellant. I hold therefore that what the appellant and respondent harvested from the shamba during the two years of their cohabitation was not a gift and the respondent is not entitled to have it returned.

Therefore, it is the law that a fiancée may bring a suit for return of gifts given in contemplation of marriage if there he/she can prove that the said gifts were given on the promise that the parties would eventually get married.

4.10.3 The Right to Damages for Adultery

According to the provisions of section 72(1) of the Act, a 'husband or wife may bring a suit for damages against any person with whom his or her spouse has committed adultery.' However, the provisions provide that no such proceedings shall lie –

> (a) where the aggrieved party has consented to or connived at the adultery;
> (b) where damages in respect of the alleged adultery have been claimed in a petition for divorce.

Under subsection (2) of section 72, however, such proceedings 'may be dismissed if the defendant satisfied the court that he or she did not know and could not, by the exercise of reasonable diligence, have known that the person with whom he or she committed the act of adultery was married.'[175]

(a) Can an Adulterer Claim a Child Obtained Adulterously?

A very interesting issue relating to the law on adultery in Tanzania is the question: can an adulterer claim a child obtained in the course of committing adultery? This question was determined in *Mgowa Madola v. Mgogolo Dododo*[176] where Kwikima, Ag. J. (as he then was) held that,

> Anyone who sires a child adulterously cannot be heard to claim it. Even if such were not the accepted custom, the ethics of our present time would not tolerate an adulterer benefiting from his sin to the detriment of his cuckold.

This case cited with approval by Lugakingira, J. (as he then was) in *Amina Bakari v. Ramadhani Rajabu*.[177] In this case, the Court held that,

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[175] See, also, *Jumanne Jingi v. Njoka Kiduda* [1984] TLR 51.
[176] [1973] TLR n. 7.
[177] [1984[TLR 41.

> A child is legitimate or illegitimate not merely from the circumstances of its birth but because the law declares so. Customary law declares that children born during the subsistence of the marriage are legitimate children of the husband. That is the end of the matter unless the husband himself, but not the wife or the adulterer, elects and is able to rebut the presumption. This also disposes of the trial court's reference to Rule 183. That provision applies to children born of unmarried women but does not licence a married woman to behave as if she were a wild tree from which any man (could have sexual intercourse with).

This was a suit for the custody of a child who was born after his parents were formally divorced. The appellant claimed that the child was sired by a person other than her former husband. The trial court refused to grant the respondent's claim for the reason that the appellant had named another person as the father of the child. On appeal, the District Court reversed the decision of the Primary Court; hence an appeal to the High Court was instituted.[178]

The same view was held by the Court in *Masuka v. Sigonjwe*[179] where the adulterer filed a case against the husband claiming custody of a child born of the wife, of which the adulterer claimed to be the father. The wife admitted adultery and said that the adulterer was the true father of the child. This claim failed in both the Primary and the District Courts; because, according to Gogo customary law, every child born during the subsistence of the marriage is a child of such

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[178] *Cf. Richard Mapesa v. Rashid Bwana* [1978] LRT n.4; and *Mungasio Munchari v. Moseti Meremo* [1978] LRT n.6. These decisions propound the view that Rule 175 of the Declaration Order, 1963, applies to a child "born to married parents" or a child which is a "natural product of the physical union between husband and wife." Under this view, a child born adulterously does not fall under Rule 175. Lugakingira, J., in *Amina Bakari v. Ramadhani Rajabu* (ibid), found this view as 'an ingenious interpretation which does not find justification in the customary law of which Rule 175 is a mere declaration.' His Lordship held that: 'The problem could possibly stem from the proliferation of terms and expressions. We have the original "*watoto wanaozaliwa na watu waliooana*"; we then have "children born to married parents," "children born during the subsistence of a marriage" "children born in wedlock," etc.; but whatever be the correct English expression it provided no justification for denying the spirit of the customary rule from which Rule 175 derives. This is the preservation of the sanctity and dignity of the marriage institutions by refusing to recognise adultery, a trespass to the marriage, as taking precedence over and ousting the husband's rights. It is thus possible to identify two fundamentals in the rule. First of all, the contract of marriage confers certain rights on the husband, including the right to children born during the subsistence of the marriage, and this is secured by the payment of bridewealth. Secondly, customary law, like any civilised law, recognises no rights founded in transgression. It is therefore open neither to the wife nor to her lover to deny the husband's paternity to a child born during the subsistence of the marriage.'

[179] [1971] H.C.D. n.92.

marriage. On appeal to the High Court, Hamlyn, J. (as he then was) dismissed the appeal, stating that:

> It would, of course, be quite improper to allow the claim of the woman in circumstances such as these, or even to accept such evidence as having any bearing on the matter … *It is clear that the local customary law contains not only basic robust commonsense but that it also accords with more sophisticated codes in this matter.* Emphasis supplied].

(b) Technical Adultery vis-à-vis Normal Adultery

It is important to note that courts of Tanzania have extended the concept of adultery by holding that there is a difference between normal adultery and technical adultery. For instance, in *Celeste Kilala & Another v. Restituta C. Kilala*[180] Maina, J. (as he then was), held that where a married man does marry a woman and they live as husband and wife under the erroneous belief that they are legally married, their cohabitation amounts to technical adultery. In this case the 1st appellant believed that by changing his religion that would convert his monogamous marriage to a polygamous one. He thus went ahead to marry the 2nd appellant in what was held by the court to be technical adultery.

(c) Adultery can also be Committed against an Inherited Widow

In addition, courts in Tanzania have also held liable for adultery people having sexual intercourse or extramarital relationship with a widow lawfully inherited, as was the case in *Juma Ng'hosha v. Amos Mutanda.*[181] The facts of this case were thus: in November 1986, the respondent's grandfather died, leaving behind a widow and three children. After the funeral and during mourning, members of the deceased's family asked the widow to remain and be inherited by one of the members of her deceased husband. She consented and chose the respondent out of the six members of the family brought before her. He took the widow to his home where they stayed as man and wife. Sometimes towards the end of March l987, the widow asked leave of her husband to visit her children living with the respondent's father. Permission was granted, and she was to return on the same day; but she never returned. After looking for her for two days, the respondent found her living with the appellant. He reported the matter to a Ten Cell leader before whom the appellant, in writing, agreed to refund the respondent's bride-price, a promise which was not honoured. The respondent sued the appellant in court.

[180] [1981] TLR 76.
[181] [1989] TLR 96.

It was held, by Sekule, J. (as he then was), that when a widow is duly inherited, according to Rule 64 of the Law of Persons,[182] she becomes a lawful wife of the one who has inherited her. His Lordship observed further that,

> I have carefully considered the evidence on record, and I am of the opinion that there was ample evidence to the effect that the widow was inherited as a wife by the respondent upon the death of her husband. And this was done with her consent. There could not be better evidence in my view on this point than that of the widow's own father, P.W.2. P.W.2's, evidence to the effect that his daughter agreed to be inherited as a wife by relatives of her deceased husband and that she, on her own accord, chose the respondent as her new husband appeared to have been given in a firm and straightforward manner. And further P.W.2 could not have lied against his own daughter. Like the trial court, I am also of the view that the evidence of this witness was nothing but the truth.

The learned judge went on to point out that: 'it would appear that the woman's denial to have been inherited as a wife by the respondent was half-hearted. For instance, she agreed in cross examination that she was visiting the home of the respondent and that it was the respondent who was paying her development tax after the death of her husband.' She further stated that after the death of her husband, she was not formally divorced, 'meaning I suppose that she had not formally parted with her deceased husband's family. And that in these circumstances; therefore, she was committing adultery with the appellant.' To that end, the learned Judge held that,

> It is obvious from this account in my view that the widow was simply trying to deny a fact that she knew was the truth or the correct position. Her evidence particularly in cross examination essentially supported the respondent's testimony to the effect that he had inherited her as a wife. For example, how come did the respondent assume the responsibility of paying her development tax after the death of her husband if he had not inherited her as his wife?

On the evidence, the learned Judge was satisfied 'that the widow was duly inherited as a wife by the respondent with her consent. And according to paragraph 64 of the Customary Law Declaration Order of 1963;[183] and as rightly pointed out by the trial court, after the widow was inherited with her consent she became the lawful wife of the respondent.' Paragraph 64 provides to the effect that,

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[182] GN 279 of 1963.
[183] Ibid.

> *Kama mjane anakubali kuishi kama mke wa mmoja wa ndugu wa marehemu na shauri likakubaliwa na baraza la ukoo, basi anakuwa mke halali wa ndugu yule.*

The two lower courts had found the applicant liable for adultery in this case, which was upheld by the High Court. According to the appellant's own testimony the widow told him that her husband was dead. And that he did not, however, bother to ask her whether or not she had formally parted with her deceased husband's family. To this defence, Justice Sekule was of the opinion that: 'the appellant had a duty to carry out adequate inquiry to ascertain and to satisfy himself that the widow was indeed a free woman before taking her to his home as his wife.' This holding is in line with the provisions of paragraph 129 of the Law of Persons, which reads:

> *Ni wajibu wa mwanamume kupata uhakika kwamba mwanamke anayetembea naye au anayemwoa hana mume. Usemi wowote wa mwanamke hata kama akiutoa mbele ya mashahidi hauwezi kuwa ngao kama mwanamume akishitakiwa ugoni.*

It is, thus, evident from this paragraph that a man has considerable burden to discharge before deciding to have an affair or getting married to a woman whose marital status he does not know before hand. The High Court, therefore, held that,

> In this case and going by the appellant's evidence at the trial, the widow's statement to him when they met to the effect that her husband was dead should have put him on notice for him to make the necessary inquiries to ascertain her true marital status. He does not seem to have done so. He was indifferent. In these circumstances therefore he was correctly found to be liable for adultery.

4.10.4 The Right to Sue for Damages for Enticement

The right to sue a person to recover damages for enticement of a spouse is provided for in section 73 of the Act. This section provides that,

> 73.- (1) A husband or wife may bring a suit for damages against any person who has, for any reason, enticed or induced his or her spouse to desert him or her.
>
> (2) A suit brought under this section shall be dismissed if the court is satisfied that the conduct of the plaintiff has been such as to justify or excuse his or her spouse leaving the matrimonial home.

4.11 Assessment of Damages for Adultery or Enticement

Under the provisions of section 74(1) of the Act the assessment of damages for adultery or enticement is made in the discretion of the court. The law prohibits such assessment to include any exemplary or punitive element. In *Mafuru Magabanya v. Joseph Mulya,*[184] the Court held that it is not the scheme of the law relating to marriage to award excessive or punitive damages in cases such as this one. In this respect, the Court remarked that,

> It is true that this was a serious case. As pointed out, it was both a case of enticement and adultery and in my view that is a circumstance which the court can properly take into account when assessing the damages. Still, I think that the damages that were awarded in this case, namely twelve head of cattle, were too expensive. Though the learned magistrate did not expressly say so, one gets the impression that *his award contained an element of punishment, which is not permissible at law.* In my view an award of five head of cattle should have met the justice of this case. {Emphasis supplied].

This was an appeal from the District Court of Bunda against quantum of damages assessed by District Magistrate; and there was enough evidence that the appellant was living with the respondent's wife after inducing her to desert the respondent. The two had previously been found committing adultery, in consequence of which the respondent was brought to court and adjudged to pay damages to the appellant in Civil Case No. 124/1984. The parties in this case did not belong to one community – whereas one was a Msukuma the other was a Mruri; and there was nothing to show that the relevant custom of Wasukuma corresponded to that of Waruri.

After considering the facts of the case, the High Court held that under the law of marriage, damages for adultery or enticement is in the discretion of the court; and, in the exercise of its discretion, the court is obliged to pay due regard to any relevant custom of the community to which the parties belong. The Court was satisfied, in this case, that this was a serious case of enticement and adultery, which circumstance could be taken into account by the court when assessing damages.

4.11.1 The Court to Consider the Custom to which the Parties Belong

According to section 74(2) of the Act, in assessing such damages, the court shall have regard, firstly, to any relevant custom of the community to which the parties belong. In *Gai Ipenzule v. Magoye,*[185] for example, Mwalusanya, J. (as he then was) held that it is not the law that direct evidence of persons caught

[184] [1987] TLR 22.

[185] [1983] TLR 298.

flagrante delicto is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence. In this case, the appellant was successfully sued at Nyambiti Primary Court by the respondent in a suit for a claim of damages for adultery. The respondent was awarded ten head of cattle as damages. The appellant's appeal to the District Court of Kwimba was unsuccessful, hence the appellant appealed to the High Court at Mwanza.

Dismissing the appeal, the High Court held, *inter alia*, that section 74(2) of the Law of Marriage Act, 1971 provides that in assessing damages for adultery, the court shall have regard to any relevant custom of the community to which the parties belong. The Court further held that, section 74(1) of the Law of Marriage Act No. 5 of 1971 prohibits the award of punitive or exemplary damages.

In *Magabanya v. Joseph Mulya,*[186] the Court held that,

> The appeal from the quantum of damages assessed by the learned district magistrate - has some merit. Under the law damages for adultery or enticement is in the discretion of the court, and in the exercise of its discretion the court is obliged to pay due regard to any relevant custom of the community to which the parties belong, and in the question of adultery, to the question whether the husband and the adulterous wife were living together or apart at the time of the commission of the adultery. The parties in this case do not belong to one community. One is a Msukuma and the other is a Mruri and there was nothing to show that the relevant custom of the Wasukuma correspond with that of the Waruri.

4.11.2 The Court to Consider Whether the Parties were Living Together

The second factor in assessing damages for adultery is the question whether the husband and wife were living together or apart.[187] This question was considered by Lugakingira, J. (as he then was) in *Jumanne Jingi v. Njoka Kiduda.*[188] In that case, the appellant lost in the Primary Court and the District Court in an action for damages for adultery; and, therefore, appealed to the High Court, which held that,

> This appeal ought similarly to fail. There was overwhelming evidence that the respondent's cohabitation with Mwai Amina Maghuna - the lady the appellant calls his wife - was preceded by the usual and necessary betrothal preliminaries, including the payment of brideprice.

[186] Op. cit.
[187] Section 74(2) of the Act.
[188] [1984] TLR 51.

The Court found the respondent to have genuinely believed that he was taking a free woman.[189] The Court was satisfied that it was evident that by the betrothal and payment of brideprice the respondent reasonably believed that Mwai was unmarried. Thus, the suit and the first appeal were therefore rightly dismissed in the light of the above provision. The Court went on to remark that,

> I think the appeal ought to fail on yet another ground. It is in fact doubtful whether the appellant was ever validly married to Mwai or was himself an adulterer. The evidence further shows the following. Mwai was first married to one Karai Kiseke. She then left this man (we do not know how) and "married" the appellant. In 1978 she abandoned the appellant and returned to Karai. In 1982 she was formally divorced from Karai in Matrimonial Cause No. 23/82 of the Primary Court at Ngimu. It was following this event that she married the respondent in 1983. The fact that Mwai had to be formally divorced from Karai suggests that their marriage was subsisting during her cohabitation with the appellant. At any rate, the burden was on the appellant to prove that he had been validly married to this woman before he could be heard to complain of adultery. This burden was not discharged as the appellant adduced no evidence of the circumstances in which he came to cohabit with her other than that she had left Karai. Therefore the suit did not disclose a cause of action. For these reasons the appeal is dismissed with costs.

In this case, however, no damages for adultery were determined because there was no evidence as to whether the respondent and Mwai were living as husband and wife.

4.11.3 The Court to Differentiate between Normal and Technical Adultery

On the other hand, in assessing the quantum of damages for adultery the court has to differentiate technical adultery from adultery by people who have not gone through any form of marriage. Thus, the quantum of damages in technical adultery should be less than in normal adultery.[190]

4.11.4 The Court to consider whether a 'Spouse' cheated that s/he was Unmarried

In addition to the foregoing factors, there is the question relating to whether damages for adultery can be granted where a woman cheated a man that she is single while she actually was married to another man. This issue was a subject matter of litigation in *Hassani Kabadili v. Joakimu Mpanda*.[191] The appellant, in this

[189] See, section 72(2), ibid.

[190] *Celeste Kilala & Another v. Restituta C. Kilala,* op. cit.

[191] High Court of Tanzania at Dar Es Salaam, PC Civil Appeal No. 179 of 2000 (unreported).

case, sued the respondent for damages for adultery, alleging that the respondent had committed adultery with his wife, one Eda Kanyelenge Mwakasege. He alleged that the marriage between him and Eda was contracted under Nyakyusa customary law in 1972. It was apparent that the appellant also had another wife, so most of the time he was staying away from Eda, in separate houses – while Eda was staying at Mtoni, the appellant was staying with the other wife at Mikocheni in Dar es Salaam.

Due to this state of affairs, the respondent admitted to have been living with Eda as husband and wife for a consecutive period of seven years, in which Eda confessed that she was single. At the same time it was testified by the respondent that there was no reasonable suspicion for him to doubt Eda's version that she was unmarried. As such, through their joint efforts they acquired a house and several other household items. But when their relationship came to an end when they resorted to the court for the purpose of distributing the 'matrimonial' assets acquired jointly. In a protracted lawsuit, through to the High Court, the courts decided in favour of the respondent. Aggrieved by this series of court victory, Eda sought the assistance of the appellant who stood in for 'his wife;' and, consequently, brought an action for adultery against the respondent. Again, the subordinate courts decided in favour of the respondent hence the appellant appealed to the High Court.

Dismissing the appeal, Muro, J. (as she then was) was confronted with the issue: whether the appellant and his alleged wife, Eda, could be said to be married at the time the respondent was having sexual affairs with her. The learned Madam Judge adopted the respondent's case, which was also corroborated by two credible witnesses, that Eda and the respondent lived together as husband and wife for the period of seven years, during which they changed houses twice, without the appellant surfacing. To this end, the Court was of the view that,

> It is not common for a husband to stay away from a wife for such a long time (i.e., seven consecutive years) when they are both staying in the same township or location. The appellant seemed to have lost all the interest in the alleged wife and likewise the wife had lost all the interest in the husband.

The Court went on to hold that,

> There is overwhelming evidence that the respondent believed that Eda was not married during the time they were staying as husband and wife. Indeed under those circumstances no reasonable man could suspect that there was any subsisting marriage between Eda and any other man. She conducted her life like

> a single woman and made the respondent and even the neighbours to believe that she was single.

So, this case represents an actual situation that in some instances parties who used to cohabit – be it as husband and wife or as man and his concubine – may conspire to launch claims in a court of law for damages in respect of adultery against a 'bona fide' person. In this situation, the court has to be careful while assessing evidence and damages for adultery as did Madam Justice Munuo in *Hassani Kabadili*.

4.12 Jurisdiction of Primary Courts

In terms of the provisions of section 75 of the Act, a primary court has jurisdiction to entertain a suit based on the foregoing causes of action 'where the parties were married in accordance with customary law or in Islamic form or, in the case of a suit under section 69[192] or section 71,[193] if the court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form.'

[192] This section concerns actions for the right to damages for breach of promise of marriage.
[193] This section concerns actions for the right to return of gifts given in contemplation of marriage.

PART III

LEGAL PROTECTION OF CHILDREN IN THE FAMILY

Chapter Five
CHILDREN'S RIGHTS IN THE FAMILY

5.1 General Overview

Under the family law regime in Tanzania children in a matrimonial relationship are referred to as 'issues of marriage,' which is a legal term simply denoting children born during the subsistence of a marriage or a marital cohabitation. The definition of a child in Tanzania is not inimitable. In Tanzania the definition of a child is provided diversely according to the context certain statute seeks to achieve.[194] For example, whereas for the purposes of establishing children's criminal responsibility, the Children and Young Persons Act[195] defines a 'child' as a person who has not attained the age of 12 years, the Adoption of Children Act[196] defines an 'infant' as a person under 21 years for the purposes of adoption. On the other hand, the Penal Code,[197] under section 138B(2), defines a 'child' as a person of the age of less than 18 years, which accords with the Convention on the Rights of the Child, 1989. Under section 139(2), the Penal Code also defines a 'child' as a person of the age of eighteen years or below.

Further, for the purposes of criminal responsibility of children in sexual offences, under the Sexual Offences Special Provisions Act (SOSPA), the Penal Code defines a 'boy' and a 'girl' as a male/female person of the age of under 18 years. For the purposes of employment, the Employment Act[198] defines a 'child' as one who appears to be under 15 years of age. In respect of criminal investigations, the Criminal Procedure Act of 1985 defines a 'child' as a person under the age of 16 years. In respect of evidence, the Evidence Act, 1967 defines a 'child of tender years' as one below the apparent age of 14 years. According to the Primary School (Compulsory Enrolment and Attendance) Rules of 1979, a child is defined as one who has attained the age of 7 years but not above the age of 13 years.

However, in this work we will concentrate on definitions of a child in matters relating to family law: i.e., maintenance, custody, adoption, education and marriage. Case law in Tanzania has also contributed to the definition of a child in matters relating to family law. For instance, in *Violet Ishengoma Kahangwa and Another v. the Administrator-General and Another*,[199] the Court of Appeal of Tanzania[200] held that a child, as defined under the Law of Marriage Act, 1971,

[194] MASHAMBA, Clement J., "Basic Elements and Principles to be Incorporated in the New Children Statute in Tanzania," in MASHAMBA, Clement J. (ed.), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*, Dar Es Salaam: **nola**, 2004.
[195] Cap. 13, R.E. 2002.
[196] Cap 335, R.E. 2002.
[197] Cap. 16, R.E. 2002.
[198] Cap. 366, R.E. 2002.
[199] Op. cit.
[200] Makame, Kisanga, and Mfalila, JJ.A.

does not include an illegitimate child; thus, the word 'children' in section 129(1) of the Law of marriage Act, does not include illegitimate children. In *Amina Bakari v. Ramadhani Rajabu*,[201] Lugakingira, J. (as he then was), held that 'whatever be the correct English expression of 'children born in wedlock belong to the father,' it provides no justification for denying the spirit of the customary rule from which Rule 175 (of the Customary Law Declaration Order, 1963) derives, namely the preservation of the sanctity and dignity of the marriage institution by refusing to recognize adultery, a trespass to the marriage, as taking precedence over and ousting the husband's rights.'

Despite this development in Tanzania's children's rights jurisprudence, this work discusses fundamental rights of children born out of wedlock along with those born within the wedlock. This approach is derived from the requirements of Article 2 of the CRC, which prohibits making a distinction of children while determining their status or situation in life.

5.2 Children's Rights under International Human Rights Law

Tanzania ratified the CRC[202] and the African Charter on the Rights and Welfare of the Child of 1990 (henceforth, "the ACRWC")[203] without any reservations. This means that Tanzania has undertaken to bring her domestic legislation in line with all the provisions of the CRC and ACRWC. The United Nations Committee on the Rights of the Child (henceforth, "the Committee") monitors the implementation of the CRC, and is considered the highest international authority for interpreting the CRC. The Committee has emphasised that an essential aspect of State implementation of the CRC is ensuring that all legislation is "fully compatible" with the provisions and principles of the Convention.

In response to that obligation, the other East African states of Kenya and Uganda have already taken steps towards implementing the CRC. They have developed their laws in accordance with the Convention by adopting new statutes to this end: the Children Bill, 1994 (Kenya) and the Children Statute, 1996[204] (Uganda).

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[201] Op. cit.

[202] Tanzania ratified the CRC in June 1991.

[203] Tanzania signed the ACRWC on 23rd October 1998 and ratified it during the February 2003 *Bunge*.

[204] Statute No. 6 of 1996.

Indeed, it will not be possible to bring the laws on children and their practice in Tanzania into strict compliance with the high ambitions of the CRC overnight.[205] We are also well aware of the provision in article 4 of the CRC, which limits the compulsion on States Parties to the Convention to implement the economic, social, and cultural rights entrenched in the Convention to the maximum extent of the resources available in the respective State. While bearing in mind the limitation on the States Parties to the CRC as regards the implementation of *economic, social, and cultural rights*, we also find it important to observe that such a limitation does not apply to the implementation of the *civil and political rights* entrenched in the Convention.[206] That is, every State Party to the Convention is obliged to undertake all appropriate legislative, administrative and other measures for the implementation of those rights. It is also crucial for the State to constantly consider the *general principles* of the Convention, i.e., best interests of the child, survival and development, non-discrimination, and participation, which should be taken account of in all policy-making, legislation, and decisions concerning the child.[207]

The Committee on the Rights of the Child has encouraged including all laws regarding children's rights in one consolidated statute. Our opinion is that this should be done in Tanzania, bringing and consolidating all provisions concerning children in other statutes into the new children statute. Provisions may be retained also in the other special statutes, like the Law of Marriage Act (1971), the National Education Act of 1978, the Penal Code, the Civil Procedure Code of 1966, the Criminal Procedure Acts of 1985, etc., for the sake of clarity. But those statutes must be amended promptly so as to bring them in line with a new comprehensive Children Act.[208]

Moreover, the new legislation should be gender neutral. Reference to gender or special provisions for one gender should be made only when deemed necessary in safeguarding gender-specific interests of the girl child or boy child. For instance, provisions for pregnant schoolgirls not to be expelled; ban on female genital mutilation; or when conditions apply exclusively to one gender, e.g.,

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[205] MASHAMBA, C.J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit.
[206] Ibid, p. 108.
[207] Ibid.
[208] Ibid.

provisions on pregnancy and childbirth; or conscription of boys into armed forces (girls are less affected by conscription.)

New children's legislation must not diverge too far from cultural norms, for then the law will not be enforceable; and an unenforceable law is a bad law. At the same time, the law must be earnest and must express commitment in its endeavour to realise, on a national level, the principles and the provisions of the Convention.

The new Children's Act should be enacted in both English and Swahili, or should be made available in a Swahili translation before entering into force. Following the example of the Ugandan Children Statute, it should also be published in a simplified version in order to make it easily accessible to children in particular and the public in general.

5.3 Tanzania's Commitment to International Children's Rights Instruments

As of to date, Tanzania has ratified the following international instruments relating to children's rights: (i) the Convention on the Rights of the Child on 10th June 1991 without reservations;[209] (ii) the African Charter on Human and Peoples' Rights on 18th February 1984; (iii) the ILO Worst Forms of Child Labour Convention on 12th September 2001; (iv) the ILO Minimum Age Convention on 16th December 1998; and (v) the African Charter on the Rights and Welfare of the Child in February 2004.

There are also other international instruments to which Tanzania is committed in relation to the administration of juvenile justice. These include:

- the UN Standard Minimum Rules for the Administration of Juvenile Justice (*the Beijing Rules*);
- the UN Guidelines for the Prevention of Juvenile Delinquency (*the Riyadh Guidelines*);
- the UN Rules for the Protection of Juveniles Deprived of their Liberty.

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[209] Tanzania has also ratified two Protocols to the CRC during the February 2003 *Bunge*.

- the UN Standard Minimum Rules for Non-Custodian Measures (*the Tokyo Rules*);
- the UN Guidelines for Action on Children in the Criminal Justice System; and
- the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

5.4 Basic Principles of the CRC

Four general principles embody the spirit of the CRC; and, as such, are fundamental to the interpretation of all the other rights. These principles are:

- *The Best Interests of the Child,* which establishes that in all actions concerning the children their best interest should be a paramount consideration;
- *Survival and Development* that not only prioritises children's rights to survival and development but also puts emphasis on the right to develop to their fullest potential in every respect, including their personalities, talents and abilities;
- *Non-discrimination*, which establishes that children's rights apply to all children without discrimination of any kind; for example, on grounds of gender, disability, ethnicity, religion and citizenship; and
- *Participation*, which sets out the principle that children should be listened to on any matter or decisions which concerns or affects them, and that their views should be given due consideration in accordance with their age and maturity.

The Committee on the Rights of the Child has stated that it should be possible to invoke these general principles before courts of law in each States Parties to the CRC.

5.5 The Rights of Children Born in Wedlock

There is a rebuttable presumption that every child born in wedlock is legitimate. However, in some cases, this presumption can be rebutted as was the case in *Richard Mapesa v. Rashid Bwana*[210] where the appellant sued the respondent for a

[210] [1978] LRT n.4.

declaration that the children born to his wife while living with the respondent were his; and an order that they should be in his custody. In that case the wife with whom the respondent lived, and with whom he had children, was legally married to the appellant. The wife deserted the appellant and went to cohabit with the respondent who fathered the children. The marriage between the appellant and his wife had not been dissolved. In dealing with the status of these children the High Court held that:

> The evidence before the trial court therefore conclusively proved that the children were fathered by the respondent. The appellant in fact did not dispute this. Since it was established that the children were fathered by the respondent, the legal presumption of legitimacy of children born in wedlock was thereby rebutted. This means that the two children are illegitimate. Since the Law of Marriage Act 1971 makes no provisions for the status of illegitimate children, the court has to resort to the Customary Law of the parties to resolve the issue as to whom the children belong.

So, it is not necessarily true that every child born in wedlock is legitimate. This principle is also comparable to the principle that 'where a child is born during wedlock or during 280 days after the death of the husband, there is a rebuttable presumption that such child is legitimate.'[211]

5.5.1 Child Maintenance and Custody

Maintenance of a child is the duty to look after the child by providing her/him with all basic needs; such as food, shelter, clothing, parental love and care.[212] According to established legal and social norms, both parents have the duty to maintain their child. A parent who does not live together with the child also has the duty to provide maintenance for the child. In many jurisdictions, it is now becoming apparent that maintenance is provided to children regardless of whether the parents are separated or divorced, or have not been married to each other. In Tanzania, the duty to maintain a child born in wedlock is provided for under section 129(1) of the Act, which provides categorically that,

> 129.- (1) Save where an agreement or order of the court otherwise provides, it shall be *the duty of a man to maintain his infant children*, whether *they are in his custody or the custody of any other person*, either by providing them with such

[211] Per Mwalusanya, J. (as he then was) in *Julius Petro v. Cosmas Raphael* [1983] TLR 346.

[212] MASHAMBA, Clement J., "Basic Elements and Principles to be Incorporated in the New Children Statute in Tanzania," op. cit.

> accommodation, clothing, food and education *as may be reasonable having regard to his means and station in life or by paying the cost thereof*. [Emphasis supplied].

According to the provisions of subsection (2) of section 129 of the Act,

> (2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

According to section 207 of the Penal Code, it is the duty of the *head* of family to provide the necessaries of life for a child under 14 years. This provision has been criticized for failing to cover children of the age between 15 and 18 years.[213] According to Mashamba this provision needs to be amended in accordance with the Convention on the Rights of the Child so as the age for provision of maintenance is raised up to 18 years; as well as so that both parents/guardians are given the responsibility to maintain children in the family.[214] On the other hand, section 299 of the Penal Code goes further, providing that a person who has lawful care or charge of a child will be held liable for a criminal offence if he/she deserts a child or leaves a child without reasonable means of care and support.

(a) The Power of the Court to Order for Maintenance of a Child

The court has power, under section 130(1) of the Act, to order a man to pay maintenance for the benefit of his infant child –

(a) if he has refused or neglected to adequately provide for him or her;
(b) if he has deserted his wife and the infant is in her charge;
(c) during the pendency of any matrimonial proceedings; or
(d) when making or subsequent to the making of an order placing the infant in the custody of any other person.

The court also has the corresponding power, under section 130(2) of the Act, to order 'a woman to pay or contribute towards the maintenance of her infant child where it is satisfied that having regard to her means it is reasonable so to order.'

An order under subsection (1) or subsection (2) of section 130 of the Act 'may direct payment to the person having custody or care and control of the infant or to the trustees for the infant.'[215] The factors that are practically taken into

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[213] Ibid.
[214] Ibid.
[215] Section 130(3) of the Act.

consideration by the court when making assessment of maintenance for children were set out in *Festina Kibutu v. Mbaya Ngajimba*.[216] In this case, Kazimoto, J. (as he then was) held that in deciding what amount of maintenance should be paid as maintenance for a child, the court should hold an enquiry as to the means of both parents in order to arrive at a just decision. It was the court's view that, where applicable the court should take into account the customs of the parties and the conditions prevailing at any particular time. In this case, marriage between the appellant and the respondent was declared null and void because the respondent was incompetent to marry under the provisions of section 38 (c) and (e) of the Law of Marriage Act, 1971. When the marriage was annulled by the court the appellant was five months' pregnant. She then gave birth to a baby girl. When the child was two years old the respondent instituted proceedings for the custody of the child. The Primary Court awarded him custody of the child. On appeal by the appellant to the District Court the decision of the Primary Court was overruled. Custody was given to the appellant until the child reached the age of seven years. The court ordered the respondent to pay Shs. 50/= a month towards the maintenance of the child.

When the child reached the age of seven years the respondent sought to be given custody of the child. The case was before a Primary Court which heard both the parties and also heard the child who expressed that she wished to live with the appellant. Custody of the child was given to the respondent. The appellant's appeal to the District Court was not entertained. She appealed to the High Court challenging the award of custody of the child to the respondent. She also attacked the maintenance award as being too low. Allowing the appeal, Justice Kazimoto held 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. The court should, where applicable, take into account the customs of the parties and the condition prevailing at any particular time.

The Court had to refer to the authority of the High Court of Tanzania in *Abdallah Salim v. Ramadhani Shemdoe*,[217] where Georges C.J. (as he then was) was confronted with the issue of "Mtonga," i.e., one cow, as the traditional reward of maintaining a child of another. Georges, C.J., had to overrule the decision on the ground that in 1967 the amount of TShs. 50/= was not enough to bring up a child and educate him for the value of a cow (which was by then costing Shs.50/=).

[216] [1985] TLR 42.
[217] [1967] HCD 55.

That decision was followed by Said, J. (as he then was) in *Juma Kisuda v. Hema Mjie.*[218] In both cases the maintenance was increased. In increasing the amount of maintenance the court took into account the "village life" in both Lushoto and Singida Districts and assessed maintenance at Shs.100/= per month.

So, Kazimoto, J., used this approach in assessing maintenance and thus observed that,

> The proceedings in the present appeal were instituted in 1977. It can be said that village life in Kilosa District in 1967 is the same as in most Districts, in this country. If that is accepted then Shs. 50/= was clearly inadequate. But village life in 1977 could never be the same as in 1967. There have been great social and economic changes affecting the whole rural life which has been turned into semi-urban life. People have moved into new village settlements. These moves have affected the standard of living. Certainly, Shs. 50/= was not enough to buy the essentials for a child. From what has transpired in this appeal the appellant is a wealthy man. Had the learned Magistrate considered these factors he would not have made the order of maintenance of Shs. 50/= per month.

Under section 131, the court may, in its discretion, 'when ordering payment of maintenance for the benefit of an infant, order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property, and subject thereto, in trust for the settlor.'

(b) Factors in Ordering for Child Maintenance

There are several factors to be considered in proceedings for custody of children, including the welfare and wishes of the child. There is also a rebuttable presumption that a child under seven years has to stay with the mother until s/he attains the age of seven years.[219] In *Ramesh Rajput v. Mrs. S. Rajput*,[220] the Court of Appeal held that the most important factor in custody proceedings is the *welfare of the child*; and that an infant child of two years should be with the mother; unless there are very strong reasons to the contrary. This case concerned custody of a child of two years. The husband applied to the District Court for an order of custody of the child. The mother of the child had gone away to her parents and refused to return to her husband until certain conditions had been met. The

218 [1967] HCD188.

219 Section 125(2) of the Act; and also, see, *Lugembe John v. Milembe Nyanda,* High Court of Tanzania at Tabora, Matrimonial Civil Appeal No. 2 of 1998 (unreported).

220 [1988] TLR 96.

matter was referred to the District Court, which decided in favour of the husband.

On appeal, this decision was overturned by the High Court. The first appellate court also awarded maintenance in the sum of Shs. 3000/= per month to be paid by the husband for the child. On appeal to the Court of Appeal of Tanzania, counsel for the appellant husband attacked, *inter alia,* the quantum of maintenance awarded by the High Court. Determining the question of custody of children, the Court of Appeal was of the opinion that, although there is a rebuttable presumption that a an infant below the age of seven years should be with the mother, in the circumstances of this case no strong reasons had been advanced to rebut the presumption.

In *Halima Kahema v. Jayantilal G. Karia,*[221] Mwalusanya, J. (as he then was) held, *obiter*, that the rebuttable presumption, under section 125(3) of the Act, that it is for the good of an infant to be with the mother, implies that the younger the child, the harder it is to rebut that presumption. The respondent in this case made an application at Nansio Primary Court in Ukerewe District, claiming the custody of an infant child, a boy called Sunny aged more than one year. The child was born to the appellant with the respondent, out of wedlock. When the application was made both mother and father of the child were living separately in Ukerewe District. The child at the time of the application was under the custody of the appellant's parents at Mwanza. The application was not disputed at the trial, as the appellant mother readily admitted that she was not in a position to take care of the child who was then with her parents at Mwanza. The admission was in writing and duly signed by her. The trial court, finding that the appellant mother had no objection to granting the custody of the child to the respondent, unanimously granted the application. That was quite proper as the welfare of the child required that the child be in the hands of either of the parents rather than the child's grandparents.

The mother's appeal to the District Court was rightly rejected. As correctly pointed out by the District Court, as the mother was not in the position to take care of the child, it was not in the interest of the welfare of the young child to remain with his grandparents when his father was fit and able to maintain him. In the memorandum of appeal to the High Court, the appellant unsuccessfully argued that there were material changes in the circumstances of this case, to enable the High Court to vary the original order made by the Primary Court.

[221] [1987] TLR 147.

She said then she was ready to take the child and maintain him. She also said that she was employed and has acquired her own accommodation at her new station in Mwanza. Although the High Court did not doubt this argument, it dismissed the appeal; and, instead, it advised the appellant to go to the original court for an application for variation of its original order as provided under section 133 of the Act.[222]

Again, in *Pulcheria Pundugu v. Samuel Huma Pundugu*[223] Mnzavas, J.K. (as he then was) held that,

> In deciding in whose custody an infant should be placed the Court is required (under section 125(2) of the Law of Marriage Act) to take into account the paramount consideration regarding the welfare of the infants. The Court is also required to have regard to the wishes of the parents of the infants.

However, as was held in *Festina Kibutu v. Mbaya Ngajimba*,[224] the wishes of a child of tender age should not be permitted to subvert the whole law of the family or to prevail against the desire and authority of a parent; unless the welfare of the child cannot otherwise be secured.[225]

The welfare principle in determining custody of children of marriage was given weight in *Gertrude B. Mwombera v. Elias John Anyandwile.*[226] In this case, the trial magistrate had refused to give custody of the issues of marriage to the appellant solely on ground that she was economically incapacitated. On this finding, Kimaro, J. (as she then was) was of the view that,

> Regarding the question of custody of children it was wrong for the trial magistrate to put into consideration the economic ability of the parties as a primary factor in determining the issue of custody.

Instead, Madam Judge Kimaro held that,

> According to section 125 of the Law of Marriage Act, 1971, *what becomes a paramount consideration is the welfare of the children: under whose custody will the child progress well in terms of care, love and affection, needs, etc*. The mere fact that a spouse has no formal employment is not conclusive that she/he is unsuitable to

[222] Cf. *Gertrude B. Mwombera v. Elias John Anyandwile,* High Court of Tanzania at Dar Es Salaam, Civil Appeal No. 6 of 2001 (unreported).
[223] [1985] TLR 7.
[224] Op. cit.
[225] Quoting Fitzgibbon L.J. in *Re O'Hara* (1900) 2 IR 2323 at page 240.
[226] Op. cit.

> have custody of the children. T*he totality of all matters which go with the welfare principle should be taken into consideration before a magistrate makes a determination on who should be given custody of the issues of the marriage*. [Emphasis supplied].

In this case, it was the High Court's opinion that the proceedings did not show that evidence was led by the parties to give the trial magistrate a good picture of the whole situation before he made the decision on custody.

5.5.2 Duty of Care of Children born in Wedlock under Customary Laws
By virtue of Rule 175 of *the Law of Persons,*[227] children born in customary wedlock are considered to belong to their fathers. The male spouse, therefore, has a general obligation to take care of a child within his family. It is interesting to note that under Rule 176, a stepchild born by the mother cannot be one of his children whereas by virtue of Rule 177, if the father has children of a former marriage they have priority over those born in a subsequent marriage.

Under the Rules, there are four circumstances where guardianship of childcare can be granted - i.e., death; absence of heirs; disability by poverty or mental illness; and where a person is imprisoned for a long time.

5.5.3 Court Orders for Custody and Maintenance
In accordance with the provisions of section 132 of the Act, an order for custody or maintenance of an infant expires on the attainment by the said infant of the age of eighteen years, unless it is expressed to be for any shorter period or where any such order has been rescinded. In practice, though, it is becoming increasingly prevalent that maintenance of a child who is schooling has to go beyond attaining the age of majority: normally it subsists until the child completes his/her schooling.

Under section 133 of the Act, the court 'may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of an infant on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.' In terms of section 134 of the Act, the court 'may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of an infant, whether made before or after the commencement of this Act, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and in the interest of the

[227] GN. No. 279 of 196.

welfare of the infant so to do.' Any arrears in relation to payment of maintenance so ordered by the court must be paid with due respect.[228]

It is the law, further, that when 'considering any question relating to the custody or maintenance of any infant, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.'[229] However, non-compliance with this requirement does not invalidate the proceedings.[230]

5.5.4 Power of the Court to restrain taking of Infant out of Tanzania

The law empowers the court to issue an injunction restraining the other parent from taking the infant out of Tanzania, where any matrimonial proceeding is pending; or where, under any agreement or order of court, one parent has custody of the infant to the exclusion of the other. The court may also give leave for such child to be taken out of Tanzania either unconditionally or subject to such conditions or on such undertaking as the court may think fit.[231] At the same time, the 'court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of an infant, from taking the infant out of Tanzania.'[232] The law provides that: 'Failure to comply with an order made under this section shall be punishable as a contempt of court.'[233]

5.6 The Rights of Children Born Out of Wedlock

5.6.1 Legitimating a Child Born Out of Wedlock

Under the family law regime in Tanzania, claims for maintenance of a child born out of wedlock can stand only if the said child was legitimated before it was weaned, according to Rule 181 of the Local Customary Law Declaration Order of 1963 (popularly known as *the Law of Persons*).[234] The law makes it mandatory that 'once a woman declares a particular man to be responsible for her pregnancy, she cannot afterwards be heard to represent otherwise.'[235] This customary rule of

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[228] Sections 124 and 135 of the Act.
[229] Ibid, section 136(1).
[230] Ibid, section 136(2).
[231] Ibid, section 137(1); and also, see, *Paola Abdullah v. Mohamed Norman Abdullah,* op. cit.
[232] Ibid, section 137(2).
[233] Ibid, section 137(3).
[234] G.N. No. 279 of 1963.
[235] *Per* Lugakingira, J. (as he then was) in *Sarah Malogo v. William Vahaye* [1993] TLR 217.

family law requires a putative father to make payment, either monetary or in kind, to the mother in order to legitimize a child. Rules 183 and 184 of the Law of Persons give the woman final say to name the putative father of the child.[236]

5.6.2 Custody of a Child born out of Cohabitation without Marriage

The principle regarding custody of a child born out of wedlock is regulated by the *Law of Persons*, which requires legitimation of such a child before it is weaned. In *Zaina Ismail v. Saidi Mkondo*[237] the parties never contracted a marriage, but they lived together in cohabitation for five years, out of which a child was born. The respondent claimed custody of the child. He lost in the Primary Court but won when he appealed to the District Court, on the basis that the parties had lived together for five years; and, therefore, the court held, they were to be treated as duly married. On appeal to the High Court, Kapoor, Ag. J. (as he then was) quashed the decision of the District Court and held that the cohabitation of the parties in this case did not give raise to presumption of marriage. He thus held that,

> The respondent was not lawfully married to the appellant; hence the appellant's child born to the appellant on 25/2/82 is an illegitimate child. The respondent could have legitimated this child before it weaned under Rule 181 of G.N. no. 279 of 1963. This the respondent has not done and it is too late in the day now for him to claim this child from the appellant.

There is a practical issue that often crops up in dealing with custody of children born out of wedlock. This question is: whether a mother of a child born out of wedlock or a void marriage has an absolute right to custody of the child. This issue was considered at some length in *Festina Kibutu v. Mbaya Ngajimba*[238] where Kazimoto, J. (as he then was) was of the opinion that the mother's entitlement to custody of a child born out of a void marriage is not absolute. Rather it is conditional upon the absence of an agreement between the parties or court order vesting custody to another person.

[236] Also, see, *Beatrice Njowoka v. Evaristus Nambuga* [1988] TLR 67.
[237] [1985] TLR 239.
[238] Op. cit.

Chapter Six
CHILD CARE AND PROTECTION

6.1 Child Care and Support
6.1.1 Child Care and Support under the Affiliation Act
This Affiliation Act,[239] basically, aims at taking care of children born out of wedlock.[240] In terms of section 3 of the Affiliation Act, where there is neglect of

[239] Cap. 278, R.E. 2002.

the duty to maintain the child, either intentionally or through denial of paternity, the unmarried mother may make an application in court for a declaration that the man is a putative farther. The maintenance order may follow upon so declaring under section 5. If the father fails to pay the statutory monthly payment of Tshs. 100/=, he may be committed to prison under subsection (3) of the section for a term not exceeding three months.

According to section 8 of the Affiliation Act, the court may appoint a custodian of the child if it is satisfied that the mother of that child is not a fit and proper person to have custody of such a child. Circumstances under which a custodian may be appointed include where: first, the mother dies; second, the mother becomes *non compos mentis;* and, third, the mother is imprisoned.[241]

Both the mother and the custodian are under obligation to take proper care of the child in accordance with the provisions of sections 9 and 10 of the Affiliation Act, respectively.

The practice of this law, however, causes some fundamental problems, which, normally, affect the best interest of the child. For instance, the time limit for applying for affiliation orders (12 months after or before birth[242] the monthly amount of orders of maintenance (i.e. Tshs (100/=) is impracticable; and the duration of maintenance orders – i.e., 14 to 16 years – does not correspond to the actual needs of most children, particularly those who are in school. Also, the law does not set out clearly the qualities of suitable persons to be appointed as guardians of children so neglected.[243]

6.1.2 Child Care and Support under the Adoption Act

The Adoption Act[244] lays down the legal foundation and procedures for adoption of 'infants' by foster parents. Under section 2 (1) of the Adoption Act an 'infant'

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[240] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit., p. 14.

[241] Ibid.

[242] According to section 3 of the Affiliation Act.

[243] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit.

[244] Cap. 335, R.E. 2002.

is a person under twenty one years of age, but does not include a person who is or has been married. The Adoption Act allows the applicant or two spouses to apply to the High Court for an adoption order in relation to a particular infant.[245] Although the Adoption Act does not provide for a working definition of the word 'adoption,' the Law Reform Commission has suggested one, that is: -

> A legal process by which the court creates new parental relationship between the child and his/her natural parents where the child was born out of wedlock or with other persons by order of the court.[246]

According to section 4 of the Adoption Act, adoption can be generally applied for by any person, or in the case of joint application, one of the applicants, who has attained the age of 25 years and is at least 21 years older than the child to be adopted. In case where the applicants or one of them is a relative of the child (other than the parents), the age limit is lowered to 21 years. Under this law, a person can be adopted only if he/she is under 21 years and has never been married.[247] But where the applicant is the mother or father of the child, age restriction is not imposed.[248]

It should be noted that, the minimum age of infancy for purposes of adoption in the Adoption Act is discrepant to several laws defining the infant in our legal system. According to the Interpretation of Laws and General Clauses Act,[249] an 'infant' is defined as a person below 18 years, which discrepancy calls for a need for consistency of the age of infancy for adoption purposes.[250] Under section 4 (5) of the Adoption Act, the applicant (s) for the adoption order must be resident(s) of Tanganyika. However, the Adoption Act does not define the meaning of the word 'residence' hence it leaves too much wide scope for different interpretations.

Suffice it to say here that, the adoption process brings in the responsibility of adoptive parents to the same footing or degree as that of parents in the wedlock.[251] Section 12 of the Adoption Act provides lucidly that:

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[245] Ibid, section 3.

[246] UNITED REPUBLIC OF TANZANIA, *Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania,* submitted to the Minister of Justice and Constitutional Affairs, April 1994, p. 131.

[247] Op. cit, section 4(i).

[248] MASHAMBA, C.J., op. cit, p. 15.

[249] Act No. 30 of 1972.

[250] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit.

[251] MASHAMBA, C.J., op. cit.

> 12. (1) Upon an adoption order (is) being made, all rights, duties, obligations and liabilities of the parents or guardian of the infant in relation to the future custody, maintenance and education of the child shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in a lawful wedlock.
>
> (2) And where two spouses are the adopters for the purposes of making orders on custody, maintenance of and right of access to children they stand in the same relation as they would had they been lawful father and mother of the child, and for the purpose of marriage, the adopter are deemed to be within prohibited degrees of consanguinity in relation to the child.

Therefore, all the obligations arising out of the Law of Marriage Act, 1971 regarding care and parental responsibilities of the child must then apply to the adopters as well as the responsibilities conferred on any parents by any another laws.[252]

6.1.3 Child Care and Support under the Education Act

Provision of education to the child is one of the fundamental and universal duties of the parents, though in Tanzania provision of primary school education seems to be solely the duty of the state.[253] Accordingly,

> The law obliges parents to assume the basic duty of ensuring that children are enrolled and attend formal schooling. Section 35 of the Education Act,[254] obliges parents of every child who is of seven years but has not attained the age of thirteen years to enrol such child for primary education.

Under the Primary School (Compulsory Enrolment and Attendance Rules, 1979,[255] parents may be guilty of an offence if they fail to take reasonable steps to ensure that a child is enrolled and regularly attends primary school until the completion of primary education. This also applies to any other person who interferes with a child's school attendance.

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[252] For instance, the Penal Code, Cap. 16, the Education Act, 1978, etc.

[253] See, MASHAMBA, C.J., op. cit.

[254] Cap. 353, R.E. 2002.

[255] GN 129 of 1979.

Although the law compels parents of children of the school age to send them to schools in the family setting, economic hardship has been singled out as a major obstacle to strict adherence to this rule.[256] The Report of the Law Reform Commission[257] shows that "a significant percentage of parents are not able to give the basic needs to their children, e.g. uniforms, school books, etc, which make the particular child feel dejected and inferior to her or his colleagues in school; gradually, the child's progress is negatively affected and resulting into poor performance (which) discourages them to attend school."[258]

6.1.4 Child Care and Support in the Community Setting

The significance of social or community parenthood in the upbringing of children in African communities is part and parcel of the African culture. It traces its roots from time immemorial, with the child being taken care of by a social group either in form of extended family, the clan or the territorial unit. It is from this reality that modern society has continued to treasure in this practice; although not at a satisfactory pace in Tanzania.[259] To date, the law in Tanzania recognizes the following such categories of community care as: children care centres, and children education centres. These are institutionalized categories of childcare facilities.[260]

6.1.5 Child Care and Support under the Day Care Centres Act

This Day Care Centres Act[261] regulates all day care centres where children are received, cared for and maintained during daytime. Section 2 defines 'a day care' centre as excluding approved schools, children homes and nursery schools. It further defines 'a child' as a "person of the age of between two and six years." Section 3 establishes a Registrar of day care centres who is the Commissioner for Social Welfare. The Act obliges the Registrar, while registering day care centres, to take into consideration:

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[256] MASHAMBA, C.J., op. cit, p. 17.
[257] UNITED REPUBLIC OF TANZANIA, *Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania*, op. cit.
[258] Ibid, p.38.

[259] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit, p. 18.

[260] Ibid.
[261] Cap. 180, R.E. 2002.

(i) The promotion of the development of children into cultured and good mannered persons;
(ii) The programmes provides a sound foundation for enabling the children to grow up into health and responsible citizens of the United Republic; and
(iii) The facilities of proposed day care centres are suitable for the preparation of children for primary education.

It is important to note that the main aim for enacting this law was to integrate the community in taking care of children while their parents are engaged in other socio-economic activities.[262] That is why the Day Care Centres Regulations of 1982[263] requires establishments of parents committee to organise ad supervise the implementation of projects and programmes of every day care centre and to initiate schemes and projects aimed at raising the income of the centre.

Although the idea of having well regulated and organised day care centres was particularly important in integrating community participation in the upbringing of children in the country, there facilities are currently few that cannot correspond to the fast-growing number of children in need of this service.

6.1.6 Child Care and Support in Nursery Schools

These are pre-school formal training schools for preparation of young children for primary school education. They differ from day care centres in that "whilst the former are formal and education-oriented, the latter are more informal and lay emphasis on care. Furthermore, nursery schools have more skilled workforce responsible for the running of these schools while in the day care scheme the workforce need not have any specialised skill. In the former, the responsible institutions are usually not community based whilst in the latter; the community is expected to be the base-line body responsible for the centres."[264]

However, to date there is no law regulating nursery schools, although their regulations are impliedly under the Education Act of 1978 and the Local Governments (District Authorities) Act, 1982. Therefore, there is a need to have a

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[262] UNITED REPUBLIC OF TANZANIA, *Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania*, op. cit, p. 47.

[263] Made under the Day Care Centres Act vide GN. No. 108 of 1982.

[264]UNITED REPUBLIC OF TANZANIA, *Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania*, op. cit, p.50

specific law regulating them, as they are very important in the up bringing of the child.

6.1.7 Child Care and Support in Children's Homes

These are institutions that care for children who cannot be taken care of in the family environment for different reasons other than those committed by a court order to approved schools under the Children and Young Persons Act.[265] They are currently regulated by Children's Home (Regulations) Act of 1968. According to this law, a child is defined to be one who is under 18 years; whereas a children's home means any premises other than an approved school where five or more children, being orphans or children whose relatives or guardians are unable to care for them, are received to be cared and maintained, either gratuitously or for payment for a period of longer than 7 days by a person who is not a relative or guardian of the child. The Commissioner for Social Welfare is the licensing authority under section 3 (7) of the Cap. 13; where section 5 (7) makes an offence to manage an unlicensed children's home.

However, by the time the Law Reform Commission conducted a study on this law (in late 1980s and early 1990s), there was only one state-run children's home[266] there were only 32 children's homes in the mainland all owned by Christian missions. This tendency has been responsible for the deplorable condition in these homes. Due to this phenomenon, the Law Reform Commission went on to recommend to the effect that:

> The Children's Homes Act (sic) must develop criteria under which a child might be described as abandoned in need of care and specific procedures be developed for declaring a child abandoned and as such in need of care.[267]

These criteria should include: neglect, exposure to ill-treatment or assault, exploitation of young people, and unsuitability of parental care

6.2 Child Care for Children born out of Wedlock under Customary Law

According to Rule 178,[268] where the father of the child is unknown, the child belongs to its maternal grandfather, and if the grandfather has got children of his own, then the child in question will be considered as coming after his sons in

[265] Ibid.
[266] Ibid, p. 53. The home is situated at Kurasini in Dar Es Salaam.
[267] Ibid., p.54
[268] The Law of Persons.

seniority.[269] But where the father of the child is known, he can legitimise the children by either marrying the child's mother or paying Tshs. 100/= to the child's maternal grandmother before the child is weaned.

The law provides that once the mother names a man to be a father of the child at the time of birth of the child such man is the only person capable of legitimising the child.[270] Upon so legitimising the child, the father will assume responsibility for caring the child.

6.3 Child Care under Customary Guardianship

The 1st Schedule to the Declaration cited above,[271] provides for the rules for guardianship of children. The clan council (*Baraza la Ukoo*) appoints the guardian in four circumstances:

(i) Where the child's father is dead;
(ii) Where a heir is not present to take care of matters entrusted to him;
(iii) Where a person responsible is unable to do so by virtue of poverty or mental illness; and
(iv) Where it concerns the wife and children of a person who has been deserted.

Although the responsibilities of caring for the child are of general nature, it is clear that the guardian takes the place of the father in terms of care and maintenance.

6.4 Children's Right to Education

6.4.1 Compulsory Primary Education

Currently, there are suggestions pointing to making primary education free and compulsory in the country, as a short-term plan, while also striving for secondary education to be free and compulsory, as a long-term plan.[272] According to the National Education Act of 1978, primary school enrolment and

[269] Ibid, Rule 179.
[270] Ibid, Rule 182.
[271] GN. No. 436 of 1963.

[272] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit.

attendance are compulsory for children aged between 7 and 13.[273] According to Article 11 of the African Charter on the Rights and Welfare of the Child, every child has the right to education that is directed to:

(a) the promotion and development of the child's personality and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments and international human rights declarations and conventions;

(c) the prevalence and improvement of positive aspects of African morals, traditional values and cultures;

(d) preparation of the child to be responsible in life, in free society based on the spirit of tolerance, dialogue, mutual respect, and friendship among ethnic, tribal, and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) *Not applicable*;

(g) *Not applicable*; and

(h) the promotion of the child's understanding of primary health care.

In that regard, it is proposed that primary education in Tanzania should be free of charge.

6.4.2 Age for Compulsory Education

According to the National Education Act, 1978, primary school enrolment and attendance are compulsory for children aged between 7 and 13, although there is a push towards making at least seven years of primary education to be compulsory to children of between the ages of 7 and 14. As Mashamba argues, 'the age at which compulsory education ends should be correlated with the age for access to full-time employment. On a longer term, compulsory and free schooling should extend to a total of at least nine years in the entire country; different standards in different regions are likely to breach the principle of non-

[273] Section 35 of the National Education Act, Cap. 353, R.E. 2002. According to the Zanzibar Education Act of 1982, free and compulsory education comprises 7 years in primary school and 3 years in secondary school.

discrimination in the Convention on the Rights of the Child.'[274] Mashamba further argues that,

> It should be made an offence to hinder children from going to school and for parents/guardians not to send children to school. Under the Primary School (Compulsory Enrolment and Attendance) Rules of 1979, parents who fail to ensure that a child is enrolled in primary school and regularly attends it until completion may be guilty of an offence, as may any person who interferes with a child's attendance at primary school.[275]

It has been recently urged that students in primary school or in higher education[276] should not be expelled for the reason that they are married, have children or are pregnant. There is also a call to the effect that students should not be expelled for having caused a pregnancy.[277] The African Charter on the Rights and Welfare of the Child prescribes that children who become pregnant before completing their education shall have opportunity to continue their education after giving birth. The provisions on expulsion of pregnant students, etc., in the National Education Act of 1978 and in the National Education (Expulsion and Exclusion of Pupils from Schools Regulations) should be repealed in order to comply with the provisions on the right of the child to primary education.

The rules on expulsion of pregnant girls seem to be contrary to the non-discrimination principle in the CRC,[278] especially as it appears that the father of the unborn child is usually not expelled. These rules appear to be in breach of the right to primary education. According to the Tanzanian Government report to the Committee on the Rights of the Child in 1998, over 3,000 girls were expelled from primary school every year due to pregnancy.

6.4.3 Corporal Punishment in Schools

Under international human rights law, no child is supposed to be subjected to corporal punishment in an educational institute, a children's home, in any form

[274] MASHAMBA, C.J., op. cit.
[275] Ibid.
[276] Higher education should include secondary school education and higher learning institutions like colleges and universities.
[277] MASHAMBA, C.J., op. cit.
[278] Article 2 of the CRC.

of institutional detention or in alternative family care or by birth parents. Article 28(2) of the CRC provides that:

> 28. (2) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

The Committee on the Rights of the Child has been perfectly clear on this issue, stating that:

> Any corporal punishment of children is incompatible with the Convention on the Rights of the Child, particularly article 19 (protection "from all forms of physical or mental violence"), and – in relation to school discipline – article 28(2) and article 37.

The Committee on the Rights of the Child has called for a clear prohibition of all corporal punishment – in the family, in other forms of care, in schools and in the penal or criminal justice system.

The UN Guidelines for the Prevention of Juvenile Delinquency require that education systems should avoid harsh disciplinary measures, particularly corporal punishment to the offending children. Article 13(6)(e) of the Constitution of the United Republic of Tanzania of 1977 prohibits cruel, inhuman and degrading punishment, generally. Such prohibition should be specifically deduced to suit the instant proposition. Article 11.5 of the African Charter on the Rights and Welfare of the Child requires state parties thereto "to ensure that children subjected to parental discipline (in educational institutions) are treated with respect and human dignity and in conformity with the present Charter."

The National Education Act, 1978 allows corporal punishment to be administered in schools. According to the National Education Corporal Punishment Regulations (Control of Administrations of Corporal Punishment in Schools) of 1979, corporal punishment means:

> Punishment by striking a pupil on his hand or on his normally clothed buttocks with a light flexible stick but excluding striking a child with any other instrument or any other part of the body.

The punishment must not exceed four strokes on any one occasion. Female teachers may give female pupils corporal punishment only, except by authorization from the head of the school if there is no female teacher.

Corporal punishment is definitely not in line with international human rights standards – it contravenes the CRC, the UN Covenant on Civil and Political Rights, and the Constitution of the United Republic of Tanzania. In the light of this provision, the Nyalali Commission found that corporal punishment in Tanzania is unconstitutional.[279] The Committee on the Rights of the Child has declared very clearly that corporal punishment is not compatible with the Convention on the Rights of the Child.

While in Tanzania corporal punishment is even more degrading in the case of juveniles than in the case of adults, as it may be inflicted on juveniles in public, in other countries, like Zimbabwe, corporal punishment has been declared unconstitutional. In Zimbabwe, it was declared unconstitutional in court in 1983. In *Ngube, Tshuma & Ndhlovu v. the State*, the Court stated that:

> … Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion, whether imposed on an adult person or a juvenile; in the main the punishment has been branded as both cruel and degrading…

In this regard, it is arguable that even in Tanzania corporal punishment needs to be prohibited for it is cruel and degrading.

6.5 Child Protection

6.5.1 Protection against Abuse and Neglect

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[279] See, GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa,* 1991, Dar Es Salaam: NPC-Kiuta, 1992.

Child abuse comprises any form of harm to a child's well being, including physical abuse, sexual abuse, emotional abuse and neglect.[280] In Tanzania child abuse has yet to be made a serious offence, but the Affiliation Act includes provisions on neglect or desertion of a child. For instance, in terms of section 5(1), where an order for maintenance has been made and the putative father fails to pay such maintenance within one month after having been made, or he refuses to do so, the court may issue a warrant so that such amount due is recovered by *distress* and/or *sale* of his property. The court may also detain the father until the amount due is paid; or the court may commit the father to prison for a term not exceeding three months.

Under the law, it is an offence for a person, having the care of a child under 14 years of age, to desert the child and leave him/her without support.[281] It is also an offence for a person having the care of a child *of tender years* to neglect to provide necessaries for the child so the health of the child may be injured. According to section 169A of the Penal Code, cruelty to children is an offence. Cruelty to children is basically defined to include: (i) ill-treatment, (ii) neglect, (iii) abandoning, and (iv) female genital mutilation.

Kidnapping from lawful guardianship of a boy under 14 years or a girl less than 16 years is an offence. Kidnapping or abducting a child under 14 years with the intention to steal from the child is an offence under section 252 of the Penal Code. It should be noted that, setting the same age of protection for boys and girls would be more appropriate and in accordance with the non-discrimination principle expressed in Article 2 of the CRC.[282] As it has been argued,

> To avoid ambiguity and misconception, the age for sexual consent should be 18 for both boys and girls. It may be allowed for those between 16 and 18. The age of consent is defined as 18 years, except for the case of a married girl; the age of consent for a married girl is 15 years. The present age of consent, 18 years, seems to be set unrealistically high in the light of the actual practices in Tanzania, thus criminalizing a large portion of the population. [283]

[280] MASHAMBA, C.J., op. cit, 123.
[281] Ibid.
[282] Ibid.
[283] Ibid, pp. 123-124.

It should be an offence to exploit children sexually. Currently, sexual exploitation of children is made an offence through the Penal Code. *Acts of gross indecency* are punished more severely if they are committed against a person under 18 or a primary/secondary school student. *Grave sexual abuse* on a person under 15 is punished more severely under the Penal Code. Procuring or attempting to procure any person under 18 to leave Tanzania with a view to the facilitation of "prohibited sexual intercourse" is an offence under section 139(b) of the Penal Code.

Bringing or attempting to bring any person under 18 into Tanzania with a view to facilitation of "prohibited sexual intercourse" is an offence in terms of section 139(d)) of the Penal Code. *Trafficking* of person is an offence under the Penal Code. At the same time, *unnatural offences* are punished more severely if committed to a child under the age of 10 years. *Incest* committed by a male person to a girl is punished more severely if the girl is under 18 years. Incest committed by female person to a boy is punished more severely if the boy is under 10. It would be more appropriate and in line with the non-discrimination provision in the CRC to set the same age of increased protection for girls and boys.[284]

The Committee on the Rights of the Child has made strongly worded statements emphasizing that there should be penalties for those exploiting children in prostitution, and that child pornography should be banned. Every child has the right to be protected from video films, television programmes, and other media containing brutal violence or pornography. It should be an offence to provide a child access to such media. Every child should have the right to be protected from customs and practices which could be dangerous to his/her welfare, health and development.

At least in criminal cases regarding child abuse, the testimony of a child victim should be presumed to be worthier than that of an adult. In order to make it possible to charge perpetrators of child abuse, it is essential to make it possible for children to give evidence.[285]

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[284] MASHAMBA, Clement J., "Basic Elements and Principles To Be Incorporated in New Children Statute in Tanzania," op. cit.

[285] See, for example, *Shozi Andrew v. R.* [1987] TLR 68.

In view of international children's rights law, it is a gradually becoming an offence to provide a child with alcoholic drinks or with tobacco. Currently, the Intoxicating Liquors Act of 1968 pegs the current drinking at age 16.[286] Under section 70 of the Intoxicating Liquors Act,

> 70. - (1) Any licensee who employees any person under the apparent age of sixteen years to–
>
> (a) sell or control or supervise the sale of intoxicating liquor;
>
> (b) have the custody or control of any intoxicating liquor on the premises,
>
> commits an offence.
>
> (2) Any licensee who permits any person under the apparent age of sixteen years to remain present on his licensed premises in any room, courtyard or other place in which intoxicating liquor is being served for consumption commits an offence:
>
> Provided that nothing in this subsection shall apply to any licensed restaurant, hotel dining room, hotel lounge or a lounge or dining room in a club where the intoxicating liquor consumed therein is served from a room on the licensed premises other than such restaurant, dining room or lounge, or to any other room or place on licensed premises in respect of which express provision is made in the licence permitting persons under the apparent age of sixteen years to be present while intoxicating liquor is being consumed.

It is apparent that 'at 16, the human body still is not fully developed and is more vulnerable to harm than in an adult. Alcohol dependency is also developed much more easily and faster in a young person exposed to alcohol than in an adult. Furthermore, there is an increased risk for committing offences or of becoming a victim of crime or abuse when intoxicated. It should be considered increasing the drinking age to at least 18, and making sure the rules are adhered to. In the United States, the drinking age is 21. Most tobacco users had developed a nicotine dependency before the age of 18. The tobacco industry's marketing efforts are also markedly directed towards teenagers. An age limit, if respected, could help reduce smoking.'[287]

Every child has the right to be protected from illicit use of narcotic drugs and psychotropic substances, and the right to be prevented from being used in the

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[286] Section 69 of the Intoxicating Liquors Act, Cap. 77, R.E. 2002.
[287] MASHAMBA, C.J., op. cit.

illicit production and trafficking of such substances.[288] It would be a good thing if children could be prevented from acquiring solvent in case it can be presumed that they intend to inhale it, but it appears difficult to make it an offence providing solvents to children when such a purpose is suspected.

6.5.2 Remedies against Child Abuse

(a) Issue of a Supervision Order

In many progressive jurisdictions, like Uganda and South Africa, if a court finds that a child is in need of care, or is being abused, ill-treated or neglected, the court should have the power to make a *care order* or *supervision order*. A care order means that the care of the child should be transferred to the care of a 'fit person' other than the person who has the care of the child at present.[289] That person could be a relative or somebody else who is suitable and willing to care for the child. This legal position is yet to evolve in the Tanzanian legal system. But it is suggested that the envisaged legal reforms of the laws relating to children should have provisions to this effect. In that case, the court should have the power to order that the care of the child should be transferred to an institution such as a children's home. Before the court makes a care order, a social welfare officer should conduct a social investigation and write a report about the child and the need for making a care order.

(b) Placing a Child under Guardianship

Unlike in Tanzania, in many progressive jurisdictions, if a court finds that a parent/legal guardian wilfully cannot take care of a child, or ill-treats, neglects or abuses the child, the court should order that another person should be the guardian of the child instead. The court always asks for advice from a social welfare officer before appointing a guardian or custodian. In such cases, a child in need of care is not be brought by the police to court for a care order or supervision order to be made. Instead, a social welfare officer should bring the child to court.

When the child is not capable of coming to court, the court appoints a guardian *ad litem* to represent the child in court, preferably a social welfare officer.

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[288] It should be noted that there are links between drug abuse and other forms of exploitation.
[289] MASHAMBA, C.J., op. cit.

According to the Tanzanian Children and Young Persons Act,[290] any administrative officer or a police officer above a certain rank may bring a child in need of care before a juvenile court for an order to be made placing the child under the care of a person or institution. However, it should be a legal duty for any person, who knows that a child is neglected, ill treated, or abused in any other way, to report this to a social welfare officer or to a police station or to a court of law.

(c) Children without adequate Care and Protection

Under international human rights law, a child who is without care and protection, or who is at *social risk* or in difficult circumstances, should not be deprived of his/her liberty only because he/she is in need of protection, unless it is in the best interest of the child to do so. The UN Committee on the Rights of the Child has noted that it does not accept that deprivation of liberty should be used as a measure for dealing with children in need of protection.[291] Currently, section 25 of the Children and Young Persons Act[292] provides that a child living in difficult circumstances may be brought before a juvenile court, which may order that the child should be put under the care of a person or institution – even an approved school, which is primarily intended for convicted young offenders – until they attain the age of 18 years or, for girls, 21 (with the girl's consent). In effect, this provision defies the recommendations of the UN Committee on the Rights of the Child made recently after it has considered the 2nd periodic progress report submitted by Tanzania to the Committee in 2004.[293] It is recommended, therefore, that introducing the same age limits for boys and girls in this respect would be in line with the non-discrimination principles expressed in Article 2 of the CRC.

6.6 Child Marriage

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290 Cap. 13 R.E. 2002.

291 See, for instance, UN COMMITTEE ON THE RIGHTS OF THE CHILD, "Consideration of Reports submitted by States under Article 44 of the Convention (on the Rights of the Child): Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania," CRC/C/TZA/02, 2nd June 2006.

292 Cap. 13, R.E. 2002.

293 See, UN COMMITTEE ON THE RIGHTS OF THE CHILD, "Consideration of Reports submitted by States under Article 44 of the Convention (on the Rights of the Child): Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania," op. cit.

According to section 13(1) of the Law of Marriage Act of 1971, the age of marriage for males is 18 years, while for females it is 15 years. A court may give leave in respect of marriage for a younger person, if that person is over 14 years old and there are special circumstances to warrant such marriage. Under the law, a girl under the age between 15 and 18 years needs parental consent in order to get married. This distinction of the minimum age of marriage between male and female children in the present law of marriage does not meet the provisions on non-discrimination as contained in Article 2 of the CRC.

It is not in dispute that when men and women marry, they take on important psychosocial and biological responsibilities.[294] Therefore, marriage should not be permitted before they have reached full maturity and capacity to act as well as consent without undue influence upon them. When setting a minimum age for marriage, it is important to take into account not primarily the physical/bodily development, but rather the psychological and intellectual development and mental and emotional maturity of the parties to a marriage.

According to the WHO, it can adversely affect the health of minors, especially girls, when they marry and have children before maturity, and it could also impede their education. If an option for dispensation to marry before 18 under special circumstances – in the interest of the intending spouses – is kept in the law, consent from parents/guardian of the minor should be required. In any case, it would be incompatible with the non-discrimination provision in Article 2 of the CRC to specify different ages of marriage for subscribers to different religious denominations.

6.7 Succession and Inheritance by Children

Children have the right to inherit from their deceased parents. In *Masudi Ally v. Chiku Masudi*,[295] for instance, Korosso, J. (as he then was) held that under customary law only children of the deceased have the right to inherit from their

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[294] Some pressure groups have suggested that: 'The minimum age for marriage should be 18 years for both male and female children. Where circumstances permit, the minimum age for marriage may be lowered to between 16 and 18 with the express consent of parents, for both girls and boys.' See, MASHAMBA, Clement J., "Basic Elements and Principles to be Incorporated in New Children Statute in Tanzania," op. cit.

[295] [1992] TLR 50.

deceased's parents property. However, under Islamic law, a brother's son has a right to inheritance, and is included in the list of ten male heirs.[296] In this case, the Appellant challenged the decision of the Kigoma District Court which reversed the decision of the Ujiji Urban Primary Court. The Appellant was neither the son nor the relative of the Respondent's late father who exclusively owned the disputed residential house in Tabora Municipality.

Dismissing the appeal, Justice Korosso held that, according to the para 26 of the Second Schedule to the Customary Law Declaration,[297] 'it is only the children of the deceased that are customarily entitled to inherit the entire property, (without exception), of their late father.' His Lordship was of the view that,

> The appellant having been a complete stranger to the family of the Respondent's late father, he is equally a stranger to the property of the Respondent's late father.
>
> As it were true that the Respondent's late father had ever inherited the property of the Appellant's late father in 1956 when his father died, the Appellant would naturally have sued the Respondent's late father during his lifetime until in 1990 when he passed away. Seeing that the Respondent's father is no longer with us, he decided to test the wisdom of courts of law.

The law also provides that a sister may claim maintenance from her full brother whether he inherited property from their father or not. This was the view of the High Court in *Bilimbasa Zacharia v. Jarves John,*[298] where the appellant was an elder child of the deceased entrusted with maintenance of his young sister. Before his death, the deceased distributed his land among his children, including female members. One of the daughters, Theopista, was a minor, whose guardianship fell on the appellant. The appellant failed to maintain the minor and even sold the land that the minor had inherited from their deceased father. On appeal the appellant argued that the minor, as a female member of the deceased's family, was not entitled to inherit the land. Indeed, the Primary Court, citing the provisions of paragraph 20 of the Second Schedule to the Government Notice No. 436 of 1963, had held that women cannot inherit clan land. The said provisions provide that,

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[296] See, EL-BUHURI, Sheik Ali Bin Hemedi, A Handbook of Mohamedan Law of Inheritance, cited in *Hassan Matolla v. Kadhi wa Msikiti, Mwinyimkuu Street* [1985] TLR 53.

[297] GN. No. 436 of 1963.

[298] [1983] TLR 67.

> Women can inherit except for clan land which they may receive in usufruct but may not sell. However if there is no male of that clan, a woman may inherit such land in full ownership.[299]

So, the Primary Court dismissed the suit, prompting an appeal to the District Court, which also referred to the provisions of paragraph 20, but held that Theopista was entitled to inherit because that was the wish of her father. The District Court also held that the buyer of the shamba which was sold by the appellant ought to have known that the shamba was in dispute and that it was not supposed to be sold. Thus, the buyer bought the *shamba* at his own peril. As such, the District Court allowed the appeal of Theopista and ordered the buyer of the shamba to vacate it forthwith and to claim any expenses incurred together with the purchase price from Bilimbasa.

When the appellant appealed to the High Court, Bahati, J. (as he then was), was of the view that,

> In my evaluation of the evidence I do not think either the Primary Court or the District Court arrived at a correct conclusion. The District Court brought in a foreign element in the case and that is of bringing in the buyer of the land in dispute. The buyer of this land (whatever his name is) was not a party to the suit nor was he made a party to the suit in any way. He therefore cannot be penalized unheard. Secondly, the claim in the Primary Court was for Shs.4,000/= because Bilimbasa had sold that piece of land which was for use by the infant Theopista. The claim is not for a shamba worth shs. 4,000/=. Therefore, the relief which the District Court purported to give was not a relief which had been claimed. For these reasons, the decision of the District Court cannot be left to stand. It is hereby set aside. But that does not mean that Theopista has no relief. *I do accept the law cited above with regard to the right of women to inherit clan land (s.20 of 2nd schedule to G.N. 436 of 1963)*. But in this case even if Theopista did not inherit the land, *certainly she had it for her own use. The appellant Bilimbasa sold this land thereby depriving her of her means of livelihood*. [Emphasis supplied].

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[299] For further details on this issue, see, *Angelo Bisiki v. Antonia Bisiki and others* [1989] TLR 225; *Deocras Lutabana v. Deus Kashaga,* Court of Appeal of Tanzania, Civil Appeal No. 5 of 1981(unreported); and *Rukuba Nteme v. Bi Jalia Hassan and Gervas Baruti,* Court of Appeal of Tanzania, Civil Appeal No. 19 of 1986 (unreported).

His Lordship then referred to Cory and Hartnoll, who had once contended that: 'No heir can take full possession of a plantation until the death of his wards.' According to paragraph 261 of Cory and Hartnoll: 'A sister may claim maintenance from her full brother whether he inherited property from their father or not.' So, Justice Bahati held that,

> In this case both paragraphs cited above are relevant. Bilimbasa being not the only heir of his father's plantation is not permitted to take full possession of the plantation until the death of his wards namely Theopista and Paulina, his sisters, for he is the guardian of these 2 sisters. In this case he not only sold his own land left to him for his use, he even sold the land meant for use by Theopista. *It is clear that because Bilimbasa went against paragraph 261 of Cory and Hartnoll, she is entitled to claim maintenance from Bilimbasa.* In this case not only is Bilimbasa not maintaining Theopista, but he has sold even the land which would go towards the maintenance of Theopista. [Emphasis supplied].

Therefore, His Lordship held that the claim for Shs. 4,000/= was justifiable and said that it should have been allowed by the lower courts. So, it allowed the claim of Shs 4,000/= from Bilimbasa and reversed the decision of the Primary Court but for different reasons from those of the District Court.

Can female heirs dispose of inherited clan land? Under paragraph 20 of the Second Schedule to Government Notice No. 436 of 1963 cited above, it seems apparent that women cannot inherit clan land. The foregoing provisions were used by courts in *Angelo Bisiki v. Antonia Bisiki and Others;*[300] *Deocras Lutabana v. Deus Kashaga;*[301] and *Rukuba Nteme v. Bi Jalia Hassan and Gervas Baruti.*[302] However, it is evident that these provisions are bad law for they are in breach of Article 2 of the CRC. So, they should be brought in line with the CRC. This is also applicable to rules discriminating against children born out of wedlock. All children should inherit their parents equally; regardless of whether or not they were born in or out of marriage, and regardless of their gender, religion, or age. Where there is a will, inheritance should be in accordance with the will. When the rules on inheritance in customary or religious law are in conflict with the rules in

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[300] [1989] TLR 225.

[301] Court of Appeal of Tanzania, Civil Appeal No. 5 of 1981(unreported).

[302] Court of Appeal of Tanzania, Civil Appeal No. 19 of 1986 (unreported).

statutory law, the statutory law should prevail, so as to safeguard the best interest of the child.[303]

[303] MASHAMBA, Clement J., "Basic Elements and Principles to be Incorporated in New Children Statute in Tanzania," op. cit.

PART IV

MARRIAGE PROBLEMS

Chapter Seven
DIVORCES AND SEPARATIONS

7.1 Introduction

Socially, it is definite that people do not get married 'with the expectations that they will divorce,'[304] although it is increasingly becoming obvious that many marriages around the world do end in divorce. Many people now consider this increasing trend in divorces as a failure of the marriage institution. However, to

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[304] OLSON, D.H. and DeFrain, J., *Marriage and the Family: Diversity and Strengths*, op. cit, p. 486.

some extent, divorce can have a positive outcome, 'by freeing individuals from painful or difficult marriages that cannot be changed. Family life is a source of stress for many. At the extreme, family life can be shattered by domestic violence, neglect, emotional cruelty, incest, or the abuse of alcohol and other substance.'[305]

Therefore, this Chapter deals with the rather complicated process of marital dissolution, separation and divorce, as essential parts of the law of Marriage Act, 1971.

7.2 Marriage Problems in Tanzania

Since its inception, the marriage institution has been preoccupied with problems. It is now settled that marriage problems 'occur in all marriages, even happy ones.'[306] There are many factors that have led to increasing incidents of divorce in Tanzania. Some of these are socio-economic factors, which has been due to increased gender-based division of role responsibilities between spouses and the job pressures on both spouses. In the past it was traditional that a woman was destined to be a housewife in the family, with the husband providing for maintenance of the entire family in a lifelong marriage. With the increase in women's active participation in employment and business activities, there has been a shift in the traditional gender-based division of labour, which has of late seen many women (most of whom are married) being employed or undertaking full-time business activities.

Culturally, in Tanzania there are a sufficient number of inter-tribal marriages, which have seen cultural intermingling as well as cultural conflicts between spouses coming from distinct cultural backgrounds. There is also an increased tendency of the *divorce culture* that has seen many married couples, particularly young spouses, taking it as acceptable that divorce is the acceptable outcome of marriage.[307] In the past divorce was rare and there was considerable social pressure to stay married, 'even if it was a bad and abusive marriage.'[308]

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[305] Ibid.

[306] ARBETMAN, L.P., et al, *Street Law: a Course in Practical Law*, op. cit, 363.

[307] WHITEHEAD, Barbara D., *The Divorce Culture*, New York: Knopf, 1997.

[308] OLSON, D.H. and DeFrain, J., *Marriage and the Family: Diversity and Strengths,* op. cit, pp. 491-492.

> But now divorce is linked with the pursuit of individual satisfaction, and there is less social pressure to stay married. Even the presence of children is not a deterrent to getting divorced as it was in the past.[309]

On the other hand, lack of good communication between couples has been singled out as a source of marital breakdown. In most cases, married couples find themselves in a situation where they cannot communicate in amicable manner; and, at the same time, they cannot amicably resolve their conflicts, leading to breakdown of the marriage in which they are. Other factors leading to increase in divorces in Tanzania include alcohol or drug abuse, conflicts about children and barrenness, adultery and conflicts with in-laws or relatives.[310]

7.3 Duration of Marriage

Generally, in Tanzania marriage is deemed to be a permanent institution. Section 12 of the Law of Marriage Act, 1971, provides for the duration of marriage. It categorically states:

> 12. A marriage, whether contracted in Mainland Tanzania or elsewhere, shall for all purposes of the law of Mainland Tanzania subsist until determined–
>   (a) by the death of either party thereto;
>   (b) by a decree declaring that the death of either party thereto is presumed;
>   (c) by a decree of annulment;
>   (d) by a decree of divorce; or
>   (e) by an extra-judicial divorce outside Tanzania which is recognised in Tanzania under the provisions of section 92.

However, the hard reality of everyday life and personal problems facing couples in marriage life have caused some couples' love and compatibility in marriage to wear away, leaving room only for separation or divorce. Sometimes, though, couples experiencing marital difficulties or who are at the verge of separating or divorcing have rescued their marriages by resorting to marriage counsellors or elder members of their communities.

In Tanzania the law on divorce or separation *generally* does not allow couples to petition for divorce before the expiry of two years from the day they contracted their marriage.[311] In *Sangali Athmani v. Bahati Abdu,*[312] determining a challenge to

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[309] Ibid, p. 492.

[310] These factors are global, for they occur in even civilised cultures like US and the U.K. See, ARBETMAN, L.P., et al, *Street Law: a Course in Practical Law*, op. cit, p. 363.

[311] Section 100 (1) of the Act.

the lower courts entertaining a petition for divorce before the expiry of two years, Muro, J. (as she then was) held that the provisions of section 100(1) of the Act *are mandatory* which must be complied with. However, as an exception to this general rule, a party to a marriage can petition for divorce upon having been given leave by the court to petition before the lapse of two years. Under the provisions of section 100(2) of the Act,

> (2) Leave shall not be granted to petition for divorce within two years of the marriage *except where it is shown that exceptional hardship is being suffered by the person applying for such leave.* [Emphasis supplied].

An application for leave of the court may be made either before or after reference to a Board under section 101 of the Act.[313]

7.4 Grounds of Divorce

For divorce to be granted the court has to ascertain that there are sufficient grounds pointing to the fact that marriage has irreparably broken down.[314] Section 107(1) of the Act provides that:

> 107.- (1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular–
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> > (a) shall, unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing;[315] and
> > (b) shall have regard to the custom of the community to which the parties belong.

Subsection (2) of section 107 of the Act sets out specific grounds for divorce, which include 'adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest.'[316] Another specific ground for divorce is sexual perversion on the part of the respondent. The court can also grant divorce where there is evidence that cruelty, whether mental or physical, has been 'inflicted by the respondent on the petitioner or on the children, if any, of the marriage.'

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[312] High Court of Tanzania at Dar Es Salaam, PC Civil Appeal No. 46 of 2001 (unreported).
[313] Op. cit, section 100(3).
[314] Ibid, section 107.
[315] See, also, *Athanas Makungwa v. Darini Hassani* [1983] TLR 132, where Bahati, J. (as he then was) refused to grant divorce for the petitioner was the wrong-doing party.
[316] See, *Mariam Tumbo v. Harold Tumbo*, op. cit.

Cruelty was defined by Lubuva, J. (as he then was) in *Saidi Mohamed v. Zena Ally,*[317]referring to Tolstoy in his book, *The Law and Practice of Divorce and Matrimonial Causes,*[318] as:

> Wilful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger.[319]

In this case, the respondent petitioned for divorce on the ground of cruelty in a Primary Court where she was unsuccessful. On appeal to the District Court she won, whereupon the appellant decided to challenge the district court's ruling in the High Court. It was established by evidence that the appellant was in the habit of regularly beating the respondent. It was in evidence that the appellant had gone as far as to threaten to kill the respondent. Moreover, it was in record that the appellant once stripped the respondent naked before other people including her father-in-law. The High Court, therefore, held such acts to be an embarrassing and distressing act of cruelty, which inflicted considerable physical and mental torture to the respondent.

In *Julia Mazengo v. Jackson Leganga*[320] Samatta, J. (as he then was) held that when physical assaults done by the respondent on the appellant are considered in the light of the general atmosphere prevailing at the matrimonial home, the parties' marriage had to be declared to have irreparably broken down. In this case, the appellant petitioned for divorce before a Primary Court on the ground that quite often the respondent used to subject her to violence. The Primary Court granted the divorce after being satisfied that the marriage had broken down irreparably. The District Court reversed the decision of the Primary Court on the ground that the ill-treatment to which the appellant was subjected was reasonable tear and wear of married life. It was in evidence that the respondent assaulted the appellant on three occasions only. On one occasion the assault was perpetrated when she was nine months pregnant. The High Court was of the view that no person has any right to assault his or her spouse.[321]

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[317] [1985] TLR 13.
[318] 5th Edition at page 60.
[319] Such was also the holding of the House of Lords in *Russell v. Russell* (1897) A.C. 395.
[320] [1986] TLR 244.
[321] *Cf. McEwan v. McEwan* (1946) 108 So. Jour. 198.

The High Court cautioned, however, that acts of cruelty should be serious and repetitive in nature.[322] To this end, Justice Samatta, was of the view that,

> [T]here may come a time *when defects of character or temperament may be such as to amount to cruelty,* but it all depends on the facts (of each case) … Similarly, *it is common ground to expect misunderstanding in the married life - which may culminate in person assaulting his or her spouse*. If such incidents occur - *and a person twice assaults his or her spouse - I do not think that that alone would be sufficient to justify a reasonable tribunal to conclude that the marriage vows have been torn apart beyond repair.* A marriage bond or contract (for that matter) – sanctity as it is – *should not be set aside lightly; in the absence of evidence that the same has foundered beyond repair*. [Emphasis supplied].

So, Justice Samatta, although he entirely agreed with the District Magistrate that a marriage bond should not be set aside lightly, he was unable to share his view that the Primary Court strayed into an error in holding that the appellant had established that she had been subjected to violence on three occasions. Indeed, there was ample evidence that at least on two of the three occasions the assaults were serious ones. One of those occasions was perpetrated when the appellant was nine months pregnant. In His Lordship's opinion, 'the Primary Court was right, when these assaults are considered in the light of the general atmosphere prevailing at the matrimonial home (described by the appellant in her evidence and to a limited extent admitted by the respondent), to hold, as it did, that the parties' marriage had irreparably broken down. The ill-treatment which the respondent has been subjecting the appellant to cannot, in my considered opinion, be described as the reasonable wear and tear of married life. The law does not expect a wife to put up with the kind of ill-treatment the respondent has been subjecting the appellant to.'

This was also the view of Lugakingira, J. (as he then was) in *Mariam Tumbo v. Harold Tumbo*.[323] In this case, His Lordship held that it is one thing to tolerate a spouse's misconduct; it is another to put up with the consequences thereof. His Lordship was of the opinion that cruelty or misconduct of a spouse has to be a ground for divorce even if it was condoned by the aggrieved spouse. His

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322 In *Charles Aoko v. Dorina Gibonga* [1988] TLR 44, Sekule, J. (as he then was) held that the two incidents that were established, in this case, by the evidence to have happened could not be said to have been clear indication that this marriage was irreparably broken down. They were the usual wear and tear of marriage life. They did not amount to cruelty in terms of section 107 (2) (c) of Act, nor did they fall within the purview of section 107 (3) (b). So, the court held that on the evidence on record the marriage was not irreparably broken down.

323 Op. cit.

Lordship also was of the considered opinion that when reprehensible conduct or departure from the normal standard of conjugal kindness causes injury to health or an apprehension of it, it is cruelty, if a reasonable person, after taking due account of the temperament and all other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to tolerate it.

Mental cruelty may also be manifested in acts of witchcraft that creates fear on one spouse. In *Mariam Tumbo v. Harold Tumbo*, the court was confronted with this issue. In this case, the respondent alleged that the petitioner was in the habit of consulting witchdoctors. He alleged that these phenomena occasioned him great physical and mental strain as well as a reasonable apprehension of injury. It was testified by the respondent that ever since they were at Musoma the petitioner used to consult witches. She continued to do so even at Singida, his protests notwithstanding.

The respondent then said that when the petitioner departed in July, 1981 he went into her room and found objects tied in the petitioner's handkerchief which he believed to be instruments of witchcraft. These objects, which the respondent tendered objects in court, consisted of: (a) five cowry shells, some wrapped in medical plaster and one in pieces of paper that bear messages in the Arabic script; (b) two powdery preparations, one brown and the other grey, from unknown matter; (c) a piece of integument which by its scaly nature could be that of a snake or similar creature; and (d), more repugnant than all, was a thing, dried up and dark, 'which defied all description and to which was tied a root or twig'. On a glance on these objects the court had no doubt that these were instruments of witchcraft.

The petitioner denied seeking assistance in witchcraft, and denied any knowledge of the said objects, suggesting that these articles were acquired by the respondent and his second woman in order to slander her. After giving a long and anxious consideration to the petitioner's denial as well as her suggestion Lugakingira, J. (as he then was), on a balance of probabilities, was inclined to accept the respondent's charge, spelling out the following reasons: First, His Lordship was not impressed with the petitioner's demeanour when the ownership of the said witchcraft objects was put to her. According to the Court, 'she suddenly changed, and looked troubled, her voice sinking low.' Secondly, she conceded that the respondent had protested to her about witchcraft ever since 1978. Thirdly, on one occasion the respondent found their fifth child with an amulet around his waist. He believed it was the petitioner's work and told her so. Regarding this object, Justice Lugakingira held that: 'I, too, cannot imagine a stranger being so "generous" to the child. I think the respondent's belief was justified.'

Fourthly, there was nothing to suggest that the discovery of these things had any connection with this litigation. The respondent informed the court that on discovering the articles he went to report to his father and the petitioner's father, but did not find the latter. Finally, the court saw no reason for the respondent to expend energy, and perhaps money, to acquire these abominable things. So, His Lordship refused to accept the suggestion of slander, saying that,

> I think the respondent had no cause to slander the petitioner after she had departed and given him the happiness he longed for. He also could not risk slandering her when they have seven children, some of whom he apparently loves. I am for these reasons persuaded to the view, and find, that the instruments of witchcraft belonged to the petitioner.

According to the court record, the respondent adduced evidence to the effect that: "Discovering these `medicines', I was greatly disturbed and thrown into a state of worry. I am still worried and apprehensive. Seeing these things, I cannot again take her for my wife. She might kill me. I can't risk again". Thus, the court held that

> It might well be that the petitioner's witchcraft activities were not intended for the respondent. Yet, in a society riddled with superstition, and ours lays no claim to exception, neither witches nor their clients would make comfortable bedfellows. In considering this, one cannot deny that the petitioner's mind on the question of acquiescence, it would be dangerous to generalise. If a spouse continues to cohabit with the other although the latter has been guilty of cruelty, it is a question of fact whether to infer forgiveness. Each case would depend on its peculiar nature, not least the nature of the cruelty. *I believe that witchcraft, such a cause of strife and misery among a greater part of our population, is not something one can elect to ignore. One can only hope and pray that it has ceased. The sudden discovery that it has not, in particular, the sudden discovery of grotesque objects like Exh. D11 herein, would in a superstitious mind give rise to an intensified and reasonable apprehension of injury.* On this score I accept the respondent's charge of cruelty. [Emphasis supplied].

Other grounds for divorce include wilful neglect on the part of the respondent and desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful. In *Mariam Tumbo v. Harold Tumbo*[324] it was

[324] Ibid.

held that it is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be the deserter; it is imperative for there to be conduct which amounts to dismissal from the consortium.

Another specific ground for divorce is that where there is voluntary separation or separation by decree of the court that has continued for at least three years, such separation could be a good ground for divorce. On the other hand, imprisonment of the respondent for life or for a term of not less than five years is also a ground for divorce. But, in this case, regard has to be had both to the length of the sentence and to the nature of the offence for which it was imposed. Again, mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery, is another ground for divorce. Change of religion by the respondent, where both parties followed the same faith at the time of the marriage; and, where according to the laws of that faith, a change of religion dissolves or is a ground for the dissolution of marriage is also a good ground for divorce.

7.5 The Right to Petition for Separation or Divorce

Under section 99 of the Act, 'any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable.'[325]

7.6 Spouses cannot be compelled to Cohabit

The law in Tanzania does not compel a spouse to live with another spouse. In this regard, section 140 of the Act prohibits institution of proceedings to compel a spouse to live 'with her husband or a husband with his wife.' [326] However, the law allows a spouse who has been deserted to institute proceedings for divorce. In *Mwinyihamisi Kasimu v. Zainabu Bakari*[327] the parties were married under Islamic Law and after living together for over 13 years, the respondent petitioned for divorce. The Primary Court dismissed the petition and her appeal to the

[325]Also, see, *Joseph Warioba Butiku v. Perucy Muganda Butiku* [1987] TLR 1.
[326] *Sangali Athmani v. Bahati Abdu,* op. cit.
[327] [1985] TLR 217.

District Court was also dismissed. But the District Court Magistrate advised that because theirs was an Islamic marriage, the respondent could still obtain divorce by redeeming herself (*kujikhului*) by returning the dowry which the appellant had paid and that this would be in accord with section 107(3)(c) of the Act. Subsequently, the respondent applied to the court to redeem herself as advised, and her application was allowed ex-parte. The husband brought an appeal to the High Court, where Sisya, J. (as he then was) held that, as section 140 of the Act does not empower any court to compel a wife to live with her husband or a husband with his wife, an application for an order to compel the respondent to return to the appellant cannot be entertained. In *Ahmad S. Kidevu v. Sharifa Shamte*[328] Maina, J. (as he then was) was confronted with the question as to whether the court could compel the respondent (the wife) to live with her husband. In considering this question, His Lordship held that,

> I must state straightaway that the appellant's suit is misconceived and not maintainable in law, in view of section 140 … *Marriage is a voluntary union of a man and a woman, and it is contracted with the consent of the parties.* It is intended that the marriage will last for their joint lives of the parties. However, *when difficulties arise in a marriage, and one spouse decides to live separately from the other, the court cannot compel them to live together*. Parliament, in its wisdom, enacted section 140 of the Law of Marriage Act, which clearly provides that a court cannot compel one spouse to live with the other. The only remedy to a spouse who has been deserted is to commence divorce or separation proceedings. [Emphasis added].

His Lordship went on to hold that:

> In the present case, the respondent wife has refused to live with her husband, the appellant. The court cannot compel her to live with her husband. The appellant's remedy now is to refer the matter to a Marriage Conciliatory Board, and then file divorce proceedings in a court of competent jurisdiction. The lower courts rightly refused to make an order compelling the respondent to live with the appellant.

In this case, in matrimonial proceedings before subordinate courts, the appellant unsuccessfully applied for an order that the respondent be compelled to live with him. The Primary Court dismissed the suit, as did the District Court on first appeal. The High Court on second appeal, found that the appellant's suit was misconceived and not maintainable in law and dismissed the appeal with costs.

[328] [1989] TLR 148.

Chapter Eight
SOLVING MATRIMONIAL PROBLEMS: PROCEDURES FOR SEPARATION AND DIVORCE

8.1 Introduction

We have seen in the previous Chapter that matrimonial problems are part and parcel of the marriage institution. Whenever they occur parties to the marriage try to settle them accordingly. Settlement of marital problems may, in some cases, result into rescuing breakdown of the marriage or may result into breaking down of the marriage. Therefore, this Chapter discusses the two end-results of settling matrimonial problems.

8.2 Settlement of Matrimonial Problems with a View to Rescuing the Marriage

This approach aims at rescuing the marriage institution. It entails parties seeking arbitrators to amicably reconcile them. In Tanzania there are many marriage settlement mechanisms, ranging from traditional leaders, elders, relatives, religious bodies to government authorities. So, it was on this approach that the Act made a mandatory requirement for anyone seeking to solve matrimonial mishaps to make reference to the Marriage Conciliation Board.[329] To this end, section 101 of the Act provides that,

> 101. -No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a (Marriage Conciliation) Board[330] and the Board has certified that it has failed to reconcile the parties.

According to section 106(2): 'Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104." However, 'such certificate shall not be required in cases to which the proviso to section 101 applies.'

8.2.1 Composition of the Board

Under section 103(1) of the Act, 'every Board shall consist of a Chairman and not less than two and not more than five other members.' According to section 103(2) the Board having jurisdiction for the purposes of this Act shall be–

> (a) the Board or any one of the Boards established for the ward within which the husband or intended husband resides, or, where the husband or intended husband is not resident in Tanzania, the Board established for the ward within which the wife or the intended wife resides;

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[329] Marriage Conciliation Boards are established under section 102 of the Act, and they include ward marriage conciliation boards, religious boards like the Muslim Council of Tanzania (popularly known as BAKWATA – *Baraza la Waislamu Tanzania*).

[330] See, *Marry Mediatrics Karugendo v. Warioba Kikanga*, High Court of Tanzania at Dar es Salaam, P.C. Civil Appeal No. 51 of 2000 (unreported).

> (b) where both parties belong to the same community, the Board, if any, designated to be the Board for that community.[331]

8.2.2 Proceedings of the Board

Section 104 of the Act sets out the proceedings of the Board by providing that a 'Board to which a matrimonial dispute or matter has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn the proceeding from time to time.'[332] The Board may also, if it deems it necessary, 'require the attendance of any person before it.' And in doing so, 'it may by notice in writing require such person to attend before the Board on the date and at the time and place specified in such notice.'[333] Failure to attend the Board's request given under notice may entitle the Board to 'apply to a primary court or a district court for a summons to be issued to such person to appear before the Board on the date and at the time and place specified in such summons,'[334] which summons has 'the same effect as a summons issued by a court requiring the attendance of a witness in any suit, and any non-compliance with such summons shall constitute a contempt of court and be punishable accordingly.'[335]

8.2.3 Certificate of the Board to the Court

According to section 104(5) of the Act, if the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it must issue a certificate setting out its findings. The Board may also 'append to its certificate such recommendations relevant to the matter or dispute referred to it as it may think fit.'[336]

8.2.4 Prohibition of Advocates before the Board

It is interesting that section 104(8) of the Act no bars advocates to appear or act for any party in any proceeding before a Board. It also bars parties to the Board to 'be represented by any person other than a member of his or her family, without leave of the Board.'

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[331] However, under section 104(7) of the Act: 'The proceedings of a Board shall not be invalid by reason only of the fact that it did not have jurisdiction under subsection (2) of section 103.'
[332] Ibid, section 104(1).
[333] Ibid, section 104(2).
[334] Ibid, section 104(3).
[335] Ibid, section 104(4).
[336] Ibid, section 104(6).

Therefore, from the manner through which proceedings in the Board are conducted, it is apparent that it is not the intention of the Board to facilitate marriage breakdown. But its main essence is to reconcile parties so that they could go back home happy; and with new expectations for making a lasting marriage. This presupposes the principle that a marriage may only be dissolved by a court of law.[337]

8.3 Settlement of Matrimonial Problems by Dissolving the Marriage

8.3.1 Circumstances Where Reference to the Board is Immaterial

The discussion in the foregoing part suggests that reference of a matrimonial dispute to the Board is only meaningful where its end result is positive or leads to rescuing the marriage. However, there are special cases where matrimonial difficulties may render reference to the Board for reconciliation impracticable. The circumstances are spelt out in the proviso to section 101 of the Act, which include a case 'where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse.'[338] Another circumstance is 'where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition.'[339] If the respondent has been required to appear before the Board and has wilfully failed to attend, the requirement for obtaining the Board's certificate may also be immaterial.[340]

Reference to the Board may also be waived 'where the respondent is imprisoned for life or for a term of at least five years or is detained under the Preventive Detention Act and has been so detained for a period exceeding six months.'[341] Another circumstance is 'where the petitioner alleges that the respondent is suffering from an incurable mental illness.'[342] Finally, reference to the Board may be waived 'where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.'[343] In *Khan v. Khan*[344] the Board

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[337] Ibid, section 107. Also see *John Kahamila v. Paschal Jonathan and Hilda Hosia* [1986] TLR 104.

[338] Ibid, section 101(a). Also see, *Mariam Tumbo v. Harold Tumbo*, op. cit; *Athanas Makungwa v. Darini Hassani*, op. cit; and *Abdallah Hamid Mohamed v. Jasnena Zaludova*, op. cit.

[339] Ibid, section 101(b).

[340] Ibid, section 101(c).

[341] Ibid, section 101(d).

[342] Ibid, section 101(e).

[343] See, *Halima Athumani v. Maulidi Hamisi* [1991] TLR 179.

[344] 1973 LRT no. 57.

was duly invited to deal with the matrimonial difficulty. Twice the Board met and twice it found itself without muscle, both as regards the presumed stature of the respondent and the complexity of the difficulty, to attempt any reconciliation. It then remitted the difficulty to the court per Exh. P6. In this case, Onyiuke, J. held that the term "impracticable" in paragraph (f) of section 101 is not to be limited to physical impracticability. He then went to say:

> The discretion conferred on the court by paragraph (f) of Section 101 should ... only be sparingly exercised and then only in circumstances where it is clear beyond any reasonable doubt that a reference to the board is not a practical proposition. This may be due to the fact that the circumstances of the case are such that no expectation can be entertained that the Board will be able to achieve any useful results and that any reference to it will be so much waste of time and effort. It is impossible to predicate all the circumstances which will make a reference to the Board impracticable. Were it not so, the legislature would have given an exhaustive list of exceptions.[345]

In *Getrude Constantine Mandanda v. Paul S. Mwaifuge*[346] Bubeshi, J. (as she then was) held that,

> In my firm view, reference to matrimonial boards were meant to act as a stepping stone before parties cold (sic) the divorce proceedings. That marriage being a sacred institution should not easily interfered with. But where a court is satisfied the circumstances of the case are such that reference to such a board would come to naught, the same ought to exercise that discretion and hold that such reference can be dispensed with.

8.3.2 Divorce Proceedings in Courts of Law

(a) Jurisdiction of Courts

The jurisdiction of courts to determine matrimonial disputes is spelt out in section 76 of the Act, which concurrently vests original jurisdiction in matrimonial proceedings in the High Court, a court of a Resident Magistrate, a District Court and a Primary Court. But under section 75 of the Act a Primary Court shall have jurisdiction to entertain a suit for a claim of damages for adultery, where the parties were married in accordance with the customary law or Islamic law. If the parties contracted a civil marriage or Christian marriage

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[345] See, also, *Mariam Tumbo v. Harold Tumbo*, op. cit.

[346] High Court of Tanzania at Dar es Salaam, Civil Revision No. 21 of 2000 (unreported).

then they have to file a suit for claim of damages for adultery at the District Court.

The statutory provision in section 75 of the Act was given judicial consideration by Mwalusanya, J. (as he then was) in *John Kahamila v. Paschal Jonathan and Hilda Hosia*.[347] This was an action for damages for adultery involving the second respondent who had contracted a Christian marriage with the appellant. The action was commenced in the Primary Court. The Court held that under section 75 of the Act primary courts have no jurisdiction to entertain claims for adultery where the parties involved contracted a civil marriage or a Christian marriage; thus, the appellant, in this case, took his claim to the wrong court.

(b) Conditions Precedent for a Petition for a Declaratory Decree

Under section 77 of the Act conditions for petition for divorce and separation are set out as follows:

> 77. - (1) Any person may petition the court for a declaratory decree–
> (a) if he or she is domiciled in Tanzania;
> (b) if he or she is resident in Tanzania;
> (c) where the decree sought is as to the validity of a ceremony which took place in Tanzania and purported to be a marriage.
>
> (2) Any person may petition the court for a decree of separation if he or she has been resident in Tanzania for at least one year immediately preceding the commencement of the proceeding and is present in Tanzania at the time of the presentation of the petition.

The provisions of section 77(3) allows any person to petition the court for a decree of annulment or a decree of divorce if he or she is domiciled in Tanzania; or she has been resident in Tanzania for at least one year immediately preceding the presentation of the petition. However, 'in the case of a petition for annulment under subsection (2) of section 96[348] such petition may be lodged by a party who is resident in Tanzania at the time when such petition is lodged, for whatever duration such party may have been resident in Tanzania.' The law also allows any person to apply to the court for maintenance, or for custody of infant children or for any other matrimonial relief if (a) he or she is domiciled in Tanzania; (b) he or she is resident in Tanzania at the time of the application; or (c) both parties to the marriage are present in Tanzania at the time of the application.[349]

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[347] Op. cit.

[348] Section 96 of the Act provides for the power of the court to annul a voidable marriage.

[349] Ibid, section 77(4).

Generally, any court in Tanzania has 'jurisdiction to entertain any of the proceedings referred to in this section notwithstanding that the marriage was contracted outside Tanzania.'[350]

(c) Transfer of Matrimonial Proceedings

The law also provides room for transfer of proceedings where a matrimonial proceeding has been instituted in a magistrate's court. This may take time 'at any time before judgment, for the High Court, on the application of either of the parties or of the magistrate or on its own motion to transfer the proceeding to itself or to some other magistrate's court.'[351] The law also empowers a magistrate hearing a matrimonial proceeding to *state* the case at any stage of the proceeding 'in the form of a special case for the opinion of the High Court or any question of law arising in the proceeding.'[352] Rule 40 of the Law of Marriage (Matrimonial Proceedings) Rules, 1971, lays down the procedures on how to state a case to the High Court.[353]

(d) Power of the Court to Grant Injunctions in Matrimonial Proceedings

The conditions precedent to grant of injunctions in matrimonial proceedings are set out in section 138(1) of the Act, which provides that,

> 138.- (1) Where–
> (a) any matrimonial proceeding is pending;
> (b) any order made under section 114[354] has not been complied with;
> (c) an order for maintenance has been made under section 115 or section 130 and has not been rescinded; or
> (d) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or infant child, the court shall have power on application–
> (i) *not applicable.*
> (ii) to grant an injunction preventing that disposition if it is satisfied that the disposition of property is intended to be made with any such object.[355]

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[350] Ibid, section 77(5). In *Abdallah Hamid Mohamed v. Jasnena Zaludova,* op. cit, the court held that: 'Parties in a matrimonial suit are subject to the jurisdiction of the court of the country of their domicile.'
[351] Ibid, section 78.
[352] Ibid, section 79. Also, see, *Fatuma Mohamed v. Saidi Chikamba* [1988] TLR 129.
[353] G.N. No. 136 of 1971. Also, see, *Fatuma Mohamed v. Saidi Chikamba,* ibid.
[354] Section 114 of the Act provides for powers of the court to order division of matrimonial assets.
[355] See, *Paola Abdullah v. Mohamed Norman Bin. Abdullah,* op. cit.

In practice, such injunctive orders are granted only where there are matrimonial proceedings pending in court. In *Shillo Mzee v. Fatuma Ahmed*[356] Sisya, J. (as he then was) held that an injunction under section 138(1) of the Act can only lie where a matrimonial proceeding is pending before the court making the order. In this case, the respondent filed a petition for divorce before a Magistrates' Court without a certificate from the Marriage Conciliation Board. Meanwhile, the magistrate issued an order of injunction restraining the appellant from disposing of the matrimonial assets pending the settlement of the dispute. The court held that in the absence of a certificate from a conciliatory board a petition for divorce becomes premature and incompetent. His Lordship, further, held that,

> Having declared that the petition was prematurely filed there was no longer any matrimonial proceeding pending before the Court. The Court was thus not competent to make the order of injunction.

The power to issue injunctions in matrimonial proceedings also extends to acts molestation as per section 139 of the Act, which provides that,

> 139. - The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree of annulment, separation or divorce, to order any person to refrain from forcing his or her company on his or her spouse or former spouse and from other acts of molestation.

This section is founded in the common law principle of family law, which states that an injunction restraining a spouse from entering the matrimonial home may be granted where it is convenient and just. At common law, where a petition for divorce is pending, one spouse may be restrained from entering his or her matrimonial home to perpetrate the other spouse acts of molestation. In *Silverstone v. Silverstone*,[357] for instance, it was held that the wife had a right to be in the matrimonial home while the petition was pending as the court had power to protect that right and to prevent the husband from occupying the home due to acts of molestation and cruelty. However, as was held in B*oyt v. Boyt*,[358] the jurisdiction of the court in granting injunction must be exercised with great care, particularly where it threatens to lead to breaking up the matrimonial home. As per Branley's *Family Law*,[359]

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[356] [1984] TLR 112.
[357] [1953] All E.R. 556.
[358] [1948] 2 All E.R. 436.
[359] Branley's *Family Law*, 6th Edn., 1981, referred to in *Paola Abdullah v. Mohamed Norman Bin Abdullah*, op. cit.

> In the end the court must balance the hardship that one spouse would suffer if he were evicted against the hardship that the other would suffer if he were permitted to remain. The health, behaviour and financial position of each spouse are clearly relevant, and it is important not to overlook the difficulty that a husband may face in finding alternative accommodation.

This principle was, indeed, deduced from the case of *Thompson v. Thompson*[360]and referred to with approval by Muro, J. (as she then was) in *Paola Abdullah v. Mohamed Norman Bin Abdullah*,[361] where the learned Judge refused to grant an injunction based on hearsay. In *Paola Abdullah*'s case, the petitioner (wife) had applied to the High Court for injunction against the respondent, but the learned Judge was of the view that,

> The pleadings of this case show that the respondent husband is a foreigner, a Malaysian. He is unemployed and has been so since they were married. He follows his wife wherever she is posted in diplomatic missions. His residential Visa has expired and continues to live in Tanzania as a result of my order. … (Thus) I regret to say that I feel constrained to order a husband into the street solely on hearsay evidence. This is a drastic order and I could only make if I have compelling evidence of cruelty and molestation. Such evidence is very much wanting here.

8.3.3 Divorce Decree on Consent

It is the law that where the parties have agreed on sufficient issues of fact and law raised in their pleadings, the court may pronounce judgement and order accordingly. So, where the parties to a divorce matter agrees on fact that there are sufficient grounds evidencing that their marriage has irreparably broken down, the court would just have to issue a decree of divorce on consent. This procedure is applied under the Civil Procedure Code, 1966, which is applicable to matrimonial proceedings vide Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules 1971 (the Rules). This Rule provides to the effect that: "The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code, 1966." Under Order XV Rule 1 of the Civil Procedure Code, 1966, it is provided that,

> Where at the first hearing of the suit it is apparent that the parties are not at issue on sufficient questions of law or of fact, the court may at once pronounce judgement.

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[360] [1975] 2 All E.R. 208.
[361] Op. cit.

In *Joseph Warioba Butiku v. Perucy Muganda Butiku,*[362] for instance, both parties had, by their respective counsel, agreed on more than sufficient issues of fact and of law raised in their pleadings. The petitioner in his petition, and the Respondent in her answer, established that the marriage had irreparably broken down, as both assert it had, and each spouse was praying for a divorce. The Court, consequently, held that,

> I have not the slightest hesitation in formally finding that the marriage has in fact and in law irreparably broken down. Accordingly it is hereby ordered that a decree absolute dissolving the marriage is to issue.

As such, after granting a decree of divorce, the court proceeds to issue consequential orders of division of matrimonial property, custody and maintenance.

8.3.4 The Manner of Dissolving an Islamic Marriage

There is a slight difference in respect of dissolving an Islamic marriage to a civil or customary marriage. Under section 107 (3) of the Act, where it is proved to the satisfaction of the court that–

> (a) the parties were married in Islamic form;
> (b) a Board has certified that it has failed to reconcile the parties; and
> (c) subsequent to the granting by the Board of a certificate that it has failed to reconcile the parties, either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law,
>
> the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce.

In *Halima Athumani v. Maulid Hamis,*[363] Mwalusanya, J. (as he then was) held that,

> Under the Law of Marriage Act, there are two ways in which Moslem spouses may seek dissolution of the marriage. The first method is the *fashk* divorce as provided in section 107(1) and (2) of the Law of Marriage Act whereby a Moslem, like any other spouse, sets out to prove that the marriage is broken down beyond repair by either cruelty, adultery, etc. This method applies to all spouses who are Moslems or non-Moslems.

[362] [1987] TLR 1.
[363] Op. cit.

According to His Lordship, the second method is for Moslems only, 'which makes it easier for them to secure divorce.' It is provided under section 107(3) of the Act that - subsequent to the granting by the Board of a certificate that it has failed to reconcile the parties either of them has done any act or thing which would, 'but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law.'

> Thus if the Board has failed to reconcile the parties, a Moslem spouses can proceed to demand a *Khului* before a Sheikh (a wife securing her release through payment of a sum of money) or she can ask the Sheikh to grant divorce *mubaraat* (mutual consent of spouses to divorce).

His Lordship was of the considered opinion that,

> For a male Moslem he can issue three *talaks*. After getting the *Khului*, or divorce *mubaraat* or three *talaks*, then the concerned Moslem merely goes to court to have his divorce officially registered without requiring him or her to prove that the marriage is irretrievably broken down. Therefore the learned District Magistrate should have so advised the parties. I hope in future she will not fail to advise the Moslem women, the easy way of securing divorce.

8.4 The manner of Instituting Matrimonial Proceedings

Under section 81(a) of the Act, every proceeding for a declaratory decree or for a decree of annulment, separation or divorce, must be instituted by a petition. According to section 81(b),

> [E]very application for maintenance, or for custody of children, or for any other matrimonial relief whatsoever shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be by summons in chambers.

Section 82 of the Act makes it lawful for the petitioner 'to include in any petition for matrimonial relief a prayer in the alternative for any other matrimonial relief.' The respondent to a petition for matrimonial reliefs may also, by virtue of the provisions of section 83 of the Act 'include in his or her answer to the petition a cross-prayer for the same or any other form of matrimonial relief and the court shall have power to grant any relief on such cross-prayer that it might have granted on a petition for the relief sought.'

Under section 84 of the Act, all petitions in matrimonial proceedings must be heard in open court. However, the court has power, 'in its discretion, in exceptional circumstances, to order that the public be excluded from any hearing.' But where the court questions an infant as to his or her wishes regarding custody; it must do so in chambers. This happens when the court complies with the requirements of paragraph (b) of subsection (2) of section 125 of the Act.

8.5 Parties to a Matrimonial Petition

In terms of section 105 of the Act,

> 105.- (1) No person shall be made a co-respondent to a petition for a decree of separation.
> (2) Where a petition for a decree of divorce includes an allegation of adultery on the part of the respondent, the petitioner, may, and if so directed by the court shall, make the person with whom the adultery is alleged to have been committed a co-respondent.

8.6 Matrimonial Petitions

8.6.1 Contents of a Matrimonial Petition

The contents of a petition for a decree of separation or divorce are set out in section 106(1) of the Act.[364] Accordingly,

> 106.- (1) Every petition for a decree of separation or divorce shall contain–
> (a) particulars of the marriage between the parties and the names, ages and sex of the children, if any, of the marriage;
> (b) particulars of the facts giving the court jurisdiction;
> (c) particulars of any previous matrimonial proceedings between the parties;
> (d) a statement of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;
> (e) where the petitioner has been guilty of any marital misconduct, an admission of such misconduct;
> (f) the terms of any agreement regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and
> (g) particulars of the relief sought.

According to subsection (2) of section 106 of the Act, every petition for a decree of divorce must be accompanied by a certificate by a Marriage Conciliation Board. The said certificate must be issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104 of the Act. However, the said certificate is not required in cases to which the proviso to section 101 applies.

[364] Also, see, Rule 18(1) of the Rules.

In case the petition is being preferred for a decree of divorce which includes an allegation of adultery, a prayer may be included to the effect that the adulterer be enjoined as a co-respondent and be condemned in damages in respect of the alleged adultery. However, 'a prayer for damages for adultery shall not be included in a petition for divorce if damages for the alleged adultery have already been claimed in a suit brought under section 72.' [365]

Under Rule 10(2) of the Rules,

> (2) Every petition shall be signed by the petitioner and shall contain a statement by the petitioner verifying the facts of which he has personal cognizance and of the facts which he believes to be true by reason of any information in his possession or otherwise.

Under Rule 19(1) of the Rules, where a petition for divorce or separation is presented 'the court shall, if it is satisfied that the petition does not comply with the provisions of section 106 of the Act or of the provisions of rule 18, reject the petition.' Where the court is satisfied that the petition complies with the provisions of section 106 of the Act and of rule 18, 'the court shall admit the petition and direct that a notice of the petition together with a copy of the petition be served upon the respondent and the co-respondent, if any.'[366]

8.6.2 Notice of Petition

Rule 20 of the Rules states that every notice of petition required to be served on a respondent or a co-respondent must be in the prescribed form (i.e., Form 5). According to Rule 21,

> 21.- (1) The petition shall not proceed to hearing unless the respondent and every co-respondent (if any) has entered an appearance or unless the court is satisfied by an affidavit or otherwise that the respondent and every co-respondent (if any) has been served with a notice of petition.
>
> (2) After service of the petition has been effected, a certificate of service in the prescribed form shall be filed.

8.6.3 Other Pleadings in Matrimonial Proceedings

There are also other pleadings to be filed in a matrimonial proceeding apart from a petition. These pleadings are set out in Rule 23 of the Rules. Under Rule 23(1) it is provided that: "Where a respondent enters an appearance and advises the

[365] Section 106(3) of the Act.
[366] Rule 19(2) of the Rules.

Registrar that he intends to resist the petition, the Registrar shall allow the respondent or, as the case may be, the co-respondent, such time, not being less than two weeks or more than six weeks, in which the respondent or, as the case may be, the co-respondent, may file an answer." In terms of Rule 23(2), where the Registrar 'allows time to the respondent or the co-respondent to file an answer he may, on application made by the petitioner, allow the petitioner reasonable time to file a reply to the answer.'

Under Rule 23 (3) of the Rules, every answer must contain 'a concise statement of facts upon which the respondent, or as the case may be, the co-respondent, will rely for his defence.' Under paragraph (4) of Rule 23 it is provided that:

> (4) It shall not be sufficient for a respondent or a co-respondent in his answer to admit generally the grounds alleged by the petitioner, but the respondent or, as the case may be, the co-respondent, must deal specifically with each allegation of fact of which he does not admit the truth.

According to paragraph (5) of Rule 23, 'every reply must contain a concise statement of facts upon which the petitioner will rely to counter the allegations made in the answer.' The answer and reply thereto 'must be signed by the person on whose behalf it is lodged and must contain a statement by such person verifying the facts alleged in the answer or, as the case may be, the reply, of which he has personal cognizance and the facts which he believes to be true by reason of any information in his possession or otherwise.'[367] According to Rule 23(7) of the Rules,

> (7) A copy of every answer and of every reply filed in any matrimonial proceeding shall be served on each of the other parties to the proceeding.

Under Rule 24, the 'court may, if sufficient cause is shown, allow any party at any time before the conclusion of the trial of a petition to amend his pleading, subject to such order as to costs as the court may think fit to make.' Where a party has failed to file any pleading within the time allowed therefor by the Registrar, 'the court may on application made by such party grant leave for the pleading to be filed out of time.'[368]

8.6.4 Requirement to Furnish Particulars

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[367] Ibid, Rule 32(6).

[368] Rule 25 of the Rules.

The Rules allow any party to require, by letter, any other party 'to furnish particulars of any allegation or other matter pleaded, and if such other party fails to furnish such particulars within a reasonable time, the party requiring the particulars may apply to the court for an order that particulars be given.'[369] All particulars, whether given in pursuance of an order or otherwise, 'shall be filed together with an affidavit in support thereof within eight days of being furnished to the party requiring them.'[370]

8.6.5 Discovery in a Matrimonial Proceeding

The Rules allow a party to a matrimonial proceeding, by leave of the court, to deliver interrogatories in writing for the examination of any opposite party.[371] Such interrogatories must, unless the court otherwise directs, be answered by affidavit.[372] According to Rule 27 (3),

> 27.- (3) A party to a matrimonial proceeding may apply for an order for discovery of documents by an opposite party and such opposite party may be ordered to make such general or limited discovery on oath as the court may think fit.

8.7 Non-appearance of Parties in a Matrimonial Proceeding

Under Rule 28(1) of the Rules, the provisions of Order IX of the Civil Procedure Code, 1966, which relate to the consequences of non-appearance of parties to a suit, apply *mutatis mutandis* to the non-appearance of any party to a matrimonial proceeding on the day fixed for the entering of an appearance or on any day on which the petition is called on for hearing. However, under this Rule, 'in no case shall a court pass a decree in favour of the petitioner for the reliefs suggested by him by reason only of the non-appearance of the respondent or co-respondent.' The Rule also provides that 'in every such case the court shall proceed to hear the petition *ex-parte* and determine the issue involved on the basis of the evidence adduced by the petitioner.'

According to Rule (2) in any case in which a decree is passed *ex-parte* against a respondent or a co-respondent, she/he may, at any time before the expiry of forty-five days from the date of the decree, apply to the court by which the decree was passed for an order to set it aside. If she/he satisfies the court that notice of petition was not duly served upon her/him or that she/he was

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[369] Ibid, Rule 26(1).
[370] Ibid, Rule 26(2).
[371] Ibid, Rule 27(1).
[372] Ibid, Rule 27(2).

prevented by any sufficient cause from entering an appearance or from appearing on any subsequent date when the petition was called on for hearing, 'the court shall make an order setting aside the decree against him upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the hearing of the petition:

> Provided that where a decree was passed *ex-parte* both against the respondent and the co-respondent, and the application is made by the co-respondent only for the setting aside of the decree, the court may, if it is of the opinion that the decree is of such a nature that it cannot be set aside as against the co-respondent only, order that the decree be set aside as against the respondent as well.

In terms of paragraph (3) of Rule 28, no decree can be set aside on any application made under paragraph (2) unless notice thereof has been served on the petitioner. Under paragraph (4) of this Rule, it is provided that: 'where a co-respondent fails to enter an appearance or to appear on the day on which the petition is called on for hearing, the court shall not pass any decree *ex-parte* against the co-respondent until after the hearing of the petition as against the respondent.'

8.8 Procedure for Hearing in Matrimonial Proceedings

The procedure on hearing of a matrimonial proceeding is provided for in Rule 29 of the Rules. Under paragraph (1) it is laid down that: 'when all the pleadings in a matrimonial proceeding have been filed, the Registrar shall fix a date for the trial of the petition.' Then, the court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code, 1966. So, the provisions of that Code which relate to examination of parties, production, impounding and return of documents, settlement of issues, summoning an attendance of witnesses, adjournments, hearing of the suits and examination of witnesses, affidavits, judgments and decrees apply *mutatis mutandis* to a trial of a matrimonial petition.[373]

8.9 Evidence in Matrimonial Proceedings

8.9.1 Admissible Evidence

According to section 85 of the Act, evidence of misconduct by a husband or a wife 'shall not be inadmissible in any matrimonial proceeding on the ground of connivance by the aggrieved spouse but no person shall be entitled to any relief by reason only of misconduct at which he or she has connived.' Equally, under

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[373] Rule 29(2) of the Rules.

section 86, 'evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground that the misconduct was condoned by the aggrieved spouse.'

When hearing a petition for a decree of divorce, the court may admit and found its decisions, wholly or partly, on evidence which is substantially the same as that on which a decree of separation has previously been granted.[374]

8.9.2 Inadmissible Evidence

In terms of section 87 of the Act, the court has 'power to dismiss any petition or application or make such other order as it may think fit, including an order as to costs, in any case where it is satisfied that the petitioner or applicant has attempted to deceive the court in any material respect or has wilfully failed to make a full disclosure of all relevant facts.' At the same time, 'in any case where there is a cross-prayer or a cross-petition for matrimonial relief, the court shall not grant decrees in favour of both the petitioner and of the respondent, except as regards any ancillary relief.'[375]

8.10 Costs in Matrimonial Proceedings

According to section 90(1) of the Act, costs in matrimonial proceedings are awarded in the discretion of the court. However, 'a woman shall not be ordered to pay the costs of her husband or former husband unless the court is satisfied that she has sufficient means of her own to make such an order reasonable.' Under section 90(2) of the Act,

> (2) At any stage of a matrimonial proceeding, the court may, in its discretion, order a man to furnish security for the payment of the costs in that proceeding of his wife or former wife.

8.11 Recognition of Decrees of Foreign Courts

Foreign decrees in any matrimonial proceedings are recognised in courts in Tanzania under section 91 of the Act, which provides that,

> 91.- Where a court of competent jurisdiction in any foreign country has passed a decree in any matrimonial proceeding, whether arising out of a marriage contracted in Tanzania or elsewhere, such decree shall be recognised as effective for all purposes of the law of Tanzania–

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[374] Ibid, section107(4).

[375] Ibid, section 88.

> (a) if the petitioning party was domiciled in that court or had been resident there for at least two years prior to the filing of the petition; or
>
> (b) being a decree of annulment or divorce, it has been recognised as effective in a declaratory decree of a court of competent jurisdiction in the country of domicile of the parties or either of them.

Section 92 recognises extra-territorial divorces to the effect that,

> 92. - Where any person has obtained a divorce, otherwise than by decree of a court in Tanzania, in any foreign country, the divorce shall be recognised as effective for all purposes of the law of Tanzania if–
>
> (a) it was effective according to the law of the country of domicile of each of the parties at the time of the divorce; or
> (b) it has been recognised as effective in a declaratory decree of a court of competent jurisdiction in the country of domicile of the parties or either of them.

8.12 Special Provisions Regulating Proceedings in Primary Courts

Section 93 of the Act provides that: 'where any matrimonial proceeding is instituted in a primary court it may be instituted, tried and disposed of in the same manner as any civil proceeding instituted in a primary court and the provisions of the Magistrates' Courts Act, and of any rules made thereunder regulating the institution, hearing and disposal of a proceeding of a civil nature in primary courts, shall apply, mutatis mutandis, to every such matrimonial proceeding.'

8.13 Duties of the Court on Petition for Separation or Divorce

Under section 108 of the Act, the main duties of a court hearing a petition for a decree of separation or divorce are, first, 'to inquire, so far as it reasonably can, into the facts alleged and to consider whether those facts, or such of them as are proved, show that the marriage has broken down.' Second, 'to inquire into the arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable.' Third, 'to inquire into the arrangements made or proposed as regards the maintenance and custody of the infant children, if any, of the marriage and to satisfy itself that such arrangements are in the best interests of the children.'[376] Finally, 'in the case of a petition for divorce, where the court is satisfied that the marriage has broken down, to consider whether the breakdown of the marriage is irreparable.'

[376] Also, see, *Fatuma Mohamed v. Saidi Chikamba,* op. cit.

8.14 Power of the Court on Claims of Damages for Adultery

The power of the court to grant damages for adultery is provided for in section 109 (1), which stipulates categorically that:

> 109.- (1) Where, in a petition for divorce, damages for adultery have been claimed against a co-respondent–
>
> (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or
>
> (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and the co-respondent has been proved, the court may award the petitioner damages against the co-respondent.

In assessing damages awarded against the co-respondent in a petition for adultery, the court shall be guided by the provisions of section 74 of the Act,[377] which provides to the effect that,

> 74.- (1) Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element.
>
> (2) In assessing such damages, the court shall have regard–
> (a) to any relevant custom of the community to which the parties belong; and
> (b) in cases of adultery, to the question whether husband and wife were living together or apart.[378]

Under section 109(3) of the Act, the court 'may award damages against a co-respondent under this section notwithstanding that the petition is, as against the respondent, dismissed or adjourned.' In terms of subsection (4) of section 109,

> 109.- (4) The court shall have power, when awarding damages under this section, to direct that such damages, or any part of them, be vested in trustees upon trust to apply the income thereof for the benefit of the infant children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of that maintenance, and subject thereto in trust for the petitioner.

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377 Section 109 (2) of the Act.

378 Also, see, *Hassani Kabadili v. Joakimu Mpanda,* op. cit.

8.15 Power of the Court to Grant a Decree of Separation or Divorce

The power of the court to grant a decree of separation or divorce is spelt out in section 110(1) of the Act. This section provides in lucid terms that,

> 110.- (1) At the conclusion of the hearing of a petition for separation or divorce, the court may–
>
> > (a) if satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce,[379] as the case may be, together with any ancillary relief; or
> >
> > (b) if not so satisfied, dismiss the petition, and where there is a cross-petition or cross-prayer the court may if satisfied as aforesaid, grant a decree on the petition or on the cross-petition or cross-prayer as it may deem fit with any ancillary relief to either party or, if not so satisfied, dismiss both the petition and the cross-petition or cross-prayer.

In terms of subsection (2) of section 110, 'where the petition or the cross-petition or cross-prayer, if any, is for a decree of divorce, the court may adjourn the proceedings for such period, not exceeding six months, as the court may think fit, for further inquiries or further attempts at reconciliation to be made and may direct that inquiries or attempts be made by a Board.' Under subsection (3) of section 110, where a decree of separation or divorce is granted, it must include provision for the maintenance and custody of the infant children, if any, of the marriage. The court may also 'grant a decree which includes an interim order as to custody, reserving its final order pending further inquiries as to the most satisfactory arrangements that can be made.'

8.16 The Legal Effect of a Decree of Separation

Under section 111 of the Act the legal effect of a decree of separation is to 'relieve the parties of the duty to cohabit and to render each other help and companionship and, except so far as the decree otherwise provides, of the duty to maintain each other, but shall not dissolve their marital status.' As per Lugakingira, J. (as he then was) in *Doto Malamla v. Lukelesha Lyaku*,[380] separation, whether voluntary or by a court order, however long it may have continued, is not an automatic license to divorce. However, under section 107(2)(f) of the Act, voluntary separation or separation by a decree of the court, where it has

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[379] See, for instance, *John Kahamila v. Paschal Jonathan and Hilda Hosia*, op. cit.

[380] [1981] TLR 29.

continued for at least three years, may be used as evidence that marriage has irreparably broken down.

According to the decision in *Doto Malamla v. Lukelesha Lyaku*, a decree of separation is not a transitory decree but a complete and independent decree which cannot be granted for a specific period. But the court can grant a decree of separation in lieu of divorce and vice versa only where the petitioner has prayed in the alternative.[381]

8.17 Power of the Court to Set Aside or Vary Decrees of Separation

The law confers power upon the court to set aside a decree of separation on the joint application of the parties.[382] Under the law the court 'may set aside a decree of separation on the application of either party where it is satisfied that the decree was obtained as the result of misrepresentation or mistake of fact.'[383] In so doing, the court may 'vary the terms of the decree of separation on the application of the parties or either of them where there has been any material change in the circumstances.'[384]

8.18 The Legal Effect of a Decree of Divorce

Under section 112(1), a decree of divorce dissolves the marital status of the parties as from a date thirty days from the date of the decree, 'if no appeal or notice of appeal, as the case may be, has been filed within that time, or in any other case, on the final determination of the appeal or, where a second or subsequent appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.' Where a decree of divorce is granted to a Muslim spouse, pursuant to the provisions of subsection (3) of section 107 of the Act, the marriage must, unless the court otherwise directs, 'be deemed to have been dissolved as from the date when the dissolution would, but for this Act, have taken effect in accordance with the Islamic law.'[385]

However, a marriage which has been dissolved is not an impediment to the subsequent marriage of either of the parties thereto.[386] At the same time, the parties may contract another subsequent marriage if they so wish.

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[381] Section 82 of the Act.
[382] Ibid, section 113(1).
[383] Ibid, section 113(2).
[384]Ibid, section 113(3).
[385] Ibid, section 112(3).
[386] Ibid, section 112(2).

8.19 Declaratory Decrees

8.19.1 Power of the Court to Grant Declaratory Decrees

The Court also has power to grant declaratory decrees under section 94(1) of the Act. This section provides that,

> 94.- (1) In any proceedings under this Part, the court may, on the petition of any interested person, grant a declaratory decree, with or without consequential relief, and no such proceedings shall be open to objection on the ground that it is a declaratory decree that is sought or that no consequential relief is claimed.

Subsection (2) of section 94 mentions interested persons who can petition in the court for a declaratory decree. They include, firstly, any person who was a party to a ceremony purporting to be a marriage, whether such ceremony took place in Tanzania or any other country, in which case the court may 'grant a decree declaring the ceremony to have been or not to have been a valid marriage for the purposes of the law of Tanzania.' Secondly, any person who desires to establish that he or she or either of his or her parents was born legitimate, in which case the court may 'grant a decree declaring that the parents or, as the case may be, the grandparents of such person were lawfully married.'

Thirdly, any person who claims that his or her marriage was determined under Islamic or customary law prior to the coming into force of this Act, in which case the court may 'grant a decree declaring that the marriage was or was not so determined. Fourthly, any person who claims that his or her marriage has been annulled or dissolved under the law of any country other than Tanzania, in which case the court may grant a decree declaring that, for the purposes of the law of Tanzania, the marriage was or was not so determined. And, finally, any person who can show reasonable grounds for supposing that his or her spouse is dead, in which the court may 'grant a decree declaring that such spouse is presumed to be dead, or may, as the case may be, dismiss the petition.'

8.19.2 Legal Effect of a Declaratory Decree

Under section 95(1) of the Act, a decree declaring that one of the parties to a marriage is presumed to be dead, if that party is not in fact dead, operates 'to determine the marriage as from a date ninety days from the date of the decree, where no appeal or notice of appeal, as the case may be, has been filed within that time, or in any other case on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.' According to subsection (2) of section 95 any other declaratory decree or the decision on appeal from any such decree 'shall be conclusive as between, and binding upon, all persons who were parties to the proceedings or were served with notice thereof and all persons claiming under any such persons.'

8.20 Decree of Annulment

8.20.1 Power of the Court to Annul a Voidable Marriage

Section 96(1) of the Act confers upon the court power to grant a decree of annulment in respect of any marriage which is voidable under the provisions of section 39. However, where the petition is founded on an allegation that at the time of the marriage the respondent was subject to recurrent attacks of insanity or epilepsy or was suffering from venereal disease in a communicable form or was pregnant by a person other than the petitioner, the court would not grant a decree. While granting such a decree the court must be satisfied, first, that 'the petition was filed within one year of the date of the marriage.' Secondly, that 'at the time of the marriage the petitioner was ignorant of the fact alleged'. Thirdly, that 'marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner of that fact.' And, fourthly, that 'where the petition is founded on an allegation that at the time of the marriage the intended wife was below the age of eighteen years and that consent as required by section 17 was not given, the court shall not grant a decree unless it is satisfied that the petition was filed before that party attained the age of eighteen years.'

The court also has power, in terms of subsection (2) of section 96 of the Act, 'to grant a decree of annulment in respect of any marriage contracted outside Tanzania or in any foreign embassy, High Commission or consulate in Tanzania where the court is satisfied that any of the conditions specified in section 36 or, as the case may be, section 37 has not been complied with.'

8.20.2 Contents of a Petition for Annulment

The contents of a petition for annulment are set out in Rule 30 of the Rules, which provides that,

> 30. Every petition for annulment shall comply with the provisions section 96 of the Act and shall contain–
>
> (a) the names and address of the party making the petition;
> (b) the names and address of the respondent;
> (c) particulars and the date of the marriage sought to be annulled;
> (d) the names, ages and sex of the children (if any) of the marriage;

(e) particulars of the facts giving the court jurisdiction;
(f) a statement of the principal allegations on which the petition is founded;
(g) where the petitioner has been guilty of any marital misconduct, an admission of such misconduct;
(h) the terms of any agreement regarding maintenance or division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and
(i) particulars of the reliefs sought.

8.20.3 Parties to a Petition for Annulment

Under section 97(21) of the Act, a petition for annulment of a marriage may *only be brought by one of the parties to the marriage* 'and where the petition is founded on an allegation of facts of which one party was ignorant at the time of the marriage may only be brought by that party and where the petition is founded on the wilful refusal of one party to consummate the marriage, may only be brought by the other party.' At the same time, 'a petition for annulment of a marriage on the ground that one of the parties was below the age of eighteen years and that the consent of his or her parent or guardian or of the court to the marriage had not been given may be brought by the parent or guardian of that party.'[387]

8.20.4 The Legal Effect of a Decree of Annulment

Section 98(1) of the Act sets out the legal effect of a decree of annulment. It provides that,

> (1) The parties to a marriage which has been annulled by a decree of the court shall be deemed never to have been married:
>
> Provided that a decree of annulment shall not–
>
> (a) render any child of the marriage illegitimate;
> (b) render lawful anything which was done unlawfully during the marriage or render unlawful anything which was done lawfully during the marriage;
> (c) affect the competence or compellability of either spouse as a witness in respect of anything done or any privilege in respect of communications made during the marriage; or
> (d) relieve the husband of any debt properly incurred on his behalf by his wife during the marriage.

Under subsection (2) of section 98 a decree of annulment 'shall be effective as from a date thirty days from the date of the decree if no appeal or notice of appeal, as the case may be, has been filed within that time and in any other case

[387] Ibid, section 97(2).

on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.'

8.21 Procedures in Applications for Maintenance, Custody, etc.

In terms of Rule 32(1) of the Rules, every application for maintenance – whether for maintenance of a party to a marriage or the children of the marriage – or for the custody of the children of the marriage must be by a chamber summons supported by affidavit. Under sub-rule (2),

> (2) Where any matrimonial proceeding is not by the Act or these Rules required to be instituted by a petition, the proceeding shall be instituted by a chamber summons supported by an affidavit.

Under Rule 33(1) where a matrimonial proceeding has been on application instituted by a chamber summons supported by an affidavit and all affidavits and counter-affidavits have been filed, the Registrar must fix a date for the hearing of the application. On the date appointed for the hearing of an application, 'the court shall proceed to hear and determine the application.' The court shall also, in that respect, have all the powers which it has in relation to any matrimonial proceeding commenced by a petition.

The provisions of these Rules which relate to the hearing and determination of a matrimonial proceeding commenced by a petition, shall in so far as they may be applicable, apply to proceedings on an application made in this regard, 'as if the person making the application were a petitioner, the person against whom any relief is sought were a respondent, and any other person likely to be affected by any decision of the court made on such application, were a co-respondent.'[388]

8.22 Appeals

The right to appeal in matrimonial proceedings is provided for in section 80 of the Act, which allows any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding to appeal therefrom to the High Court.[389] An appeal to the High Court must be filed in the magistrate's court within forty-five days of the decision or order against which the appeal is brought.[390] Under subsection (6) of section 80 of the Act 'an appeal against a declaratory decree granted under

[388] Rule 33(2) of the Rules.
[389] Ibid, section 80(1).
[390] Ibid, section 80(2).

paragraph (e) of subsection (2) of section 94, may be filed within ninety days of such decree.'

According to Rule 37(1) of the Rules, an appeal to the High Court under section 80 of the Act must be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against. A memorandum of appeal may be either in Kiswahili or in English; and it must state briefly the grounds of objection to the decision, order or decree appealed against. Under sub-rule (3) of Rule 37 of the Rules,

> (3) Upon the receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with the complete record of the matrimonial proceeding to which the appeal relates.

The Rules are more flexible in respect of technical defects of a memorandum of appeal. According to sub-rule (4) of Rule 37 of the Rules the High Court 'shall not reject or refuse to entertain any memorandum of appeal by reason only of any defect in the form of the memorandum but shall admit every memorandum of appeal.'

According to subsection (4) of section 80 of the Act, any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal therefrom to the Court of Appeal on any ground of law or mixed law and fact. This applies also to an appeal made against a decision or order of the High Court in its original jurisdiction.[391]

8.23 Execution of Matrimonial Decrees

The execution of decree passed in matrimonial proceedings is provided for in Rules 34-35 of the Rules. According to Rule 34,

> 34.- Where in any matrimonial proceeding, the court has passed a decree for the payment of any money, whether periodically or otherwise, or for the delivery of any property, such decree may be executed in the same manner as a similar decree passed in any civil suit under the Civil Procedure Code, and the provisions of the Civil Procedure Code, relating to the execution of such decrees shall apply mutatis mutandis to a decree for payment of money or delivery of property passed in any matrimonial proceedings.

By virtue of Rule 35(1) where, by a decree passed in any matrimonial proceeding, the court has awarded the custody of any child of the marriage to any party, 'the

[391] Section 80(5) of the Act.

court may, on application of such party, issue an injunction against any other party to such proceeding or against any other person, ordering such person to refrain from interfering in any way with the exercise of lawful rights by the person to whom the custody of a child was granted and may enforce compliance with such order by imprisonment and detention in a civil prison of the person against whom the order is made and who fails to comply with the order.' In this regard, the provisions of the Civil Procedure Code which relate to arrest and detention in a civil prison of any judgement debtor apply *mutatis mutandis* to arrest and detention in a civil prison under this rule.[392]

8.24 Costs in a Matrimonial Proceeding

In terms of Rule 45 of the Rules, in any matrimonial proceedings, the court shall have the same power to award costs as it has in any other civil proceedings to which the Civil Procedure Code, 1966, applies. Rule 46 of the Rules provides categorically that,

> 46.- Where in any matrimonial proceeding commenced award in the High Court, the court is of the opinion that reduced such proceeding could have been more expeditiously costs dealt with by a subordinate court, the court may direct that the costs payable to any party shall be assessed as if the proceeding had been commenced and determined by a subordinate court, and where such order is made, the party entitled to recover any court fees paid by him shall be entitled to recover only such amount of the court fees as would have been paid by him had he commenced the proceeding in a subordinate court.

Fees levied in respect of documents filed in a matrimonial proceeding are set out in the Second Schedule to the Rules.[393] However, under Rule 48(1) of the Rules, the court may, for reasons of poverty or other good cause, remit in whole or in part the fees or any of the fees payable under these Rules. An application for remission of fees under this Rule may be either orally to the court or by an *ex-parte* chamber summons supported by an affidavit,[394] where no fee will be payable on an application under this rule.[395]

[392] Rule 35(2) of the Rules.
[393] Ibid, Rule 47.
[394] Ibid, Rule 48(2).
[395] Ibid, Rule 48(3).

PART V:

POST-DIVORCE MATRIMONIAL RIGHTS AND LIABILITIES

Chapter Nine
DIVISION OF MATRIMONIAL ASSETS AND MAINTENANCE OF A SPOUSE

9.1 Division of Matrimonial Assets on Dissolution of Marriage

9.1.1 Power of the Court to Order Division of Matrimonial Assets

The power of the court to order division of matrimonial assets upon grant of a decree of divorce or separation is provided for in section 114 of the Act. According to section 114(1),

> 114.- (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any

> assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

As it was held by the Court of Appeal of Tanzania in *Bi Hawa Mohamed v. Ally Seif*,[396] it is apparent that the court's power to divide matrimonial or family assets under section 114(1) is invoked only when the following conditions exist:

> (i) When the Court has granted or is granting a decree of divorce or separation; and
> (ii) When there are matrimonial or family assets which were acquired by the parties during the marriage; and
> (iii) When the acquisition of such assets was brought about by the joint efforts of the parties.

However, the said consequential order of division of matrimonial property must be pleaded in the petition. In *Fatuma Mohamed v. Saidi Chikamba*,[397] Kazimoto, J. (as he then was), held that,

> It should be noted at the outset that … a party seeking an order for division of matrimonial property must plead in his or her petition to that effect and must prove in court by adducing evidence to show that he or she contributed to the acquisition of such property. An order for division of property is not therefore automatic upon the grant of a decree of divorce. When it is not pleaded and proved under section 106 (f) and section 108 the court has no power to enquire into the issue of division and cannot make an order to that effect. Where a petitioner has pleaded for an order for division of matrimonial property in his or her petition he or she should be required to lead evidence at the same time and in the same proceedings regarding the relief of decree of divorce or separation.

His Lordship was of the view that the court should first decide 'whether the marriage has irreparably broken down and should it so hold it should proceed to consider and decide whether the property was a matrimonial property. If it is satisfied that the property is matrimonial property it should order division between the parties according to their contribution. Under this procedure which is contained in section 106 of the Law of Marriage Act the same court which hears the petition is empowered to hear and determine the issue of division of matrimonial property.'[398]

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396 Op. cit.
397 Op. cit.
398 Also, see sections 106, 108 and 114(1) of the Act.

The court further held that the wording of section 114(1) of the Law of Marriage Act 'provides a second procedure under which one may petition for an order for division of property. A party may first seek a decree of divorce without at the same time asking for an order for division of matrimonial property. The court may, when satisfied grant the decree dissolving the marriage. Subsequent to the grant of the decree of divorce a party to the proceedings may institute fresh proceedings claiming division of matrimonial property.' According to the court, the said proceedings for division of matrimonial property must be instituted in the court which granted the decree of divorce or separation and not any other court. His Lordship held further that,

> [W]here a petitioner seeks and obtains a decree of divorce without at the same time asking for an order of division of matrimonial assets, and lodges the claim for division later, the claim for division need not be heard by the same magistrate and certainly there must be a different file. This is the procedure obtainable subsequent to the grant of decree of divorce or separation as stated in section 114 of the Law of Marriage Act, 1971.

For the purposes of this section, reference to assets acquired during the marriage includes assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.[399] In *Anna Kanungha v. Andrea Kanungha,*[400] Mwalusanya, J. (as he then was) held that any personal property is liable for distribution in terms of the provisions of section 114(3) of the Act when such property has been `substantially improved' during the marriage by the joint efforts of the spouses. In this case, subsequent to a divorce, the appellant applied to the Dodoma Urban Primary Court for the division of the matrimonial assets, which consisted of 130 head of cattle, 28 sheep, 8 goats, 6 donkeys, two houses of corrugated iron sheets and two thatched houses. She was awarded only one corrugated iron house; consequently, appealed to the High Court against that award, faulting the trial court's holding that the animals were not liable for distribution since the respondent had inherited them from his father before the marriage, and were thus the respondent's sole personal property. Allowing this part of the appeal, Justice Mwalusanya held that, in this case, there was evidence to suggest that some cattle were purchased during the subsistence of the marriage with the proceeds of crop sales. Thus, some heads of cattle had been jointly acquired by the spouses as a bride price following the marriage of their two daughters. So, the court held that,

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[399] Ibid, section 114(3).
[400] [1996] TLR 195.

> In the case at hand there can be doubt that the appellant had helped to improve the cattle by going to graze them in the bush (as is common with the Wagogo) and by cleaning the kraal. So she is entitled to a share.

In exercising the power conferred by subsection (1) of section 114, the court must factor in the following issues: first, the customs of the community to which the parties belong; second, the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;[401] third, any debts owing by either party which were contracted for their joint benefit; and, fourth, the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.[402]

9.1.2 Factors for Division of Matrimonial Assets

(a) Customs of the community to which the parties belong

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[401] In England, two significant judgments of the House of Lords handed down in May 2006 have brought far-reaching implications in respect of division of matrimonial assets based on contribution of spouses to the accumulation of the said assets. In the case of *Julia McFarlane*, the House of Lords held that the ex-wife was entitled to 250,000 Sterling Pounds a year from her ex-husband, Kenneth, for life – not just the five years decided by the Court of Appeal. In this case, Mrs. McFarlane had argued that she gave up a high-earning career when she married 18 years earlier. Prior to this judgment, maintenance for stay-at-home wives in England was based on purely living expenses. Pursuant to this judgment, English judges now must consider as well contribution and compensation of the wife to the matrimonial relationship. In another case involving *Melissa Miller* and her husband, Alan Miller, the House of Lords held that Melissa could keep the 5,000,000 Sterling Pounds she was awarded out of her ex-husband Alan's 17,500,000 Sterling Pounds fortune. Mr. Alan Miller had challenged an earlier court order that he pay his ex-wife and had disputed the 5,000,000 Sterling Pounds settlement for Melissa. The Millers, who lived in Chelsea, London, were married for two years and nine months and had no children when they split. The trial judge decided that Mrs. Miller was entitled to a substantial settlement because she married with "reasonable expectation" of a future wealthy life-style. The trial judge had also cited Mr. Miller's adultery as a factor in the award. The Law Lords dismissed Mr. Miller's appeal; but said that the court should not have taken into account the husband's behaviour. In effect, "these two judgments reaffirm the belief that England and Wales are among the most generous jurisdictions in the world for divorcing wives. U.K. courts, now can order the dominant wage earner to pay spousal maintenance fees for a much longer period of time than courts in the U.S. and continental Europe. U.K. courts also back the principle that a spouse's domestic contributions, in maintaining a home and children, should be valued on a par with earning money. As a result, settlements are determined by assessing a couple's total assets, rather than just wealth acquired during the marriage." See, BRITISH COUNCIL, *Legal e-News*, India, 2nd June 2006.

[402] Section 114(2) of the Act.

One of the factors the court considers while determining division of matrimonial property is customs of the communities to which the parties belong. In *Pulcheria Pundugu v. Samwel Huma Pundugu,*[403] where the parties were respectively Mchagga and Msukuma, Mnzavas, J.K. (as he then was) held that, when the court considers the question of division of matrimonial assets under section 114(1) of the Act and where the parties are of different customs a non-traditional mode of life may be assumed in which case section 114(2)(a) may not be invoked.

(b) The extent of the contribution made by each party towards acquisition of the matrimonial assets

The general principle underlying division of matrimonial property is premised around compensation; it does not make any difference whether what is being compensated is direct monetary contribution or domestic services.[404] In essence, this principle presupposes equality of parties to a marriage, which is guaranteed by the provisions of Article 13(1) of the Constitution of the United Republic of Tanzania. According to this article, every person has the right to equality before the law.[405] It is basing on this principle that courts in Tanzania has been determining division of matrimonial property, mainly after the landmark decision of the Court of Appeal of Tanzania in *Bi. Hawa Mohamed v. Ally Seif*. In this case, it was held that, since the welfare of the family is an essential component of the economic activities of a family man and woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets. The 'joint efforts' and 'work towards the acquiring of the assets' have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife. In this case, the main question before the court was: whether domestic services of a house wife amount to contribution in acquisition of matrimonial assets. Following the decision of *Bi Hawa Mohamed,* Kimaro, J. (as she then was) in *Mwajuma Mohamed Njopeka v. Juma Said Mkorogoro*,[406] held that,

> The case of *Bi Hawa Mohamed v. Ally Seif* … recognises domestic services as a contribution towards acquisition of matrimonial assets. The Primary Court judgment also shows that the respondent admitted that they acquired the two houses together. … The decision of the Primary Court is (therefore) discriminatory and offends Article 13(1) of the Constitution of the United Republic of Tanzania.

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[403] Op. cit.

[404] Ibid.

[405] Also, see, *Mwajuma Mohamed Njopeka v. Juma Said Mkorogoro,* High Court of Tanzania at Dar Es Salaam, PC Civil Appeal No. 6 of 2001 (unreported).

[406] Op. cit.

In *Mwajuma Mohamed Njopeka v. Juma Said Mkorogoro*, the primary Court and the District Court granted TShs. 500,000/= to the appellant as compensation after finding the marriage between the parties had irreparably broken down. The respondent was left with two houses which were acquired during the subsistence of the marriage, which aggrieved the appellant, who argued in the High Court that the amount given to her was low when compared to her contribution towards the acquisition of matrimonial property that included the two houses. It was the appellant's contention, in the High Court, that the lower courts ought to have made an order to the effect that each of the parties had contributed 50% towards the acquisition of the matrimonial assets because they were both employed. Hence, each of the parties was entitled to a 50% division of the said assets.

Allowing the appeal, Madam Justice Kimaro held categorically that,

> Under such circumstances the primary court erred by not giving the appellant an effective remedy. The remedy which was given to her by ordering the respondent to pay her TShs. 500,000/= left her in a disadvantage (sic) position. The decision did not put into consideration the right to equal protection (before the law).[407]

Before the Court of Appeal decision in *Bi Hawa Mohamed*, there were two conflicting schools of thought which contended in the High Court on this issue. In the case of *Zawadi Abdallah v Ibrahim Iddi*,[408] Mapigano, J. (as he then was) referred to these two schools of thought by stating:

> There are those who maintain that under section 114 the term joint effort is limited to direct contribution by a spouse by way of money, property and work, to the acquisition of the asset in question and that housekeeping and raising the children count for nothing.
>
> On the other hand, there are those who take the view that household work must be regarded as part of the joint effort or contribution towards the acquisition of any asset by the husband and that the wife's citing of the husband's marriage vow and the fact that she has been running the home operate to entitle her to a slice in her husband's estate. You may, if you prefer, describe the two

[407] Ibid, p. 5 of the typed judgment. Also, see, *Augustine Mkangalia v. Moshi Ahmadi*, High Court of Tanzania at Dar Es Salaam, PC Civil Appeal No. 125 of 1998 (unreported); and *John Joseph v. Elizabeth Zaidi,* High Court of Tanzania at Dar Es Salaam, PC Civil Appeal No. 3 of 1996 (unreported).
[408] [1981] TLR 311.

> constructions as narrow and broad, respectively. The question which I am called upon to answer in this case is which one of those views is correct. This is an important matter and I confess I have not found it all easy. To my knowledge not much has been said about it in this country and there is a paucity of judicial pronouncement on the matter. Such few decisions as there are either way and happily I am not bound by any.

Thus, His Lordship was of the view that:

> Those who champion the broad view see no valid distinction, in principle, between the wife who takes up employment or carries on business or profession and the one who remains at home and devotes her time running the home. They would construe the terms contribution and joint efforts liberally to include domestic services rendered by the full time "domestic" wife.[409]

The Court of Appeal in *Bi Hawa Mohamed* referred to the broader or liberal school and held that the proponents of this school would advance several reasons to back up their viewpoint. Among the reasons include, first, the contention that 'it is the philosophy and spirit of our time and that it is quite in harmony with realities and changed social and economic circumstances.' Secondly, that 'the domestic work may be more valuable to family than of a wife who is self-earning.' Thirdly, that 'the husband can hardly conduct his business if his wife does not cook the dinner and mind the children.'

Fourthly, that 'in certain instances the wife may have sacrificed her own career on the altar of matrimonial life; and, if say after twenty or thirty years of marriage her husband for old man's reasons or no reason whatsoever (as probably was the position in the case before me), sees fit to banish her, the decree of divorce may have the further undesirable and sad effect of practically thrusting her into destitution.' Finally, that 'in yet certain instances the estate of the husband may have been built up by the industry of the husband and the thrift and prudence of the wife in running the home and that, therefore, it is in conformity with one's sense of justice and fairness that she should share as of right in the fruits of his success.'

The Court of Appeal felt that the supporters of this school pf thought find 'encouragement' and 'comfort' in the words of Scarman, L.J., who once stated that,

[409] This decision was quoted *in extenso* in *Bi Hawa Mohamed v. Ally Seif*, op. cit.

It is recognised that a married woman who brought up a family and maintained a home was thereby actually supporting her husband in his bread-winning activities by releasing him from family duty. Quite plainly if the marriage broke down she must have a claim upon the family funds by reason of that vital contribution to the family life. It was here that law of England (as it then was) went wrong.

These are, I think, strong and weighty reasons and no doubt that the strict operation of the doctrine of separate property can occasion a great deal of distress to a divorced woman. But we should bear in mind that the whole question is a legal one.[410]

Justice Makame for one has taken stand on the side of the liberal school. In *Rukia Diwani Kinzi v. Abdallah Issa Kihenya,*[411] His Lordship felt himself 'prepared and able to say that the domestic services that a wife renders count.' So, according to Nyalali, C.J., (in *Bi Hawa Mohamed*), Justice Makame's 'reading of section 114 does not square with that of the magistrate who heard' *Bi Hawa Mohamed*'s case.' According to Justice Makame, the section has sufficient width to embrace the broad view. He, thus, opined that,

There is a school of thought which says that domestic services a housewife renders do not count when it comes to acquisition, and therefore the subsequent possible division, of matrimonial assets...

I find this view too narrow and conservative and I must confess my inability to subscribe to it. Section 114 of the Law of Marriage Act *does not really support the school of thought referred to and is, in my view, capable of accommodating a more liberal interpretation*. [Emphasis supplied].

According to Mapigano, J. (as he then was), in *Zawadi Abdallah v. Ibrahim Iddi*,[412]

Even in a country like Britain, where salaried married women are quite common, the modern progressive view, with which I wish to associate myself, is that looking after the home and bringing up the children is a valuable contribution. See for example the recent case of *Bateman v. Bateman*, The Law Report 1979 FAM 25.

But be it noted that in this respect our statutory law compares unfavourably with the English Law. The perimeters or ambits of the English Law are simply and

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410 These words appeared in the *Medico-Legal Journal*, 1966 Vol. 34 at p.19.

411 Court of Appeal of Tanzania at Dar Es Salaam, Matrimonial Cause No. 6 of 1971 (unreported and referred to in *Bi Hawa Mohamed v. Ally Seif*, op. cit).

412 Op. cit.

> expressly more extensive. The English case to which the learned judge made reference was an application by the wife for financial provision and adjustment of property in her favour, upon the dissolution of the marriage between her and the respondent. The decision of the court was manifestly predicated upon the provisions of the English Matrimonial Causes Act, 1973, which makes explicitly provisions to the effect that in adjusting property rights under that Act, the contribution made by each of the parties to the welfare of the family is a relevant consideration to be taken into account. So in my respectful opinion the decision in that case can hardly be helpful or persuasive.

Mapigano, J. continued to hold that,

> As shown, in this case the learned magistrate expressed and followed the narrow interpretation. He argued that since traditionally looking after the household and caring for the children is the occupation and responsibility of wife, just as the feeding and clothing the family is the occupation and responsibility of the husband, then that should not be considered as a contribution or joint effort. Was he wrong? At the risk of being deemed a conservative, though I would like to believe that I am not, I must say that on the view that I take of the law I feel compelled to pronounce that the decision of the learned magistrate is, in the final analysis, sound. I share his opinion that under section 114 the housework of a wife and looking after the children are not to be equated with the husband's work for the purpose of evaluating contributions to marital property. I hold as he did that such domestic services are not to be taken into consideration when the court is exercising its powers under the section. I will give my reasons.

First, His Lordship was of the view that: "the broad view is inextricably linked with other matters. It does bring to the fore other issues which are arguably troublesome in regard to which the statute does not appear to make any clear provisions. Two such issues come to my mind. One, there would be in many cases the question whether the matter is to be decided with reference to the matrimonial differences which may in fact have made it necessary to consider the matter in the light of the principle that no one should be allowed to benefit from his own wrong. To put it interrogatively, will a wife be allowed to benefit from a marriage which she has wrecked? Two there would be the relationship between the order under section 144 and the order which the court may make with regard to maintenance under section 115."

The second point, which His Lordship regarded to be a stronger one, was the question: "Is there really anything in law to give any strong colour to the suggestion that is put forward by the liberal school? Certainly it was not part of our own law before the enactment of the Law of Marriage Act[413]… And to be

[413] See, for example, *Iddi Kungunya v. Ali Mpate* [1967] HCD 49.

sure, there is no provision in the Law of Marriage Act which says so in terms." So, it was His Lordship's view thus:

> That throws up a question of judicial policy. It is this, that where there are no clear rules of law governing matters of such general social importance, matters which directly affect the interests of almost every matrimonial couple and which raise issues that might be the subject of public controversy and on which laymen are as well able to decide as lawyers, can the courts properly proceed on their view of public policy? (There is the warning uttered by a judge over a century and half ago that public policy is a most unruly horse, you can never know where it will carry you.) Would it not be to encroach on the province of the Legislature? Patel, J. thought so. He observed briskly in the case of *Hamidi Amir Hamid* (supra) that if the Legislature had intended that domestic services performed by a wife be regarded a contribution and joint effort it would have said so in language clear and plain. But the liberal school might put forth the line that the law should be innovative and responsive to societal aspirations. I would embrace that principle. I do understand that judges must develop the law and indeed it is now generally accepted that sometimes they must, and do, legislate. The myth that common law judges merely enunciate or discover the existing law should now stand discredited. Blackstone was, I think, one of the leading proponents of that theory. However, as the great American judge Holmes once said, and many subscribe to that view point, the judges should do so only interstitially, and with molecular rather than molar motions.

Cementing his views, Mapigano, J., referred to Sir Charles Newbold, then the President of the Court of Appeal for East Africa, in his paper which he read at the University College Dar es Salaam in 1969. In that paper Sir Newbold argued that:

> The power of the judges to make law is a power which can be exercised within very circumscribed limits. The power is exercised in two fields. The first is where rights and duties of a member of the community are determined by legislation; and in that field the circumscribing limits are the doctrines of equity and the indefinable but real customs and needs of the community. Within the field in which rights and duties are specified by legislation a judge's duty is to apply and enforce the legislation and, save as regards subordinate legislation, he cannot challenge the validity or effectiveness of the legislation.

Having referred to the foregoing passage, Mapigano, J., went on to refer to another passage from the decision of Parke, J. in *Egerton v. Brownlow* (1853) 4 HL Cas 196, a passage, which read as follows:

> It is the province of the statesman, and not the Lawyer, to discuss, and of the Legislature to determine, what is best for the public good and to provide by proper enactments. It is the province of the judge to expound the law only; the written from the decisions of our predecessors and of our existing courts, from

> text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community.

In Hon. Mapigano's considered opinion, if at all there was 'any grey area in respect of the matter, the appropriate solution to the problem lies in the intervention of the Legislature and not in judicial Legislation. But is there a grey area? That leads me to my next point and this is where I would put the emphasis.' So, His Lordship opined that:

> I apprehend that to follow the broad view would be to give recognition to the concept of community of property between the husband and the wife -*communio bonorum* - and perhaps with its logical corollary community of loss and debts. And, specifically, it would run directly counter to section 58 and 60 (1) of the Law of Marriage Act and empty those two provisions of all meaning and effect. Those sections are some of the striking features of the statute and seem to reflect the notion of separate property.

Indeed, Mapigano, J., said that the sections 'say that subject to the provision of section 59 (which relate to matrimonial homes) and to any agreement the parties may make, any property acquired in the name of the husband or of the wife, presumptively belongs exclusively to that person.' To His Lordship, further, held that:

> There are materials which strongly point to a definite legislative intention that domestic services should not count when the court is dealing with the matter of division of assets under section 114. In this regard attention should be called to the fact that the Act is based on the work of the Kenya Commission on the Law of Marriage and Divorce which was headed by Spry, J.A., and which is comprised in the Commission's report of August, 1968. The Act borrows heavily from the draft bill prepared by the said commission - Appendix VII to the report. For instance, our sections 58, 60 and 114 are, respectively, exactly the same as sections 66, 68 and 123 of the draft bill. Now the view and recommendations of the Spry Commission on the subject now at hand are contained in paragraphs 177-184. It is patently clear that the Commission rejected the broad view and section 123 of the draft bill must, therefore, be taken to embody or reflect that standpoint. Our Government White Paper No. 1 of 1969 - which preceded the enactment – contains nothing which suggests a difference between the ideas of the Spry Commission and those of the authors of the White Paper.

Actually, the said White Paper had only a few words about the subject. It was the last sentence of paragraph 19 and it merely said that:

> The proposed law should provide expressly that either spouse may own his or her own separate property which he or she owned before, or acquired after, marriage.

Although Mapigano did not treat the foregoing as authority in any technical sense, he found the same to be valuable because 'it provides the background to our Law and helps to discover the intention of the Legislature.' He, thus, held that,

> I think I can treat the background as strongly indicating that our Legislature adopted the ideas and philosophy contained in that report. It should, therefore, be inferred that the purpose for which section 114 was enacted by our Legislature was not all that broad as canvassed by the liberal school. It seems, from a historical perspective, that the section was not designed to help a married woman who has no property or has failed to acquire any during marriage because of household duties. *In other words, it was not written into section 114 that a wife's marital status and duties should per se make her a partner in the husband's economic enterprises or gains. That in my opinion, is the true construction of the section*. [Emphasis supplied].

So, His Lordship concluded that:

> I *am not of course saying that is good law. I am not for instance gainsaying the fact that one of the ills of the breakdown of marriage is the economic hardship that a woman may have to suffer, where, as is common in Tanzania*, the woman has not acquired any property, and I think, therefore, that there is much to commend the liberal viewpoint to serious reflection, and consideration. What I am saying is that the broad view does not (conform to) the history of the legislation and that the other provisions of the Act would make little sense if that view is adopted. *I am saying that if the law is unsatisfactory the proper solution to the problem should be legislative rather than judicial*. [Emphasis supplied].

The Court of Appeal, in *Bi Hawa Mohamed*, quoted Mapigano, J. at length because he appeared 'to deal adequately with the arguments in favour of the opposite views of the High Court' and because it was 'satisfied that the narrow view is wrong and the broad view is correct.' To demonstrate this, the Court of Appeal held that,

> Although it is correct to say that under English Law, the joint efforts or contributions of spouses is considered directly in relation to the welfare of the family rather than directly in relation to the acquisition of matrimonial or family assets, we do not see any difference between the effect of English Law and our Law on this issue since the welfare of the family is an essential component of the economic activities of a family man or women. So, it is proper to consider

> contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.

The Court of Appeal was of the view that,

> The point made is that the broad approach to the issue presupposed the existence of common ownership of matrimonial or family assets. Contrary to the concept of separate ownership recognized under sections 58 and 60 is not correct since the issue of division of matrimonial or family assets arises only when the Court is granting or has granted a decree of separation or divorce but not otherwise. *As to the point to the effect that the broad view of the law on the issue is not supported by authority existing before the enactment of the Law of Marriage Act, we do not think that it is logical or sensible to take the absence of earlier authority as precluding progress in the law of the Land.* [[Emphasis supplied].

Regarding the argument that the broad view of the law amounts, in effect, to judicial legislation, the Court of Appeal held that this argument was 'not supportable since the court is not making or introducing a new rule in a blank or grey area of social relations but is interpreting existing statutory provisions - that is - the words "their joint efforts" and "the contributions made by each party in money, property or work towards the acquiring of the assets" used under section 114.'

> Undoubtedly, these provisions are not free from ambiguity. In such a situation the court has to be guided by the established rules of construction of statutes. Mapigano, J., used the report of the Kenya Commission on the Law of Marriage and Divorce which, it is said, was the basis of our Law of Marriage Act, 1971. We think such a report should be used only as a last resort upon failure to make sense of these statutory provisions on application of the normal rules of construction.

One such normal rule of construction of ambiguous provisions the Court of Appeal was suggesting in *Bi Hawa Mohamed* is the *mischief rule*. 'Under this rule, the court, in looking for the true meaning of ambiguous statutory provisions, is guided by the defect or mischief which the statute was enacted to rectify or cure. On examination of the Law of Marriage Act, 1971, and the law as it existed before its enactment, *one cannot fail to notice that the mischief which the Law of Marriage Act, 1971 sought to cure or rectify was what may be described as the traditional exploitation and oppression of married women by their husbands*.'

To this end, the Court of Appeal was of the opinion that,

> *It is apparent that the Act seeks to liberate married women from such exploitation and oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned.* Although certain features of traditional inequality still exist under the Act, such as polygamous marriages, these do not detract from the over-all purpose of the Act as an instrument of liberation and equality between the sexes. [Emphasis supplied].

Guided by this objective of the Act, the Court of Appeal was satisfied that '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.' According to the Court of Appeal,

> The correct approach is that husband and wife, in performing their domestic duties are to be treated as working not only for their current needs but also for their future needs. In the present case, the appellant, in looking after the matrimonial home, must be regarded as working not only for her current needs but also for her future needs and such future has to be provided from the matrimonial or family assets jointly acquired during the marriage in keeping with the extent of her contribution.

(c) Any debts owing by either party which were contracted for their joint benefit

Where a spouse causes a debt which was contracted for their joint benefit or commits a matrimonial misconduct which reduced to nothing her contribution towards the welfare of the family and consequential acquisition of matrimonial or family assets she or he would not be entitled to a share in the property. In *Bi Hawa Mohamed*, where the wife had squandered TShs. 18,000/= the Court of Appeal held that:

> [T]he squandering of that money by the appellant when weighed against her contribution, can be regarded as a matrimonial misconduct which reduced to nothing her contribution towards the welfare of the family and the consequential acquisition of matrimonial or family assets.'

In this case, the appellant was paid a sum of Shs. 18,000/= by the respondent apparently when the spouses were still resident in Mombassa. The money was to be used by her to set up some family business. She did not use the money for the purpose it was intended. She apparently squandered it away. Consequently, the Court was satisfied that, on the foregoing basis, the appellant was not entitled to claim any share in the available matrimonial or family assets.

In the English case of *Martin v Martin*[414] Cairns, L.J held that,

> ...Such conduct must be taken into account because a spouse cannot be allowed to fritter away assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably.

There is yet an interesting practical question that has been often confronting courts when considering the factors set out in section 114(2) of the Act. This is: whether the guilty party who causes the breakdown of the marriage should benefit from his/her own wrong. This question cropped up in *Robert Aranjo v. Zena Mwijuma,*[415] where the appellant urged the Court of Appeal to hold that in determining division of matrimonial assets, the lower courts ought to have considered that the respondent had been the wrong party who had wrecked their marriage. Indeed, Maina, J. (as he then was), in the High Court, directly addressed himself to this question and came to the conclusion that whether the appellant was guilty of cruelty or the respondent was guilty of desertion it made no difference as regards the division of the matrimonial assets. In coming to that conclusion, His Lordship had relied on section 114(2) of the Act. The learned High Court Judge took the view that there was nothing in this section – or, indeed, in the provisions of the Act as a whole – which makes the conduct of the guilty party who causes the breakdown of the marriage a relevant consideration in ordering division of the matrimonial assets.

In a lengthy submission before the Court of Appeal, the appellant strongly criticised this view and vigorously contended that it would be grossly unfair to permit a guilty party who wrecks the marriage to benefit from his/her own wrong. He urged that section 114 of the Act 'should be read and construed so as to make the conduct of such guilty party a relevant consideration in ordering division of the matrimonial assets.' He claimed that this was the view expressed by this Court in the case *Hawa Mohamed v. Ally Sefu.* The relevant passage in *Bi Hawa*'s case reads:

> With regard to the fear that the broad view might result in a wife being "allowed to benefit from a marriage which she has wrecked" we think, with respect, that it is misguided because what is in issue is the wife's contribution or efforts towards the acquisition of matrimonial or family assets, and not her contribution towards the breakdown of the marriage. *Of course there may be cases where a wife's misbehaviour may amount to failure to contribute towards the welfare of the family and*

[414] [1976] 3 All ER. 629.
[415] [1986] TLR 207.

thus failure to contribute towards the acquisition of matrimonial or family assets; but this has to be decided in accordance with the facts of each individual case. [Emphasis supplied].

Relying on the last underlined sentence, the appellant pressed that the respondent had been guilty of desertion which, in turn, wrecked their marriage; and, therefore, that factor should have been held against her in ordering division of their matrimonial assets. On this argument, the Court of Appeal was of the opinion that,

> We think that the appellant has not quite understood the message contained in this passage. *As the passage makes it very clear, the Court in Hawa's case was dealing with the issue of contribution towards acquisition of the matrimonial assets, not contribution towards the breakdown of the marriage which is the issue in the present case. The underlined words which the appellant seeks to rely on simply mean that in ordering division of the matrimonial assets, the Court will consider whether the conduct or behaviour of the guilty party who wrecked the marriage operated in such a way that by reason of such conduct the said party cannot have made a contribution to the acquisition of the matrimonial assets*. So that if, for example, the guilty party was in desertion at the time of the acquisition of the matrimonial assets, such conduct would be a relevant consideration when deciding on the extent of the party's contribution towards acquisition of the matrimonial assets; the point to stress is that such conduct, in order to warrant consideration, must have been operative at the time of acquiring the matrimonial assets. Thus in a proper case the Court may well find that the guilty party made no contribution at all if, say, he/she was in desertion for the whole period during which the said assets were acquired. [Emphasis added].

Therefore, the Court of Appeal was quite satisfied that the Court in *Hawa*'s case 'did not consider the question whether the guilty party who causes the breakdown of the marriage should benefit from his/her own wrong because, as the Court clearly stated, that question was not before it.' To this end, the Court had to address itself to that question which had been raised squarely in this appeal, holding that,

> It is pertinent to point out that subsection (2) of section 114 of the Law of Marriage Act … sets out four matters to which the Court shall have regard when ordering division of the matrimonial assets. It is noted, however, that the extent of the guilty party's contribution to the breakdown of the marriage is not made one of such matters, nor can it be construed to fall under any one of them. We think that this was such an obvious and significant factor that if it was intended to be one of such considerations Parliament would not have failed to say so. Indeed we would go further and say that in our view such a provision would pose a practical problem.

The Court had to consider, 'for instance, a situation where a marriage lasted for a long time during which the spouses jointly acquired matrimonial assets, but the marriage was eventually dissolved because one of the spouses committed adultery recently. Now, if the appellant's submission were to be upheld, the implication would be to deny the guilty party his/her share of the joint matrimonial assets because of adultery committed only in old age and long after the said assets had been acquired.' The Court went on to opine that,

> In our view there could be no legal justification for that. As we have amply demonstrated herein before we think that consideration of the conduct of the party who causes the breakdown of the marriage is relevant only in relation to the acquisition of the matrimonial assets, not in relation to the breakdown of the marriage. On the evidence the matrimonial assets in the present case were acquired jointly by the parties long before the respondent had left the matrimonial home. Thus, whether the respondent was in desertion or whether, as found by the District and the High Courts, she was forced out of the matrimonial home by the appellant's cruelty, that was neither here nor there. It was not relevant for the purpose of considering division of the matrimonial assets, and the learned High Court Judge was perfectly entitled so to hold.

This means, therefore, that what ought to be taken into account when the court determines division of matrimonial property is misconduct by a spouse touching to the management of matrimonial property, as was the case in Bi Hawa's case and in *Omari Chikamba v. Fatuma M. Malunga*.[416] In both cases, it was held that where a spouse commits a matrimonial misconduct which reduced to nothing her contribution towards the welfare of the family and consequential acquisition of matrimonial or family assets she or he would not be entitled to share in the property.

(d) The needs of the infant children of the marriage

Another factor that the court is required to consider under this section is the needs and welfare of the children of the marriage. In *Anna Kanungha v. Andrea Kanungha*,[417] the court held that considering the fact that the spouses were now old, they being allegedly married in 1950, and considering the fact that respondent had some two other younger wives, with a number of children, the appellant was granted a lesser portion of the matrimonial assets, i.e., cattle. She was, indeed, awarded 10 head of cattle, two goats and six sheep out of 130 head of cattle, 28 sheep, 8 goats, 6 donkeys, two houses of corrugated iron sheets and two thatched houses.

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[416] [1989] TLR 39.

[417] Op. cit.

9.2 Maintenance of a Spouse after Dissolution of Marriage

9.2.1 Power of the Court to Order Maintenance

The power of the court to order maintenance for spouse is provided in section 115(1) of the Act, which provides that,

> 115.- (1) 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;
> (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:
>
> Provided that where the marriage has been dissolved, the wife shall not, unless the court for special reason so directs, be entitled to maintenance for herself for any period following the date when the dissolution takes effect.

The court has the corresponding power to order a woman, under subsection (2) of section 115 of the Act, 'to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.'[418]

Under section 115(3) the power to order maintenance in the cases referred to in paragraphs (d), (e), (f) and (g) of subsection (1) extends 'to cases where the decree was granted by a foreign court, if it is one which is recognised as effective under the provisions of section 91 and, for this purpose, a declaratory decree recognising as effective a divorce obtained otherwise than by decree of a court shall be deemed to be a decree of divorce.'

9.2.2 Assessment of Maintenance

Under section 116, it is provided that in determining the amount of any maintenance to be paid by a 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

[418] Also, see, *Bi Hawa Mohamed v. Ally Seif*, op. cit.

means and *needs* of the parties.[419] In *Festina Kibutu v. Mbaya Ngajimba*[420] Kazimoto, J. (as he then was) held that in deciding what amount of maintenance should be paid the court should hold an enquiry as to the means of both parties 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.

Under the same section, the court has to take into account first, the degree of responsibility which the court apportions to each party for the breakdown of the marriage; and second, the customs of the community to which the parties belong. In *Athanas Kindole v. Elizabeth Kindole*[421] the court added another factor to be taken into account when the court determines the amount to be awarded as maintenance. It held that living with another woman gives weight on the amount to be awarded as maintenance, querying that if the husband is capable of living with and maintaining another woman, why not his former wife and children.

9.2.3 Court's Order for Security for Maintenance

Under section 117 of the Act, the court has power to order security for maintenance. According to these provisions,

> 117. The court may in its discretion when awarding maintenance order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property and, subject thereto, in trust for the settlor.

At the same time, an agreement for the payment, 'in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.'[422]

9.2.4 Duration of Orders for Maintenance

According to section 119 of the Act, 'every order for maintenance shall, subject to the provisions of section 120, expire–

> (a) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;

[419] Also, see, *R. Rajput v. Mrs. S. Rajput*, op. cit.
[420] Op. cit.
[421] High Court of Tanzania at Dar Es Salaam, Civil Appeal No. 74 of 2001 (unreported).
[422] Section 118 of the Act.

(b) if the maintenance was secured, on the death of the spouse in whose favour it was made.

However, the law provides that the court may grant an order for maintenance for any shorter period or it may rescind any order at any time.[423] According to section 120,

120.-(1) The right of any divorced woman to receive maintenance from her former spouse under any order of court shall cease on her remarriage.
(2) The right of any man to receive maintenance from his former wife under any order of court shall cease upon his remarriage.
(3) The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her remarriage unless the agreement otherwise provides.

Under section 121 of the Act, the 'court may at any time and from time to time vary, or may rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.'

The court also may, subject to the provisions of section 118, 'at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the coming into force of this Act, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.'[424] Also, under the provisions of section 123 of the Act, 'maintenance payable to any person under an order of court shall not be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever save for a debt due to the Government.'

9.2.5 Recovery of Arrears of Maintenance

In terms of section 124(1) of the Act, 'arrears of unsecured maintenance payable under any agreement shall be recoverable as a debt from the defaulter and, where they accrued before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt from his or her estate.' In addition, 'arrears of

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[423] Ibid, section 119.
[424] Ibid, section 122.

unsecured maintenance payable under an agreement and which accrued before the death of the person entitled thereto, shall be recoverable as a debt by the legal personal representatives of such person.' However, in terms of subsection (3) of section 124 of the Act,

> (3) No amount owing as maintenance payable under an agreement shall be recoverable in any suit if it accrued more than three years before the institution of the suit.

Under section 124(4) of the Act, 'Every order for maintenance made by a court shall be enforceable, in respect of any maintenance accrued thereunder, in the same manner as a decree for payment of money passed by that court, and the provisions of the Civil Procedure Code (1966) relating to enforcement and execution of decrees for payment of money shall apply *mutatis mutandis* to the enforcement of an order for maintenance.'

9.3 Whether damages are payable to a wife upon break up of the marriage

There is quite often a very tricky issue upon break-up of marriage as to whether a wife can claim damages for the break up of the marriage or for compensation for loss of youthfulness on the part of the wife. These are practical issues quite often practising family lawyers meet in dealing with their clients. In *Nyamhanga v. Robi Nyamhanga*,[425] for instance, the issue was whether a wife can claim damages for break up of the marriage. In this case, Lugakingira, J. (as he then was) held that damages are not awardable to a wife upon the break up of a marriage and the only remedy is to petition for divorce or maintenance. In another case, *Nyangi Gati v. Chacha Mwita*,[426] Chua, J. (as he then was) was confronted by the question as to whether the Law of Marriage Act, 1971, envisages compensation for youthfulness upon marriage breakdown. His Lordship was of the opinion that the Act does not provide for compensation for services rendered by a wife nor for wear and tear occasioned during the subsistence of the marriage. But, rather, the wife is entitled to maintenance upon the dissolution of the marriage.

[425] [1981] TLR 44.
[426] [1981] TLR 293.

Chapter Ten
MATRIMONIAL OFFENCES

10.1 Introduction

Although, as we have observed in Chapters One and Two, marriage is, legally speaking, a contractual matter, the Act has created several offences arising from breach of certain provisions of the Act. This Chapter, in a nutshell, discusses these offences.

10.2 Some Marital Offences

10.2.1 Giving False Statement in Notice of Intention to Marry or in Notice of Objection

Under section 145 of the Act: 'Any person who, when giving notice of intention to marry in compliance with section 18, or notice of objection to an intended marriage under section 20, makes any false statement shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years.' However, it is 'a good defence to a charge under this section, that the person charged had reasonable grounds for believing the statement to be true.'

10.2.2 Failure to Attend before a Marriage Reconciliation Board

According to section 146 of the Act, any person who, 'having been required to attend before a Board, refuses or neglects to do so without reasonable excuse shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred shillings.'

10.2.3 Giving False Testimony before a Marriage Reconciliation Board

Section 147 of the Act, sets out incidences that may be criminal offences when committed. It provides that,

> 147. Any person who in or in relation to any proceeding before a Board–
> (a) knowingly makes a false statement; or
> (b) fabricates evidence or makes use of fabricated evidence;
> (c) destroys, mutilates or conceals any documentary evidence; or
> (d) attempts to influence any witness,
> shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.

10.2.4 Marrying a Person who is of Minimum age

This matrimonial offence is created under section 148, which provides that,

> 148.-(1) Any person who is a party to a ceremony purporting to be a marriage knowing or having reason to believe that the other party is below the minimum age for marriage shall be guilty of an offence and shall be liable on conviction to imprisonment for three years.
>
> (2) Any person who participates in any such ceremony knowing or having reason to believe that either party is below the minimum age for marriage shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.

10.2.5 Marrying while under a Prohibited Relationship

By virtue of section 149(1) of the Act, 'any person who is a party to a ceremony purporting to be a marriage where the parties are within the prohibited relationships shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.' However, it is 'a good defence to a charge under this section, that the person charged did not know and could not reasonably have discovered the relationship.'

Under subsection (2) of section 149 of the Act, 'any person who participates in any such ceremony knowing or having reason to believe that the relationship exists shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.'

10.2.6 Taking Party in a Prohibited Ceremony

Taking party in a ceremony purporting to be a marriage, knowing that the intended marriage has been prohibited by order of the court or of a Board under the powers conferred by section 22, is an offence under the Act.[427] This offence, when proved in court, attracts a conviction to imprisonment for three years.[428] At the same time, 'any person who participates in any such ceremony knowing that the intended marriage has been so prohibited shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.'[429]

9.2.7 Coercion and Fraud

Under section 151(1) of the Act, 'any person who is a party to a ceremony purporting to be a marriage knowing or having reason to believe that the consent of the other party was induced by any coercion or fraud on the part of himself or herself or of any other person, or by a mistake as to the nature of the ceremony, or that the other party was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years.' According to subsection (2) of this section, 'any person who participates in any such ceremony with the knowledge of the fact which makes the ceremony a nullity shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years.'

10.2.8 Polyandry and Similar Offences

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[427] Section 150(1) of the Act.

[428] Ibid.

[429] Ibid, subsection (2).

Under section 152(1) of the Act, it is an offence for a married woman to marry another man. Similarly, under subsection (2) of this section, 'a man who is a party to a ceremony whereby he purports to marry a woman who is married to another man knowing or having reason to believe that she is so married, shall be guilty of an offence.' The respective sentences for the offences provided for under subsections (1) and (2) of this section are set out in subsection (3) of the section. This subsection provides that,

> 152.- (3) Any person guilty of an offence under subsection (1) or (2) shall be liable on conviction to imprisonment for a term not exceeding three years.

However, under subsection (5) of the section, it is 'a good defence for a person charged with an offence under subsection (1) or (2), that he or she believed his or her spouse, or the spouse of the person with whom he or she purported to contract marriage, as the case may be, to be dead or that the marriage had been dissolved and had reasonable grounds for that belief.'

According to subsection (4) of this section, 'any person who participates in any such ceremony with knowledge of the fact which makes the ceremony a nullity shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years.'

10.2.9 Ceremony Performed by Unauthorised Official

According to section 153 of the Act, 'any person who is a party to or participates in a ceremony purporting to be a marriage knowing or having reason to believe that any person officiating thereat is not lawfully entitled to do so, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand shillings.'

10.2.10 Absence of Witness

Under section 154 of the Act, 'any person who is a party to or participates in a ceremony purporting to be a marriage at which there are not at least two competent witnesses present shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand shillings.'

10.2.11 Irregular Marriages

According to section 155(1) of the Act, 'any person who is a party to a ceremony of marriage where–

(a) the intended wife is below the age of eighteen years and consent to the marriage, as required by section 18, has not been given;

(b) notice of intention to marry, as required by section 18, has not been given; or

(c) notice of objection to the intended marriage has been given and has not been dismissed or withdrawn,

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding six months.

However, it is 'a good defence to a charge under paragraph (a) or paragraph (c) of this subsection, that the person charged did not know and had no reason to believe that the party was below the age of eighteen years or, as the case may, that he had no knowledge that notice of objection had been given, or that he reasonably believed that such had been dismissed or withdrawn.'
Under subsection (2) of this section 'any person who participates in any such ceremony with knowledge of the irregularity shall be guilty of an offence and shall be liable on conviction to the like penalty.'

Meaning of 'Participation' under sections 148 to 155: under sections 148 to 155 of the Act, reference to the word 'to participate in' a ceremony is made. Therefore, for the purposes of sections 148 to 155, inclusive, "to participate in" a ceremony means: first, 'to officiate thereat;' second, 'to give consent thereto under section 17; or, third, 'to act as a witness thereto.'[430]

10.2.12 Failure to Apply for Registration

Under section 157 of the Act, 'any person who, being under a duty to apply for the registration of any marriage, fails to do so within the prescribed time, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred shillings.' However, 'no person shall be charged with an offence under this section if the marriage has been registered under the provisions of subsection (8) of section 43.'

10.2.13 Unlawful Attempt to Prevent Marriage

In terms of section 158(1) of the Act, 'any person who unlawfully attempts to prevent parties to an intended marriage to get married shall be guilty of an offence.' Similarly, 'any person who with the intention to disturb or delay the celebration of any marriage, or with the intention of embarrassing the intended parties or any other person present at the place where a marriage ceremony is

[430] Ibid, section 156.

being, or is about to be, or has been, performed, causes a disturbance in, at or near such place shall be guilty of an offence.'[431] Any person guilty of an offence under section 158 'shall be liable on conviction to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months or both.'[432]

ANNEXURES

THE LAW OF MARRIAGE (MATRIMONIAL PROCEEDINGS) RULES

[G.Ns. Nos. 136 of 1971; 107 of 1984; 392 of 1987; 224 of 1994; 112 of 1996; 246 of 1997]

PART I: PRELIMINARY PROVISIONS

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PART II: GENERAL PROVISIONS

3. Use of forms in First Schedule.
4. Title of proceedings.
5. Notices to be in writing.
6. Process to be sealed.
7. Service.
8. Chamber applications and summons.
9. Notice of chamber summons.

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[431] Ibid, section 158(2).

[432] Ibid, subsection (3).

PART X: MISCELLANEOUS PROVISIONS

PART I: PRELIMINARY PROVISIONS (rules 1-2)

1. Citation

These Rules may be cited as the Law of Marriage (Matrimonial Proceedings) Rules.

2. Interpretation

In these Rules, unless the context otherwise requires–

"Act" means the Law of Marriage Act *;

"matrimonial proceedings" means proceedings–

(a) on an objection under section 20 of the Act;

(b) for divorce, separation or annulment;

(c) for maintenance of a spouse;

(d) for custody or maintenance of children of the marriage;

(e) for a declaratory decree under section 94 of the Act;

"pleading" means a petition, an answer or a reply;

"prescribed" means, in relation to forms, means the forms prescribed in the First schedule to these Rules and in relation to fees, means the fees prescribed in the Second Schedule to these Rules;

"Registrar" means–

(a) where matrimonial proceedings are instituted in the High Court, the Registrar of the High Court, and includes a District Registrar of the High Court;

(b) where matrimonial proceedings are instituted in a subordinate court, the magistrate having jurisdiction over that court;

"subordinate court" means a court of a Resident Magistrate or a District Magistrate but does not include a primary court.

PART II: GENERAL PROVISIONS (rules 3-14)

3. Use of forms in First Schedule

The forms in the First Schedule to these Rules (or the Kiswahili versions thereof) where applicable, and where they are not applicable, forms of like character, with such variations as circumstances may require, shall be used.

4. Title of proceedings

(1) All pleadings and other documents filed in a court for the purpose of or in connection with any Form 1 matrimonial proceeding shall be entitled "Matrimonial Cause" with the name of the court and the matter to which it relates. Numbers and dates may be denoted by figures.

(2) The first pleading or document in any matrimonial proceeding shall have a distinctive number assigned to it by the Registrar and all subsequent pleadings and documents in the same proceeding shall bear the same number.

5. Notices to be in writing

All notices required by the Act or these Rules shall be in writing unless otherwise provided in the Act or these Rules or the court in any particular case orders otherwise.

6. Process to be sealed

All summons, petitions, notices, orders, warrants and other process issued by the court shall be sealed.

7. Service

Service of any summons, petition, notice, warrant or other process issued by a court and required to be served on any party, shall be by personal service:

Provided that the court may in any case grant leave for substituted service in such manner as it may direct.

8. Chamber applications and summons

Where any matrimonial proceeding is required by the Act or these Rules to be commenced by a chamber application or where any application is required by these Rules to be made by a chamber summons, the chamber summons shall be in the prescribed form.

9. Notice of chamber summons (Form 3)

(1) Where an application made by a chamber summons is of such a nature that it affects, or any decision made by the court on such summons is likely to affect, any person other than the person making the application, a notice of the application and a copy of the affidavit filed in support thereof shall be served upon the person so affected or likely to be affected.

(2) Every notice under paragraph (1) shall be in the prescribed form.

(3) Where under these Rules or by order of the court, a notice of application made by a chamber summons is required to be served on any person then, unless the court otherwise directs, such copy together with a copy of any affidavit filed in support of the application, shall be served on such person not later than eight days before the date fixed for the hearing of the application, and such person shall have the right to file a counter-affidavit and appear and be heard at the hearing of the application.

(4) Where a respondent intends to use affidavits in opposition to an application made by a chamber summons, he shall deliver a copy of every such affidavit to the applicant not less than two days before the day appointed for the hearing of the chamber summons.

10. Filing of affidavits
Every application to be used in support or opposition of any affidavit made by a chamber summons shall, unless the court otherwise directs, be filed with the Registrar not later than the day before the day appointed for the hearing of the application.

11. Hearing of chamber summons
Every chamber summons shall, unless the court otherwise directs, be heard in chambers.

12. Record of court
All pleadings, affidavits and other documents relating to any matrimonial proceeding, together with the record of evidence taken in such proceeding and the decision of the court, shall remain on record in the court so as to form a complete record of such matrimonial proceeding, and they shall not be removed for any purpose except by an officer of the court or on a special direction of the court.

13. Office copies
Office copies of pleadings, affidavits, records of evidence, judgements and other decisions in a matrimonial proceeding, shall be supplied by a Registrar to any person applying therefor and paying the prescribed fee.

14. Search
A search of any record shall be granted to any person applying for same and paying the prescribed fee:

Provided that a search shall be granted only between the hours of 8.30 a.m. and 11.30 a.m on weekdays and between the hours of 9.00 a. m. and 11.00 a.m. on Saturdays.

PART III
PROCEEDINGS ON A NOTICE OF OBJECTION (rules 15-16)

15. Court to issue summons (Form 4)
(1) Where a notice of objection has been transmitted to a court in accordance with the provisions subsection (1) as section 21 of the Act, the Registrar shall open a matrimonial cause file in relation to such notice and shall place the notice in such file.

(2) Where the court is satisfied that the grounds of objection stated in the notice of objection are not such as to confer jurisdiction upon the court, the court may, after giving the person making the objection opportunity of being heard, dismiss the objection or refer it to the Board.

(3) Where the court is satisfied that the grounds of objection stated in the notice of objection are such as to confer jurisdiction upon the court to determine the objection, the court shall direct the Registrar to issue a summons for appearance in the prescribed form to the person making the objection as well as to the intended husband of such person.

(4) Where the court is of the opinion that the person with whom the man intends to contract a marriage should be given an opportunity of being heard, a summons for the appearance of such person shall be issued by the Registrar.

16. Determination of objection
On the date appointed for the hearing of an objection under this Part, the court shall proceed to hear and determine the objection and shall in that respect have all the powers which the court has in relation to any matrimonial proceeding commenced by a petition, and the provisions of these Rules which relate to the hearing and determination of a matrimonial proceeding commenced by a petition shall, in so far as they may be applicable, apply to proceedings on an objection under this Part as if the person making the objection were a petitioner, the husband were a respondent and the person with whom the husband intends to contract a marriage, were a co-respondent.

PART IV
DIVORCE AND SEPARATION (rules 17-29)

17. Application for leave to present a petition for divorce within two years
(1) An application for leave to present a petition for divorce before two years have passed since the date of the marriage shall be by chamber summons.

(2) There shall be filed in support of the application an affidavit by the applicant stating the grounds for application, the grounds on which the applicant will rely to prove that the marriage has irreparably broken down, whether the matter has been referred to a Board, and if so, the decision of the Board, whether there are any children of the marriage, and if so, the names, age and sex of the children and where and with whom the children are residing.
(3) A copy of the application shall, unless the court otherwise directs, be served upon the other spouse.

(4) When all the affidavits have been filed or where the other spouse has not entered appearance, the Registrar shall give the parties a notice of the date and time of the hearing of the application.

(5) The court shall proceed to dispose of an application under this rule in the same manner and shall have, in that respect the same powers as it has in relation to an application made under the Civil Procedure Code *.

18. Petitions

(1) Every petition shall state in addition to the facts required to be stated therein by section 106 of the Act–

(a) the full names of the petitioner and his address for service;

(b) the full names and address of the respondent and of every co-respondent.

(2) Every petition shall be signed by the petitioner and shall contain a statement by the petitioner verifying the facts of which he has personal cognizance and of the facts which he believes to be true by reason of any information in his possession or otherwise.

19. Petition for divorce or separation

(1) Where a petition for divorce or separation is presented the court shall, if it is satisfied that the petition does not comply with the provisions of section 106 of the Act or of the provisions of rule 18, reject the petition.

(2) Where the court is satisfied that the petition complies with the provisions of section 106 of the Act and of rule 18, the court shall admit the petition and direct that a notice of the petition together with a copy of the petition be served upon the respondent and the co-respondent, if any.

20. Notice of petition (Form 5)

Every notice of petition required to be served on a respondent or a co-respondent, shall be in the prescribed form.

21. Service of notice (Forms 5 and 6)

(1) The petition shall not proceed to hearing unless the respondent and every co-respondent (if any) has entered an appearance or unless the court is satisfied by an affidavit or otherwise that the respondent and every co-respondent (if any) has been served with a notice of petition.

(2) After service of the petition has been effected, a certificate of service in the prescribed form shall be filed.

22. Appearance

An appearance shall be entered by a respondent or co-respondent by appearing in person or through an advocate before the Registrar, on the dates specified in the notice of petition.

23. Other pleadings

(1) Where a respondent enters an appearance and advises the Registrar that he intends to resist the petition, the Registrar shall allow the respondent or, as the case may be, the co-respondent, such time, not being less than two weeks or more than six weeks, in which the respondent or, as the case may be, the co-respondent, may file an answer.

(2) Where the Registrar allows time to the respondent or the co-respondent to file an answer he may, on application made by the petitioner, allow the petitioner reasonable time to file a reply to the answer.

(3) Every answer shall contain a concise statement of facts upon which the respondent, or as the case may be, the co-respondent, will rely for his defence.

(4) It shall not be sufficient for a respondent or a co-respondent in his answer to admit generally the grounds alleged by the petitioner, but the respondent or, as the case may be, the co-respondent, must deal specifically with each allegation of fact of which he does not admit the truth.

(5) Every reply must contain a concise statement of facts upon which the petitioner will rely to counter the allegations made in the answer.

(6) Every answer and every reply must be signed by the person on whose behalf it is lodged and must contain a statement by such person verifying the facts alleged in the answer or, as the case may be, the reply, of which he has personal cognizance and the facts which he believes to be true by reason of any information in his possession or otherwise.

(7) A copy of every answer and of every reply filed in any matrimonial proceeding shall be served on each of the other parties to the proceeding.

24. Amendment of pleadings

The court may, if sufficient cause is shown, allow any party at any time before the conclusion of the trial of a petition to amend his pleading, subject to such order as to costs as the court may think fit to make.

25. Pleadings out of time

Where a party has failed to file any pleading within the time allowed therefor by the Registrar, the court may on application made by such party grant leave for the pleading to be filed out of time.

26. Particulars

(1) Any party may by letter require any other party to furnish particulars of any allegation or other matter pleaded, and if such other party fails to furnish such particulars within a reasonable time, the party requiring the particulars may apply to the court for an order that particulars be given.

(2) All particulars, whether given in pursuance of an order or otherwise, shall be filed together with an affidavit in support thereof within eight days of being furnished to the party requiring them.

27. Discovery

(1) A party to a matrimonial proceeding may by leave of the court, deliver interrogatories in writing for the examination of any opposite party.

(2) Interrogatories shall, unless the court otherwise directs, be answered by affidavit.

(3) A party to a matrimonial proceeding may apply for an order for discovery of documents by an opposite party and such opposite party may be ordered to make such general or limited discovery on oath as the court may think fit.

28. Non-appearance of parties

(1) The provisions of Order IX of the Civil Procedure Code, 1966, which relate to the consequences of non-appearance of parties to a suit shall apply mutatis mutandis to the non-appearance of any party to a matrimonial proceeding on the day fixed for the entering of an appearance or on any day on which the petition is called on for hearing:

Provided that in no case shall a court pass a decree in favour of the petitioner for the reliefs suggested by him by reason only of the non-appearance of the respondent or co-respondent, and in every such case the court shall proceed to hear the petition ex parte and determine the issue involved on the basis of the evidence adduced by the petitioner.

(2) In any case in which a decree is passed ex parte against a respondent or a co-respondent, he may, at any time before the expiry of forty-five days from the date of the decree, apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that notice of petition was not duly served upon him or that he was prevented by any sufficient cause from entering an appearance or from appearing on any subsequent date when the petition was called on for hearing, the court shall make an order setting aside the decree against him upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the hearing of the petition:

Provided that where a decree was passed ex parte both against the respondent and the co-respondent, and the application is made by the co-respondent only for the setting aside of the decree, the court may, if it is of the opinion that the decree is of such a nature that it cannot be set aside as against the co-respondent only, order that the decree be set aside as against the respondent as well.

(3) No decree shall be set aside on any application made under paragraph (2) unless notice thereof has been served on the petitioner.

(4) Notwithstanding the provisions of this rule, where a co-respondent fails to enter an appearance or to appear on the day on which the petition is called on for hearing, the court shall not pass any decree ex parte against the co-respondent until after the hearing of the petition as against the respondent.

29. Hearing

(1) When all the pleadings in a matrimonial proceeding have been filed, the Registrar shall fix a date for the trial of the petition.

(2) The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code, 1966, and the provisions of that Code which relate to examination of parties, production, impounding and return of documents, settlement of issues, summoning an attendance of witnesses, adjournments, hearing of the suits and examination of witnesses, affidavits, judgments and decrees shall apply mutatis mutandis to a trial of a petition.

PART V
ANNULMENT (rules 30-31)

30. Petition for annulment

Every petition for annulment shall comply with the provisions section 96 of the Act and shall contain–

(a) the names and address of the party making the petition;
(b) the names and address of the respondent;
(c) particulars and the date of the marriage sought to be annulled;
(d) the names, ages and sex of the children (if any) of the marriage;
(e) particulars of the facts giving the court jurisdiction;
(f) a statement of the principal allegations on which the petition is founded;
(g) where the petitioner has been guilty of any marital misconduct, an admission of such misconduct;
(h) the terms of any agreement regarding maintenance or division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and
(i) particulars of the reliefs sought.

31. Procedure on petition for annulment

The provisions of Part IV which regulate the procedure on and determination of a petition for divorce or separation shall, so far as they may be applicable, apply to a petition for annulment.

PART VI
APPLICATION FOR MAINTENANCE, CUSTODY, ETC. (rules 32-33)

32. Application for maintenance etc., to be by chamber summons

(1) Every application for maintenance (whether for maintenance of a party to a marriage or the children of the marriage) or for the custody of the children of the marriage shall be by a chamber summons supported by affidavit.

(2) Where any matrimonial proceeding is not by the Act or these Rules required to be instituted by a petition, the proceeding shall be instituted by a chamber summons supported by an affidavit.

33. Procedure on application

(1) Where a matrimonial proceeding has been on application instituted by a chamber summons supported by an affidavit and all affidavits and counter-affidavits have been filed, the Registrar shall fix a date for the hearing of the application.

(2) On the date appointed for the hearing of an application, the court shall proceed to hear and determine the application and shall, in that respect, have all the powers which the court has in relation to any matrimonial proceeding commenced by a petition, and the provisions of these

Rules which relate to the hearing and determination of a matrimonial proceeding commenced by a petition, shall in so far as they may be applicable, apply to proceedings on an application under this Part as if the person making the application were a petitioner, the person against whom any relief is sought were a respondent, and any other person likely to be affected by any decision of the court made on such application, were a co-respondent.

PART VII
EXECUTION OF DECREES (rules 34-35)

34. Decrees for payment of money or for delivery

Where in any matrimonial proceeding, the court has passed a decree for the payment of any money, whether periodically or otherwise, or for the delivery of any property, such decree may be executed in the same manner as a similar decree passed in any civil suit under the Civil Procedure Code *, and the provisions of the Civil Procedure Code, relating to the execution of such decrees shall apply mutatis mutandis to a decree for payment of money or delivery of property passed in any matrimonial proceedings.

35. Custody of children

(1) Where by a decree passed in any matrimonial proceeding, the court has awarded the custody of any child of the marriage to any party, the court may on application of such party, issue an injunction against any other party to such proceeding or against any other person, ordering such person to refrain from interfering in any way with the exercise of lawful rights by the person to whom the custody of a child was granted and may enforce compliance with such order by imprisonment and detention in a civil prison of the person against whom the order is made and who fails to comply with the order.

(2) The provisions of the Civil Procedure Code, 1966, which relate to arrest and detention in a civil prison of any judgement debtor shall apply mutatis mutandis to arrest and detention in a civil prison under this rule.

PART VIII
APPEALS (rules 36-38)

36. Interpretation

In this Part "subordinate court" includes a primary court.

37. Memorandum of appeal

(1) An appeal to the High Court under section 80 of the Act shall be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against.

(2) Every memorandum of appeal shall be either in Kiswahili or in English and shall state briefly the grounds of objection to the decision, order or decree appealed against.

(3) Upon the receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with the complete record of the matrimonial proceeding to which the appeal relates.

(4) The High Court shall not reject or refuse to entertain any memorandum of appeal by reason only of any defect in the form of the memorandum but shall admit every memorandum of appeal.

38. Procedure after admission of appeal
The provisions of rules 9 to 37 (inclusive) of Order XXXIX of the Civil Procedure Code, 1966, shall apply mutatis mutandis to an appeal to which this Part applies:

Provided that–
(a) where a respondent wishes to take any cross-objection to the decree, he may do so without being required to file a memorandum of such cross-objection;

(b) in determining any appeal, the court shall not be confined to the grounds of objection raised in the memorandum of appeal but may, after giving the parties an opportunity of being heard thereupon, decide the appeal on any ground not raised in the memorandum of appeal; and

(c) the High Court shall decide every appeal according to substantial justice without undue regard to technicalities of procedure and without undue delay.

PART IX
REFERENCE TO HIGH COURT (rules 39-44)

39. Construction
In this Part a Magistrate includes a Primary Court Magistrate.

40. Procedure on case stated
Where, before or on the hearing of a matrimonial proceeding by a magistrate, any question of law or usage having the force of law arises on which the magistrate entertains a reasonable doubt the court may, either on its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.

41. Stay of proceedings pending reference to High Court
The magistrate may either stay the proceeding or proceed with the case notwithstanding a reference to the High Court under rule 40 and may pass a decree or make an order contingent upon a decision of the High Court on the point referred:

Provided that no decree or order passed or made by the magistrate shall be executed until the receipt of a copy of the judgement of the High Court on the point referred to the High Court.

42. Judgment of High Court
The High Court, after hearing the parties, if they appear and desire to be heard, shall decide the point referred to it under rule 40 and shall transmit a copy of its judgment under the signature of the Registrar to the court by which the reference was made; and such court shall on receipt thereof proceed to dispose of the case in conformity with the decision of the High Court.

43. Costs where case stated
The costs, if any, consequent on a reference for the decision of the High Court under rule 40 shall be costs in the cause.

44. Power to alter, etc., decree of court making reference

Where a case is stated to the High Court under rule 40, the High Court may return the case for decree of amendment, and may alter, cancel or set aside any Court or order which the court stating the case has making passed or made in the case and may make such orders reference as it thinks fit.

PART X

MISCELLANEOUS PROVISIONS (rules 45-48)

45. Costs

In any matrimonial proceedings, the court shall have the same power to award costs as it has in any other civil proceedings to which the Civil Procedure Code, 1966, applies.

46. Court may award reduced costs

Where in any matrimonial proceeding commenced award in the High Court, the court is of the opinion that reduced such proceeding could have been more expeditiously costs dealt with by a subordinate court, the court may direct that the costs payable to any party shall be assessed as if the proceeding had been commenced and determined by a subordinate court, and where such order is made, the party entitled to recover any court fees paid by him shall be entitled to recover only such amount of the court fees as would have been paid by him had he commenced the proceeding in a subordinate court.

47. Fees

The fees specified in the Second Schedule hereto shall be levied in respect of the several matters and proceedings mentioned therein.

48. Remission of fees

(1) The court may for reasons of poverty or other good cause remit in whole or in part the fees or any of the fees payable under these Rules.

(2) Application for remission of fees under this Rule may be either orally to the court or by an ex parte chamber summons supported by an affidavit.

(3) No fee shall be payable on an application under this rule.

THE MARRIAGE CONCILIATION BOARDS (PROCEDURE) REGULATIONS

(Section 162(2))

[G.N. No. 240 of 1971]

1. Citation

These Regulations may be cited as the Marriage Conciliation Boards (Procedure) Regulations and shall be read as one with sections 102, 103 and 104 of the Act.

2. Interpretation

In these Regulations, unless the context otherwise requires–

"Act" means the Law of Marriage Act *;

"Board" means a Marriage Conciliation Board established or designated under section 102 of the Act and includes a Communal Board;

"Chairman" means the Chairman of a Board and includes, in relation to any meetings of the Board, the Vice-Chairman or temporary Chairman presiding over that meeting;

"Communal Board" means a Marriage Conciliation Board designated under the provisions of subsection (2) of section 102 of the Act as a Board of the community for which it is so designated;

"matrimonial dispute" includes an objection to an intended marriage referred to a Board under section 21(1)(b) of the Act;

"member" means a member of a Board and includes the Chairman;

"prescribed form" means a form prescribed by the Schedule to these Regulations.

3. Communal Boards

(1) Every Communal Board shall consist of a Boards Chairman and not less than four other members appointed by the appropriate organ of the community for which the Communal Board has been established.

(2) Every appointment, either as a Chairman or a member of a Communal Board, shall be signed by the proper officer of the organ of the community concerned and shall be conclusive evidence that the person named therein is a member of the Board.

(3) Where the appointment of a Chairman or any member of a Communal Board is revoked, revocation shall be by a letter addressed to the person concerned and signed by the proper officer of the organ of the community.

(4) The Chairman of every Communal Board shall, within three months of being appointed as Chairman, inform the Registrar in writing of the postal address of the Board.

(5) A Chairman of a Communal Board who fails to comply with the provisions of paragraph (4) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand shillings.

4. Quorum

The quorum necessary for the transaction of the business of a Board shall be three members.

5. Vice-Chairman

A Board may, from amongst its members, appoint a Vice-Chairman.

6. Chairman

(1) The Chairman shall preside over the meetings of the Board.

(2) Where at any meeting of a Board, the Chairman is absent, the Vice-Chairman shall preside over the meeting of the Board.

(3) Where both the Chairman and the Vice-Chairman are absent, the members present may elect a temporary Chairman from amongst themselves and such temporary Chairman shall preside at such meeting.

7. Reference of dispute to a Board

(1) A matrimonial dispute, other than an objection under section 21(1)(b) of the Act, may be referred to a Board either verbally or in writing by either party to a marriage or any other person having a right to refer a matrimonial dispute to a Board.

(2) Oral reference to a Board may be made either to the Chairman or Vice-Chairman or to any member of the Board.
(3) Where a dispute is referred to a Board, the member to whom the dispute is referred shall forthwith advise the Chairman of the dispute and the Chairman, or in his absence, the Vice-Chairman, or where both the Chairman and the Vice-Chairman are absent, any member of the Board shall forthwith fix a date, time and place for a meeting of the Board to consider the dispute.
(4) Where a meeting has been fixed pursuant to the provisions of paragraph (3), a notice in writing shall be addressed to the parties to the dispute advising each of such parties of the date, time and place of the meeting and requiring such party to attend the meeting:

Provided that where in the opinion of the Board it is expedient to give oral notice of the date, time and place of the meeting of the Board, such oral notice, if given by the Chairman or any member of the Board, shall have the same effect as a notice in writing.
(5) Where it is found that at any meeting of a Board, a quorum is not present, the members present at that meeting shall adjourn the meeting to a further date and shall notify the parties to the dispute and the other members of the Board, of the date, time and place of such meeting.
(6) Where at a meeting held pursuant to an adjournment under paragraph (5) only two members are present, then, notwithstanding the provisions of these Regulations regarding the quorum, such two members shall proceed to consider the dispute and the decision made by the Board constituted shall be as lawful and binding as a decision made by a meeting of the Board at which a full quorum is present.
(7) Where, after the commencement of the hearing of any dispute, the Board adjourns its meeting to any future date and at the subsequent meeting held pursuant to such adjournment, a sufficient number of members are not present so as to constitute a quorum, the Board shall be deemed to be validly constituted even if only one member is present, and may proceed to determine the dispute notwithstanding any provision of these Regulations to the contrary:

Provided that–
(a) the provisions of this paragraph shall apply only in respect of the proceedings relating to the dispute not concluded at the previous meeting;
(b) the member present, or where there are two or more members present, any one of them must be a member who was present at the previous meeting and all the meetings held to consider the dispute in question.

8. Decision of the Board
(1) Where at any meeting three or five members are present, the decision of the majority shall be the decision of the Board.
(2) Where, at any meeting of the Board, two or four members are present, the person presiding over the meeting of the Board shall have a casting vote in addition to his deliberative vote.
(3) Where the proceedings of any Board relating to any matrimonial dispute has been adjourned and at the adjourned meeting only one member is present, the decision of such one member shall, subject to the provisions of paragraph (5) of regulation 7, be deemed to be the decision of the Board.

9. Certificate of Board
(1) Where the dispute arises out of a notice of objection referred to the Board under paragraph (b) of subsection (1) of section 21 of the Act, the Board shall issue a certificate of its decision and such certificate shall be in the prescribed form.

(2) Where the dispute is between a husband and his wife, and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, and the Board fails to reconcile the parties, the Board shall issue a certificate in the prescribed form.

10. Forms of Notices
Notices issued by the Board shall, in so far as it may be practicable and subject to such variations as may be necessary, be in the form prescribed in the Schedule.

11. Offences
Any person who participates at any meeting of a Board without being a duly appointed member thereof or after his appointment as a member has been terminated, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand shillings.

12. Transfer of proceedings
Where a Board to which a matrimonial dispute has been referred is of the opinion that it is desirable, in the interests of justice, that another Board having jurisdiction in the matter should determine the dispute, it may transfer the dispute to such other Board:

Provided that no dispute shall be transferred to any Communal Board unless all the parties to the dispute are members of the community for which the Board has been designated.

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