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Source: *The Journal of Modern African Studies*, Vol. 28, No. 3, (Sep., 1990), pp. 521-526

Published by: Cambridge University Press

Stable URL: <http://www.jstor.org/stable/161233>

Accessed: 15/04/2008 17:39

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## **The Division of Matrimonial Property in Tanzania**

by Rose Mtengeti-Migiro, *Lecturer in Law, University of Dar es Salaam*

The labour of women in the house, certainly, enables men to produce more wealth than they otherwise could; and in this way women are economic factors in society. But so are horses. The labour of horses enables men to produce more wealth than they otherwise could. The horse is an economic factor in society. But the horse is not economically independent, nor is the woman.

— Charlotte Perkins Gilman, *Women and Economics* (Boston, 1898)

For a long time, women's work has not been valued very highly, mainly because of the belief in many cultures that whatever is undertaken in the house is a natural duty and/or act of love for the husband and the family. Indeed, in many parts of subsistence Africa, the heavy duties performed by women in preparing, planting, weeding, and harvesting crops are regarded as 'domestic' commitments and hence not serious labour. This situation can hardly be said to be characteristic of only 'non-developed' societies, in which patriarchal attitudes are still dominant, since according to a 1985 study, although women make up more than half of the world's population and do two-thirds of the world's working hours, they receive only one-hundredth of the world's property.<sup>1</sup> This state of affairs, however, is now changing, because as women everywhere unite in order to achieve legal, social, and economic equality, the value attached to their work naturally increases.

In Tanzania up to 1971, family affairs were basically governed in accordance with either the customary and/or religious beliefs of the different communities. Thus the majority of the indigenous inhabitants were subject to their own customary laws, the Hindus and Muslims had their own Marriage, Divorce, and Succession (Non-Christian Asiatics) Ordinance, while Christian and monogamous civil marriages were subject to the provisions of the Marriage Ordinance. This state of affairs not only gave rise to a number of problems, particularly as regards conflict of legislation, but also hindered the emergence of national unity, and to a great extent perpetuated the inherent inequalities in the various personal laws. Not surprisingly, efforts were made before the end of the 1960s to secure the enactment of a single law to govern family matters. Because of the belief held by the then-ruling party, the Tanganyika African National Union (T.A.N.U.), 'that all human beings are equal and that every individual has a right to dignity and respect', the Government announced in 1969 that it was 'anxious to enact legislation to provide for the uniformity of law relating to marriages and divorce'.<sup>2</sup>

### *The Law of Marriage Act, 1971*

Many Tanzanians regarded the National Assembly's enactment of the Law of Marriage Act in 1971 as a progressive step towards uniformity and unification of law, and as a recognition of equality between husbands and

<sup>1</sup> See Ruth Leger Sivard, *Women... a World Survey* (Washington, D.C., 1985), quoted by J. W. Kabeberi, 'Women and Property in Kenya', Faculty of Law, University of Nairobi, 1987.

<sup>2</sup> Tanzania, Government Paper No. 1 of 1969, para. 5.

wives. Indeed, it was hailed in some quarters as a piece of legislation that had come 'to rescue' female spouses. Nearly 30 years later, how far have the expectations been fulfilled?

The Act gives power to the court, *inter alia*, to order a division of the marital assets acquired by the spouses during marriage through their joint efforts. According to Section 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 assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1), the court shall have regard to:

- (a) the custom of the community to which the parties belong;
- (b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (c) any debts owing by either party which were contracted for their joint benefit; and
- (d) the needs of the infant children, if any of the marriage, and subject to those considerations, shall incline towards equality of division.

Unfortunately the Act does not make clear what constitutes a 'contribution' towards the acquisition of matrimonial assets. In particular, the main bone of contention has been whether or not 'work', as mentioned in sub-section 2(b) above, includes housework; and if so, can the latter be said, in appropriate circumstances, to have made such a valuable 'contribution' to the marital assets as to entitle the wife concerned to a share if/when a division is ordered by the court?

#### *Some Differing Judgements, 1973-7*

In the case of *Omari Oberi v Maria Nyakagare* in 1973, the Magistrate's Court in Musoma awarded a total of T.Shs. 4,000 to the ex-wife as she had contributed Shs. 200 as long ago as 1942 towards the establishment of a fishing venture which turned out to be a success, and this decision was confirmed when the High Court in Mwanza turned down the husband's appeal.<sup>3</sup>

By way of contrast, in the case of *Phares Masalu v Joyce Ngwalabu* in 1974, the High Court in Dar es Salaam dismissed the wife's claim that she was entitled to a part of the matrimonial property, namely the house, because she had cooked for the workers during its construction. According to the Judge, 'had the wife not performed these tasks, the house would still have been built. The cooking was of course part of her wifely duties', and she was therefore not entitled to any part of the house.<sup>4</sup>

This position was echoed in the case of *Margareth Wilson v Wilfred Selemani* in 1976, when the Court said that it could only determine issues pertaining to the division of marital property after sufficient evidence had been adduced to show the contribution of each spouse, and that the wife's claim must fail since her domestic work was not a relevant consideration.<sup>5</sup>

<sup>3</sup> Mwanza High Court, Civil Appeal No. 181 of 1973, unreported.

<sup>4</sup> Dar es Salaam High Court, Civil Appeal No. 37 of 1974, unreported.

<sup>5</sup> *Law Reports of Tanzania* (Dar es Salaam), 1976, No. 48.

One of the most important cases in which the issue arose was *Rukia Diwani Konzi v Abdallah Kihanya* in the High Court in Dar es Salaam, 1977. As explained by Justice Lewis Makame:

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.

He finally held that a wife should be entitled to a share in the matrimonial property on the basis of her housework.<sup>6</sup>

In the case of *Hamid Amir Hamid v Maimuna Amir* in 1977, Justice Patel rejected the wife's claim that she was entitled to a share of the matrimonial assets because of her previous domestic duties:

with due respect I am unable to agree ... because the wife runs a household, washes, cleans, cooks and saves money each month, this should be termed as her contribution and joint effort towards acquisition of property during subsistence of marriage.

He added that if the legislature had intended that to be the case it would have said so in clear terms.<sup>7</sup>

#### *Justice Mapigano's Ruling, 1980*

In the case of *Zawadi Abdallah v Ibrahim Idi* in 1980, the facts presented showed that the parties had been married for 17 years, and that they had acquired two houses and a lorry. The wife said she had contributed to the property through hard work and prudence, as well as by participating in running a retail shop from which money had been obtained to buy the lorry. The husband disputed the claim by bringing witnesses who testified that they served as assistants, and by giving evidence to show that the lorry had been bought through a loan advanced to him by his employers. Satisfied with the evidence of the husband, the District Magistrate rejected the wife's claim. He explained that since traditionally looking after the household and caring for the children is the occupation and responsibility of a wife – just as feeding and clothing the family is the occupation and responsibility of the husband – then that should not be considered as a 'contribution' or part of a 'joint effort'.

When the wife appealed to the High Court in Dar es Salaam, Justice Mapigano explained that, at the risk of being deemed a conservative, which he believed he was not, he held the view that the Magistrate's decision was 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 domestic services are not to be taken into consideration when the court is exercising its powers under the section.

<sup>6</sup> Dar es Salaam High Court, Matrimonial Cause No. 6 of 1977, unreported.

<sup>7</sup> *Law Reports of Tanzania*, 1977, No. 55.

Mapigano said, *inter alia*, that he concurred with the position that had been taken in 1977 in *Hamid Amir*; namely, that if the legislature had intended that the domestic services performed by a wife be regarded as a 'contribution', or part of a 'joint effort', it would have said so in language clear and plain. In the absence of such an express provision in the law the Judge felt that he had to ask the following:

...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?

In trying to answer this question, Mapigano made it clear that he agreed, in principle, that the law should be innovative and responsive to societal aspirations, and acknowledged the fact that judges, including those in the Commonwealth, do sometimes make law, albeit concurring with Oliver Wendell Holmes that they do so 'interstitially, and with molecular rather than molar motions'. Sir Charles Newbold, the former President of the East African Court of Appeal, was also quoted approvingly:

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.<sup>8</sup>

Bearing in mind these arguments, Justice Mapigano felt that his hands were tied because, despite the continuing dissatisfaction with the wording of Section 114, the appropriate solution lay in the intervention of the legislature and not in judicial law-making.<sup>9</sup>

#### *A Breakthrough in 1983?*

Three years after this seemingly elaborate and authoritative judgement, the Court of Appeal, the highest in Tanzania, had to deal with the case of *Bi.Hawa Mohamed v Ally Sefu*.<sup>10</sup> Their marriage had been dissolved in 1983 by the Primary Court in Ilala. The Magistrate held that Bi.Hawa was not entitled to any share of the matrimonial assets as 'she was only a mere housewife, and the house was bought by the husband with his own money', but accepted the offer made by Ally Sefu to pay a sum of T.Shs. 2,000 as a parting gift to his wife, in accordance with their religious tenets. On appeal to the High Court in Dar es Salaam, Justice Kimicha substantially agreed with the views that had been expressed by the Magistrate, but increased the parting gift to T.Shs. 3,000, whereupon Bi.Hawa resorted finally to the Court of Appeal.

As in all other disputes over the division of matrimonial property, the burning issue was whether Bi.Hawa's wifely duties amounted to a material

<sup>8</sup> Extracted from a paper by Sir Charles Newbold, University College, Dar es Salaam, 1969.

<sup>9</sup> Dar es Salaam High Court, Civil Appeal No. 10 of 1980, unreported.

<sup>10</sup> Dar es Salaam Court of Appeal, Civil Appeal No. 9 of 1983, as reported in *Tanzania Law Reports* (Dar es Salaam), 1983, No. 6.

and valuable 'contribution'. The Justices reviewed *in extenso* the judgement of Justice Mapigano in the case of *Zawadi Abdallah*, and agreed that the words in Section 114(2) – i.e. 'joint efforts' and 'contributions made by each party in money, property or work towards the acquiring of the assets' – were not free of ambiguity. However, the Court of Appeal adopted the 'mischief rule' of interpretation:

On examination of the LMA [Law of Marriage Act] 1971, and the law as it existed before its enactment, one can not fail to notice that the mischief which the LMA sought to cure or rectify was what may be described as the traditional exploitation and oppression of married women by their husbands. It is apparent 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 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 overall purpose of the Act as an instrument of liberation and equality between the sexes.<sup>11</sup>

Since the value and rôle of domestic work appeared to have been established, this judgement was received as a victory, particularly by female spouses who felt that they would no longer be the victims of the conservative school of interpretation in the courts.

But was the case of *Bi.Hawa* really a milestone as regards the equitable division of matrimonial property? It is certainly significant that the Court of Appeal not only effectively overruled the decision of Justice Mapigano in the case of *Zawadi Abdallah*, but also resolved the disagreement within the judiciary over whether or not housework is to be recognised as entitling a spouse to a share in the family assets.<sup>12</sup> This was surely a major achievement in view of the strength of the traditional belief that a woman's place is in the kitchen, and that what she does there is of no financial significance. Moreover, the case of *Bi.Hawa* demonstrated how a court may positively interpret the law to fit the needs and aspirations of the society. As observed by W. B. L. Kapinga: 'in view of the traditional norm that judicial law-making is acceptable in appropriate cases... the conceptualisation in *Bi.Hawa*'s case did not need to wait for legislative intervention'.<sup>13</sup>

However, it must be noted that since the National Assembly has not yet intervened to make the Court of Appeal's decision 'water-tight', there is still the possibility that another panel of judges could return to the conservative stance adopted in the case of *Zawadi Abdallah*, not least because according to the rules of precedent the Court of Appeal is not bound by its own decisions. In other words, it is free to make a re-interpretation of the law, the effect of which could be a departure from the case of *Bi.Hawa*.

Moreover, since Section 114(2)(a) requires that the court shall have regard to the customs of the community to which the parties belong, when ordering a division of matrimonial property, this could well be detrimental for female spouses. As is widely known, customary law tolerates little gender equality, and although the domestic services rendered by a wife are traditionally appreciated, they have not been accepted as 'valuable' and therefore as

<sup>11</sup> Ibid.

<sup>12</sup> B. A. Rwezaura, 'Division of Matrimonial Assets Under the Tanzania Marriage Law', in *Verfassung und Recht in Übersee* (Hamburg), 17, 1984, pp. 177–93.

<sup>13</sup> W. B. L. Kapinga, in *Law Reform of Tanzania Bulletin* (Dar es Salaam), 1, 1987.

making a 'material contribution' to the acquisition of marital property. As Justice Lugakingira explained in the High Court in Dodoma in the case of *Mariam Tumbo v Harold Tumbo* in 1982:

I would require considerable persuasion to come to the view that 'work' refers to and includes fulfilment of what are purely conjugal obligation. I think...that 'work' refers to physical participation in the production of the asset itself.<sup>14</sup>

He then relied upon the *verbis legis non est recedendum* rule – i.e. that thou shall not vary the words of a statute. This appears such a strong point that little imagination is needed to forecast accurately the type of judgement that might be made if one or more members of the Court of Appeal held similar views, even though the wording in Section 114(2)(b) does not expressly rule that 'work' should *not* include domestic services.

### *Conclusion*

In the absence of a legislative clarification/amendment, the celebrated judgement in the case of *Bi.Hawa* could be a short-term gain. This is because the issues at stake still depend on judicial activism, and what a particular judge considers to be public policy. As Justice Mapigano observed in the disturbing case of *Zawadi Abdallah*, 'public policy is a most unruly horse, you can never know where it will carry you.' Should it happen that the 'unruly horse' is the inherent ambiguity in Section 114(2)(b), which was not disputed by the Court of Appeal, coupled with the mandatory requirement in Section 114(2)(a) to take into account customs of the relevant community, then the milestone in the case of *B.Hawa* could well turn into a tombstone. The National Assembly should once and for all intervene to give married women a long-lasting legal panacea.

<sup>14</sup> Justice Lugakingira, in Dodoma High Court, Matrimonial Cause No. 1 of 1982, unreported.