

**WOMEN AND THE RIGHT TO PROPERTY ON DIVORCE: A
CRITICAL ANALYSIS OF THE DIVISION OF MATRIMONIAL
PROPERTY RIGHTS UPON DIVORCE: A CASE STUDY OF
ILALA DISTRICT COURT IN DAR ES SALAAM, TANZANIA.**

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**A Dissertation submitted in partial fulfillment of the requirements
for a Masters Degree in Women's Law, Southern and Eastern
African Regional Centre for Women's Law, Faculty of Law,
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2014

DECLARATION

I, JOSEPHINE ARNOLD, declare that this dissertation is my own original work. It has not submitted for a degree to any other University.

Signed;

Date;

ACKNOWLEDGEMENT

My heart appreciation during the preparation of this work goes to the following:

Special gratitude to the Almighty God through whom everything was made possible, for giving me the courage to take up this opportunity of pursuing my studies and for protecting me throughout the course.

To Annmarie Nkelame Mavunjina, thank you for encouraging me to apply and take up this course. Thank you very much for believing in my success.

Special gratitude goes to NORAD, thank you for the scholarship, without which the Master's programme would have remained a dream. To the Director of the Women's Law Centre Professor Julie Stewart for the motherly care, concern and understanding throughout the course

To my Supervisor Professor Julie Stewart, thank you so very much for your guidance, assistance, support and input from the beginning of this work to this final product. Forever be blessed Professor Julie.

To Tanzania Women Lawyers Association (TAWLA) Management for recognizing the need for Professional Advancement of its members and for allowing me to be out of the Office to take up this Course. Thank you Tike Mwambipile (Executive Director) for the permission.

I would like to acknowledge each and every individual who contributed either directly or indirectly to the success of this work

DEDICATION

This work is dedicated to my beloved parents, Mr. and Mrs. Arnold Wilson Kimaro for their everlasting love, heart encouragement, constant prayers, emotional and moral support.

To my unborn child who irrespective of my condition still allowed me to do the write up even though it was on bed. Thank you so very much my little Angel.

LIST OF STATUTES AND INSTRUMENTS USED

DOMESTIC LEGISLATION

United Republic of Tanzania (URT) Constitution (As Amended from time to time)

Tanzania Law of the Marriage Act, No. 5 of 1971 (CAP. 29 R.E. 2002)

The Magistrate's Courts Act No. 2 of 1984 (CAP. 11 of Revised Laws)

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS;

African (Banjul) Charter on Human and People's Rights (Banjul Charter)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

International Covenant on Civil and Political Rights (ICCPR)

Protocol to the African Charter on the Rights of Women in Africa, 11 July 2003, 11 July 2003
(Women's Protocol)

Southern African Development Community (SADC Protocol on Gender and Development)

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/811 (1948)

LIST OF CASES CITED

Bi Hawa Mohamed v Ally Sefu 1983 TLR 32

Christina Gati v. Chinato Mwitwa Matrimonial (Primary Court) Civil Appeal No 7 of 1985, High Court Mwanza, original Tarime District Court Civil Appeal No 8 of 1984, and Primary Court Mtana Civil Case No 59 of 1984

Constansia Anatori v Taidini Snaga, Matrimonial (Primary Court) Civil Appeal No 35 of 1977, High Court of Tanzania, Bukoba, original Primary Court Rulenge (Ngara District) Civil Case No 8 of 1977

Mahanga Zengo V. Hogo Kadaso (1982) TLR 94

Mwajuma Mohamed Njopeka vs Juma said Mkorogoro (HC) 1998

Rukia Diwani Konzi Vs Abdallah Issa Kihenya (Matrimonial Cause No. 6 of 1977 - unreported)

Veronica Kondela v Samuel Nyando Primary Court Sengererna Civil Case No. 77 of 1984

Zawadi Abdallah Vs Ibrahim Iddi 1981 TLR 311

EXECUTIVE SUMMARY

This paper provides the summary of what the research was about and the finding of a study carried out in Ilala District Court in Dar Es Salaam Tanzania on women and the right to property on divorce: A critical Analysis of the Division of matrimonial property rights upon divorce. It further seeks to analyze the legal position of women under the Tanzanian Law of Marriage Act and to facilitate amendment of section 114(2) (b) to include clear guidelines on the division of matrimonial property pursuant to their non monetary contributions on divorce

The main objectives of the study were: To analyze the legal position of women under the Tanzanian Law of Marriage Act and to facilitate amendment of section 114(2)(b) to include clear guidelines on the division of matrimonial property pursuant to their non monetary contributions on divorce.

To suggest useful recommendations aimed at assisting women get their property rights upon divorce.

In order to analyze the legal position of women in relation to division of matrimonial property upon divorce; I had to employ various research methodologies during the study such as women's law approach, grounded theory, human rights approach, legal centralism approach, feminist legal perspective, sex and gender analysis, actors and structures approach. Methods used during the study in collecting data include experiential data, individual in-depth interviews and court and TAWLA records

The findings of the research included; women's lived realities on divorce and division of matrimonial assets including; factors like lack of knowledge and awareness on their rights, economic factors, fear and stigma from the society, quantification problems by women on their monetary and non monetary contribution in relation to the acquisition of the assets in question, the role of the court when adjudicating matrimonial property claims and the role of the TAWLA as a vibrant women rights organization within the Ilala District.

The study recommends as follows;

Article 8(f) of the Women's Protocol provides for Access to Justice and Equal Protection before the Law that; Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: reform of existing discriminatory laws and practices in order to promote and protect the rights of women. In this regard;

Section 114 (2) (a) of the Act to be removed because it's out dated on its applicability because the LMA was put in place to curb the plurality of laws being customary and religious which in most cases bring about inequalities between spouses.

Section 114 (2) (b) of the Act to be amended to comply with the various human rights Instruments which require division of matrimonial property to be effected in an equitable manner. Further the new section should reflect article 13 of the URT Constitution which stipulates that there must be equality between men and women.

Not only that but also section 114 (2) (b) of the Act should be amended to include housework as valuable contribution towards the acquisition of matrimonial assets enough to entitle her to an equitable share of the same when the marriage breaks down.

That the law should be clear on how division between spouses should be carried out to curb the current situation of judicial officers' discretion which is unjust for women

Therefore the LMA should provide clear guidelines on how exactly marital assets should be shared between spouses after divorce.

There is a need to capacity build all Administrators of justice i.e Magistrates and Judges on gender sensitivity for them to adjudicate matrimonial cases based on equality as provided for under the Constitution and different human rights Instruments instead of only relying on the gendered provision of the LMA which denies women their entitlements.

Judges and Magistrates to be trained on the importance of thinking out of the box so as to reflect women's needs in order to improve their status as well as bringing equality between spouses in matters related to family relations.

The need to conduct mass awareness campaigns aimed at educating women and the general public on marriage laws as well as deconstructing the societal perceptions that disempowers women from accessing justice as far as matrimonial assets upon divorce is concerned.

To educate the society on the importance of valuing house hold work as a valuable contribution enough for one to get equitable share of matrimonial assets acquired during the subsistence of the couple's marriage.

In conclusion, it is clear from the study that in order to improve the position of women in matters related to division of matrimonial property upon divorce we need to amend the provisions of section 114 (2) (b) of the LMA.

Dahl Tove Stang observed that “law as an institution to a large extent contributes to the maintenance of the traditional male hegemony in society”. She notes that law is also fertile soil for the cultivation of rules which can provide a foundation for vast changes, including the relationship between the two sexes. If the position of women is to be improved, this must also be done through the law, and this is acknowledged by today's law makers (Dahl, 1987, p14). It is in this context that we seek to look at the position of women and the law, not as the only but one of the means through which their status may be improved. That in many African societies property is mostly owned by men despite the existence of Constitutions which give equal opportunities to all.

The recommended amendment of section 114 of the Act will improve women status when done in compliance with the International human rights standards and the Constitutional provisions cited above.

ACRONYMS & ABBREVIATIONS

CAP = Chapter

CEDAW = Convention on the Elimination of All Forms of Discrimination Against Women

FIDA= Federation of Women Lawyers

I.E.C = Information Education and Communication

LMA = Law of Marriage Act

NGO= Non Governmental Organization

R.E= Revised Edition

SADC = Southern African Development Community

TAWLA= Tanzania Women Lawyers Association

TLR= Tanzania Law Report

UDHR = Universal Declaration of Human Rights

URT = United Republic of Tanzania

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND

This dissertation is about the division of matrimonial property between spouses upon divorce as provided for under section 114 of the Tanzanian Law of Marriage Act (LMA) No. 5 of 1971 (CAP. 29 R.E. 2002), provides:

- 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.
- (2) In exercising the power conferred by subsection (1), the court shall have regard-
- (a) to the custom of the community to which the parties belong;
 - (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
 - (c) to any debts owing by either party which were contracted for their joint benefit; and
 - (d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.
- (3) For the purposes of this section, references to assets acquired during a marriage include 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.

Section 114 should be read together with section 60 of the LMA which provides for the presumptions as to property acquired during marriage which in one way or another affect the application of section 114. As will be discussed further in the coming chapters. Section 60 provides that:

- 60.** Where during the subsistence of a marriage, any property is acquired-
- (a) 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;
 - (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

“In Tanzania up to 1971, family affairs were basically governed in accordance with either the customary law and/or religious beliefs of the different communities. This state of affairs not only gave rise to a number of problems, particularly as regards conflict between various pieces of legislation, but also hindered the emergence of national unity. The enactment of the Law of Marriage Act in 1971 was considered as a progressive step towards uniformity and as recognition of equality between husbands and wives. 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. 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' includes housework” (Mtengeti-Migiro, Rose. (1990).

1.1 MY PASSION FOR THE STUDY (Identification of the problem area)

My passion on this topic was informed by the following experiences;

My personal experiential data from my family tree made me realize that division of matrimonial properties between spouses after divorce is a problem for some of my family members as well as many women in Tanzania. For example one of my aunts is currently having a division of matrimonial assets case (unreported) which originated from the primary court and is now pending at the District court. My aunt and her husband contracted an Islamic marriage and lived together for six years. The husband issued her a talak stating that the marriage was over. My aunt was a house wife. They had no children. They had acquired two houses. The wife applied for divorce at the primary court and claimed for division of matrimonial assets. The primary court granted divorce and ordered the husband to pay the petitioner Tshs 350,000. The wife appealed to the District court stating that the Tshs 350,000 was insufficient as it did not reflect her contribution for 6 years.

Regional professional experience acquired from Federation of Women Lawyers (FIDA-Kenya) where I worked as a legal/program officer for ten months (February 2012 to December 2012) and national experience from Tanzania Women Lawyers Association (TAWLA) where I am currently working as a legal/program officer. I have experienced lots of division of matrimonial assets cases which gave me the idea to work on this topic to reveal inequalities experienced by women when going through divorce and distribution of matrimonial assets.

1.2 OBJECTIVES OF THE STUDY

The main objectives of this study are:

To analyze the legal position of women under the Tanzanian Law of Marriage Act and to facilitate amendment of section 114(2)(b) to include clear guidelines on the division of matrimonial property pursuant to their non monetary contributions on divorce.

To facilitate removal of section 114 (2) (a) of the Act because it is out dated on its applicability for the fact that the LMA was put in place to curb the plurality of laws being customary and religious which in most cases bring about inequalities between spouses. This provision is indirectly discriminatory against women because in most cases customs favors men.

To suggest useful recommendations aimed at assisting women get their property rights upon divorce.

1.3 ASSUMPTIONS

The following were the assumptions for the study:

1. The provision of the law on division of matrimonial property upon divorce facilitates unequal shares for women
2. Presiding Magistrates have discretion to award or not to award any portion of matrimonial property to women upon divorce
 - (a) Female Magistrates are more incline to award women equitable share than male magistrates
 - (b) Some male and female Magistrates count house work as a valuable contribution

3. It is difficult for women to quantify monetary contributions before the court in relation to the acquisition of the property in question hence they end up getting lesser shares than their husbands.
4. It is difficult for women to quantify labour (non monetary) contributions before the court in relation to the acquisition of the property in question hence they end up getting lesser shares than their husbands.
5. Lack of knowledge and awareness on their rights hinder women from claiming division of matrimonial property upon divorce
6. Economic factors hinder women from claiming division of matrimonial property on divorce
7. Fear and stigma from the society hinder women from claiming division of matrimonial property on divorce
8. NGO's are important source of women's rights:
 - (a) Women are ignorant of their rights
 - (b) Women know about TAWLA
 - (c) Women who seek advice from TAWLA may get equitable shares
 - (d) Responses of men when women are represented by TAWLA while they are not represented at all.
9. It is more problematic to effect equitable distribution of matrimonial assets where the marriage is of very short duration

1.4 RESEARCH QUESTIONS

Generated from the assumptions above, the following are the research questions;

1. Does the provision of the law on division of matrimonial property upon divorce facilitate unequal shares for women?
2. Do Presiding Magistrates have discretion to award or not to award any portion of matrimonial property to women upon divorce?
 - (a) Do female Magistrates more inclined to award women equitable share than male magistrates?
 - (b) Do some male and female Magistrates count house work as a valuable contribution?
3. Is it difficult for women to quantify monetary contributions before the court in relation to the acquisition of the property in question hence they end up getting lesser shares than their husbands?
4. Is it difficult for women to quantify labour (non monetary) contributions before the court in relation to the acquisition of the property in question hence they end up getting lesser shares than their husbands?
5. Does lack of knowledge and awareness on their rights hinder women from claiming division of matrimonial property upon divorce?
6. Do economic factors hinder women from claiming division of matrimonial property on divorce?
7. Do fear and stigma from the society hinder women from claiming division of matrimonial property on divorce?
8. Are NGO's important source of women's rights?
 - (a) Are women ignorant of their rights?
 - (b) Do women know about TAWLA?
 - (c) Do women who seek advice from TAWLA get equitable shares?

(d) What are the responses of men when women are represented by TAWLA while they are not represented at all?

9. Is it more problematic to effect equitable distribution of matrimonial assets where the marriage is of very short duration?

1.5 CONCLUSION

This chapter dealt with the introduction and background part of the study, my passion for the study, justification of the study, objectives, assumptions and research questions as an opening note for further discussions in the following chapters in relation to women and the right to property on divorce: a critical analysis of the division of matrimonial property rights upon divorce: a case study of Ilala District court in Dar Es salaam, Tanzania

CHAPTER TWO

2.0 LEGAL FRAMEWORK AND LITERATURE REVIEW

2.1 INTRODUCTION

In this chapter several laws and works were reviewed to get an in-depth understanding of the concept of women's rights to property as far as the division of matrimonial assets on divorce is concerned. To this end- domestic laws, International human rights Instruments, journals, books and dissertations were reviewed to establish gaps, contradictions and the concepts addressed related to the topic.

2.2 DOMESTIC LEGISLATIONS

2.2.1 CONSTITUTION

Since 1971 there have been many legal changes in Tanzania. There have been major constitutional changes in the country, including a Bill of Rights and Duties whereby one may go to court to enforce those rights when they are infringed. This Bill of Rights emphasizes the whole question of individual freedom, equality and justice (Law Reform Commission of Tanzania, 1986). Where section 12(1) of the Constitution, guarantees equality of all persons and section 13(1) and (2) provide as follows:

12.-(1) All human beings are born free, and are all equal.

(2) Every person is entitled to recognition and respect for his dignity.

13-; (1) All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.

(2) Subject to this Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect.

In reality section 114 (2)(b) of the LMA which requires the court to consider the extent of contribution made by each party in money, property or work towards the acquisition of the marital assets is discriminatory of itself and in its effect. The section is not clear as to what constitutes a contribution and whether or not work includes housework done mostly by women. This provision is rather gendered as its application seem to favor men mostly as they are placed in a public sphere capable of earning enough to acquire property unlike women who are in private sphere earning very little or nothing at all. In this regard protection before the law

provided for by the Constitution is gendered and therefore discriminatory as the Constitution failed to consider the public/private divide within the society.

On the other hand section 114(2)(a) of the LMA is discriminatory on itself and in its effect by allowing the court to consider the customs of the community to which the parties belong when dividing marital assets. By so providing, the legislature failed to consider that most customs favor men than women mostly therefore putting equality at stake.

Further article 24 of the Constitution recognizes the right to own property that:

- 24-: (1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.
- (2) Subject to the provisions of sub article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.

The essence behind is that both men and women have the capacity to acquire, own and maintain property whether independently or jointly regardless of their marital status. However most women are in the most disadvantaged situation as they are placed in the private sphere where they are unable to acquire and own property on their own. Therefore when it comes to the division of matrimonial property the entitlement without any discrimination to protection and equality before the law becomes a dream for them. Why? Just because the law under section 114 (2) (b) of the LMA requires the court to consider the extent of contributions made by each party in money, property or work towards the acquisition of the assets.

2.2.2 THE LAW OF MARRIAGE ACT

The Tanzanian Law of Marriage Act (LMA) is an Act to regulate the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other matters connected therewith and incidental thereto'. Property rights for married couples are governed under the Law of the Marriage Act, No. 5 of 1971 (CAP. 29 R.E. 2002) seeks to protect the rights of women in marriage. Section 114 of the same Act provides for the guidelines on property rights on separation and divorce such that as indicated earlier:

- (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.
- (2) In exercising the power conferred by sub section (1), the court shall have regard:
 - (a) to the custom of the community to which the parties belong;
 - (b) to the extent of the contributions made by each party in money, property or work towards the acquisition of the assets

The duration of the marriage is vital when it comes to division of matrimonial property, if considerable property has been acquired then it becomes easy for the court to divide. The activities of the respective parties are also taken into account, and the relative contributions are considered. What matters is the proof of the duration of the marriage. In case of the clan land the wife's contribution on the development of the same could also be taken into consideration if she can claim and prove her developmental contribution. In cases of immovable property she can receive recognition through witnesses who could have witnessed her contribution. Section 100 of the LMA provides for the restriction on petition for divorce during first two years of marriage that;

- 100.**-(1) No person shall, without the prior leave of the court, petition for divorce before the expiry of two years from the date of the marriage which it is sought to dissolve.
- (2) Leave shall not be granted to petition for divorce within two years of marriage except where it is shown that exceptional hardship is being suffered by the person applying for such leave.
- (3) An application may be made to the court under this section either before or after reference, to a Board under section 101.

101. No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board 'and the Board has certified that it has failed to reconcile the parties:

The Marriage Act provides that, except in extreme cases, no petition of divorce is to be heard before a marriage has subsisted for two years. Either spouse may apply for divorce on grounds of breakdown, but no decree of divorce can be granted unless the court is convinced of irreparable breakdown. The party seeking the divorce must first apply to the Marriage Conciliatory Board. The board must certify failure to reconcile parties before the divorce suit can be initiated. Evidence of irreparable breakdown of marriage for the court's purposes must indicate one of the

following grounds: mental or physical cruelty; willful neglect; desertion; voluntary separation; or change of religion that dissolves the marriage under the religious law the parties were subject to at the time of their marriage. In dividing marital property and passing decisions on maintenance, courts must consider the customs of the parties' community, the contribution made by each party towards acquisition of the property in money, property or work, the debts owed by either party for acquiring property for their joint benefit, and the needs of infant children (Rwezaura, 1997).

2.2.2.1 PROBLEMS IDENTIFIED IN THE APPLICATION OF THE LAW TO LIVED REALITIES OF WOMEN

Section 114 (2) (a) of the LMA requires the court to order the division between the parties based on the custom of the community to which the parties belong. By so providing- the law seem to defeat the object and purpose of the enactment of the LMA. As LMA seeks to curb the inequalities brought about by the different customs of communities which in most cases are the source of oppression to women because most customs favor men than women. For example in some communities a wife is never entitled to any share of the marital property. And where she is proved to be the cause of breakdown of the marriage she gets nothing as with the Sukuma community in Mwanza Region. This limits women from initiating matrimonial proceedings as they are blamed for the breakdown of marriages in most cases. As it was pointed out in the case of Mahanga Zengo V. Hogo Kadaso (1982) TLR 94. The holding was that “the court has a duty to assist the growth and promotion of equitable customary law/rules which reflect common sense. This provision acts on the disadvantage of women contrary to article 5 (a) of CEDAW which require states to; modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

However section 114(2)(b) above is discriminatory on the face of it as it is not in line with article 13(2) of the URT Constitution which provides that; “no law enacted shall make any provision that is discriminatory either of itself or in its effects”. On the face of it, section 114(2)(b) is discriminatory in its effects as it directs the court to consider monetary contribution towards the

acquisition of marital assets without considering the fact that many women are placed in the private sphere doing unpaid house work thereby rendering them unable to contribute monetarily. On the other hand, it could be argued that housework should be included in the term work. Further Section 114 (2)(b) of LMA has caused a lot of controversy over what is meant by the parties respective contribution. On the face of it seem to mean individual contribution. The question becomes what is contribution and whether work includes women's unpaid housework? Here in reality women's work has never been counted as a valuable contribution until 1983 in the land mark case of *Bi Hawa Mohamed v Ally Sefu* 1983 TLR 32 where the Court of Appeal accepted house work as a valuable contribution.

But the interpretation and application of the section still brings issues in later cases as adjudicators differ in their perspectives on the application of the section. This means that the operation of the law is not benefiting women who are placed in private sphere. The level of the court and the complexities of defending claims faced by women e.g quantification. The fact that a wife stays at home, takes care of the house and the children enabling the husband to perform well his duties outside the house has not usually been taken as a valuable contribution.

Again based on the cumbersome and unfamiliar procedures of the court which requires parties to prove the extent of their contributions towards the acquisition of the properties, again acts as a bar for women to get what they deserve. When women fail to justify and prove their claims they end up getting less. This is because the court deals with what has been brought before it and the evidence adduced. So again is a challenge in the application of the law to lived realities of women. This becomes more complicated to women when they are not represented by either private Advocates or NGO's. As pointed out by Wanitzek, U. (1990) as women's difficulties in articulating their claims and ignorance of procedures by legally unrepresented women litigants.

The application of section 114 (2) (a) and (b) caused controversy in the sense that the LMA does not define a number of concepts, namely; joint efforts, contribution and work. The question becomes what does these terms cover. Judicial attempts to give interpretation to the three concepts have led into two extreme results and creating two schools of thought within the Judiciary; the conservatives and the progressive (Law Reform Commission of Tanzania-1986) In the

case of **Zawadi Abdalla v Ibrahim Iddi 1981 TLR 311** where a High Court judge supporting a decision of the lower court stated that:

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.

And further stated that:

...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 and stated with finality that:

...if the legislature had intended that domestic services performed by a wife be regarded as contribution and joint effort it should have said so in a language clear and plain.

This represents the stand of the first school of thought.

The other school of thought is represented by another High Court decision where Judge Makame, for one, has taken a stand on the side of the liberal school. He felt himself prepared and able to say that the domestic services that a wife renders count. That was in the case of **Rukia Diwani Konzi VS. Abdallah Issa Kihenya – (Matrimonial Cause No. 6 of 1971 unreported)**. His reading of section 114 does not square with that of the magistrate who initially heard this case. The learned judge thought that the section has sufficient width to embrace the broad view.

The learned judge stated:

“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”.

A little further on Makame, J. continued:

“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”.

It was only in 1983 in the case of **Bi Hawa Mohamed v Ally Sefu 1983 TLR 32** where the principle of recognizing domestic work was accepted as contribution to the acquisition of matrimonial property. The facts were that the parties had lived together as husband and wife from 1971 to 1980 when their marriage was dissolved. In the subsequent proceeding the ex-wife sought division of matrimonial assets but the primary court held that since she “was only a mere wife and the house was bought by the husband with his own money”, she was not entitled to any share. Her appeal to the High Court was unsuccessful.

On further appeal to the Court of Appeal she argued that her efforts in performing domestic duties had the effect of placing the respondent husband in a financial position to buy the property in question. The Court of Appeal extensively reviewed the judgment which held that domestic service by a wife was not to be regarded as contribution within the meaning of section 114 of the Act. The Court of Appeal noted that the provisions of section 114 (2) (b) of the Act were ambiguous in which case it was necessary to apply the Mischief Rule of Interpretation. The Justices of Appeal found that the law of Marriage Act sought to do away with the traditional exploitation and oppression of married women by their husbands. The Justices of Appeal considered both cases above and evaluated arguments for both schools of thought, and came up with a statement that:

...we are satisfied that the narrow view is wrong and the broad view is correct. The court went on to argue further that:

The argument that the broad view of the law amounts in effect to judicial legislation, is 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 joint efforts and the contributions made by each party in money, property or work towards the acquiring of the assets used under section 114.

Bi. Hawa’s judgment was received as a victory for female spouses as they ought no longer to be the victims of the conservative school of interpretation in the courts. However the question remains- was the case of Bi. Hawa really a milestone in relation to equitable distribution of matrimonial assets?

In the case of **Mwajuma Mohamed Njopeka vs Juma said Mkorogoro (HC) 1998**. Brief facts of the case are that, the parties married in 1989 under Islamic rites. They lived together until 1998 when the husband divorced his wife by issuing the Islamic *talaq*. The wife applied for judicial divorce at a local primary court and further claimed for division of matrimonial assets consisting of the couple's two houses. The parties had no children. The primary court granted divorce and ordered the husband to pay the petitioner Tshs 500,000.

The wife appealed to the District court stating that the Tshs 500,000 was inadequate as it did not reflect her contribution for nine years of marriage. The District court dismissed her appeal on account of insufficient grounds, she appealed again to the High court where Kimaro J set aside the two lower court's decision and held that the wife was entitled to one of the houses being her share of the matrimonial assets.

The appellate judge used the Tanzania Bill of Rights as well as international human rights norms to decide the appeal. The Judge cited article 13(1) of the URT Constitution which provides for equality before the law and equal protection of the law. The Judge further referred to article 9(f) of the Constitution which requires state authority and all its agencies...to direct their policies and programmes towards ensuring that human dignity is preserved in accordance with the spirit of the UDHR. Finally the appellate court cited article 2 of CEDAW which require States Parties to condemn discrimination against women in all forms and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

The appellate court held that, the lower courts had failed to apply properly section 114 of LMA because they allowed the former husband to keep the two houses acquired during the subsistence of the marriage. They had thus not given due weight to the contribution of the appellant for 9 years and this had resulted in leaving the appellant without shelter. The lower court's decision was discriminatory and in contravention of article 13(1) of the Constitution. It did not take into consideration the right to equal protection of and equality before the law (Rwezaura B, 1999).

2.2.3 THE MAGISTRATE'S COURTS ACT

The current study seeks to analyze the legal position of women in relation to division of matrimonial assets upon divorce in Ilala District court. Hence I found it prudent to review the Magistrates Court's Act (MCA) No. 2 of 1984 (CAP. 11 of the Revised Laws); an Act to provide for the jurisdiction, powers and functions of magistrates' courts and for other related matters. The Ilala District court is one of the Magistrates court in Tanzania established under this Act. The establishment and jurisdiction of the Magistrate's court is provided below that: District court is established under section 4 of the MCA as provided hereunder:

4-; (1) There is hereby established in every district a district court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the district in which it is established.

(2) Subject to subsection (3), the designation of a district court shall be the district court of the district in which it is established.

(3) The Chief Justice may, by order published in the *Gazette*, vary the designation of any district court.

(4) The variation of the designation of a district court or of the area within which such court may exercise jurisdiction, shall not affect the jurisdiction of such court to continue the hearing of, or to determine, any proceeding commenced before it prior to such variation.

(5) The Chief Justice may, if in his opinion it is in the public interest so to do, by published order in the *Gazette*, confer upon a district court established for any district, jurisdiction over any other contiguous district or districts and where such order is made, such district court shall have concurrent jurisdiction in relation to the district for which it is established and also in relation to such other district or districts as may be specified in the order.

Original jurisdiction of district court is provided for under section;

40-(2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited—

(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed twelve million shillings; and

(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed ten million shillings.

The above sections are important as they stipulate the establishment, jurisdictions, powers and functions of the Magistrates courts Ilala District court being one of them. However the Act has failed to provide for the qualifications of the magistrates. The qualifications of the magistrates for the purpose of this study have been found in the report by The Law Reform Commission of Tanzania, 2013 as follows that; initially primary court magistrates were promoted from among court clerks and were taken for one year training for certificate of Law at the Institute of Development Mzumbe (IDM). Later on through Civil Servant Circular No 2/1994 Primary court magistrates had to undergo the two years diploma in Law course at IDM, Institute of Judicial Administration (IJA) Lushoto or any other recognized Higher Learning Institution. Therefore primary court is still manned by magistrates with certificate and or Diploma in law. Further the District Magistrates were promoted from Primary court Magistrates after special legal training at Mzumbe University and acquired a Diploma in Law. There are still very few District Magistrate to date who are diploma holders who are still serving as District Magistrates. This is because the District Magistrates cadre is now being phased out and replaced by graduate magistrates (i.e with L.L.B) and who went through the law school. All cadres or magistrates are being appointed by the Judicial Services Commission under its special body established under article 112 to 113 of the URT Constitution. Their appointment is not automatic rather one must pass an interview. Their powers and jurisdiction are found under the Magistrate Court Act 1984 Cap 11 RE 2002. The judiciary has now taken measures to remove the lay or semi-trained primary court magistrate and employ graduates as primary court magistrates. The move has started in few primary courts. The qualifications for magistrates for all levels or cadres are found under Civil Servant circular No 1/2010.

2.3 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Tanzania has ratified various human rights Conventions where it is a signatory to the Universal Declaration of Human Rights, the African Charter on Human and People's Rights and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) just to mention a few. Several principles has been enshrined in different International Human Rights Instruments that are connected to this study such as equality, right to property, access to justice as well as non discrimination as far as marriage is concerned.

For instance; Article 23(4) of the ICCPR provides that:

“State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution...”

Article 15 (1) and (2) of CEDAW provides that;

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Tanzania has failed to accord to women equality with men before the law as provided above. Tanzanian laws seem to give out this right with one hand and takes it away with another in the sense that the Constitution gives it under articles 12 and 13 but section 114 of the LMA seem to contravene it by considering the customs to which the parties belong and by putting conditions like the parties respective contribution towards the acquisition of the property to be divided.

CEDAW being women’s Convention stipulates various specific women rights on marriage; For instance **Article 16 (1)** of CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: However the government of Tanzania has failed to eliminate discrimination against women when it comes to division of matrimonial property upon divorce by providing that division will be effected based on the extent of contribution made by each spouse without specifying how that contribution shall be assessed.

Further article **16 (1)(h)** of CEDAW provides for equality between spouses in relation to ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. This is to say that both men and women have the same rights to own, acquire, manage, administer, enjoy and dispose of property but the reality of this is gendered in relation to section 60 (a) of the LMA which provides that 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. This is so because the party who has the ownership in his name is the one who determines how the property will be managed, administered, enjoyed and/or disposed off. In most cases men are in this position as they are placed in public sphere where they are capable of earning and increase property unlike women who are in private sphere performing unpaid work.

Further Article 8 of the SADC Protocol on Gender and Development (Gender Protocol) requires state parties to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage. Further, article 8(3)(b) of the SADC Protocol requires state parties to enact and adopt appropriate measures to ensure that where spouses separate, divorce or have their marriage annulled, they shall have equitable share of property acquired during their relationship. However the government of Tanzania has failed to ensure that when spouses divorce equitable sharing of matrimonial assets shall be the paramount consideration. This is because the LMA requires the court to consider the extent of contribution instead of equitable share of the property acquired during their relationship. Equitable share because in most cases women do a lot to enhance the acquisition of the property to be divided e.g by putting the husband in a position to earn and acquire property and by looking after the home.

Article 7(d) of the Women's Protocol provides that; States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

In Tanzania greater emphasis is placed on monetary, property or work contribution¹. The reality of which is a myth in the sense that most women are house wives who do unpaid work. Hence making them unable to contribute monetary or in form of property. Again the law is not clear as to whether work includes house hold work done by women such as raising and caring for

¹ Section 114(2)(b) LMA

children, caring for sick and elderly relatives. It should be noted that women's non monetary contribution enables men to be in public sphere where they are able to earn and increase the assets. In this regard, the women's non monetary contribution entitles her to get equitable share as her unpaid work places the husband in a position to earn. Therefore instead of looking at the extent of contribution based on the provision of section 114 (2) (b) of the LMA they should just divide equitably based on who did a lot on the acquisition of the assets.

Article 13(h)² provides that;

“States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall: take the necessary measures to recognize the economic value of the work of women in the home;”

It was found that Tanzania has failed on that as the research revealed that the economic value of the work of women in the home depends on judicial discretion (conservative school of interpretation in the courts) where magistrates have discretion to award or not to award any portion of marital assets to women

2.4 OTHER LITERATURE EMPLOYED DURING THE STUDY

As a necessary prerequisite for any study, I conducted a survey of relevant available literature related to my topic taking into account that such literature can help in providing a theoretical framework to rely on. However it came out clearly that the relevant literature on the topic is somehow limited. The useful sources of information are as follows:

Migiro Rose 1990 considered the legal position of women under the Tanzanian Law of Marriage Act of 1971 (CAP. 29 R.E. 2002) in her article “The Division of Matrimonial Property in Tanzania.” The Journal of Modern African Studies, vol. 28. She observed the historical background of division of matrimonial property in Tanzania and found that:

² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

“In Tanzania up to 1971, family affairs were basically governed in accordance with either the customary law and/or religious beliefs of the different communities. 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. The enactment of the Law of Marriage Act in 1971 was considered as a progressive step towards uniformity and as recognition of equality between husbands and wives. 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. 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' includes housework”. In fact what the literature has pointed out touches my research the most as it has shown the court’s discretion to award or not to award any portion among others.

Rwebangira, M.K. (1996). “The Legal Status of Women and poverty in Tanzania” describes the historical background of the enactment of the Law of Marriage Act that it’s the main source of law regulating married women’s rights in a specific and meaningful way. It pointed out that the Law of Marriage Act introduced to Tanzania the concept of separate property as opposed to community of property between spouses. It pointed out further that married women shall enjoy equal rights to acquire, hold and dispose of property as per section 56 of the Act. Rwebangira also pointed out the discretion of the court to order equal division of the property where financial or other tangible contribution in terms of work or property has been proved which is one of the focal points of my study.

With regards to the Human Development Trust (June 2011). “Gaps in Policies and Laws That Perpetuate Gender Based Violence in Tanzania” which also gave me an insight for the current study. The article discusses the Law of Marriage Act with regard to customary law and tradition in the division of property between spouses when divorce occurs. That customs and traditions do not provide for equal as women get little or nothing. That customs favor men mostly the situation which led to violence against women when they insistently pursued to be given their shares of property.

Win Everjoice J. and Veneklasen Lisa O., (1994). Family Laws: “Customs and Practices in Zimbabwe” considers the historical background of property distribution on divorce before the amendment of the Matrimonial Causes Act in 1985. Section 7 of the amended Act provides for the factors to determine how the property is to be shared between the spouses which includes among others; the duration of the marriage and the direct and indirect contributions made by the spouses to the welfare of the family including contributions made through the performance of domestic duties though women do not fare well because again there is devaluation of women’s contributions. In one way or another this literature points out the factors which are also provided for within the LMA under section 114 (2) (b) on the issue of contribution made by parties as one of the gist of my study.

Banda, F. (2005); *Women, Law and Human Rights: An African Perspective*. Discusses the landmark cases where the contribution of women to the acquisition of marital property was acknowledged. For instance the landmark case of Tanzania- Bi Hawa Mohamed v Ally Sefu, Zimbabwe- Muchada v Muchada (unreported) just to mention a few. It further provides for the factors to be taken into consideration by the courts when dividing matrimonial assets; such as direct and indirect contribution made by each spouse including contribution made by looking after the home, caring for the family and other domestic duties among others. She also observes that judicial officers have refused to see domestic contribution as being on a par with financial contribution (courts discretion to award or not to award any share) which is the gist of my study.

Wanitzek, U and Twaib, F. (1996); *The Presentation of Claims in Matrimonial Proceedings in Tanzania: A Problem of Language and Legal Literature*. This article discusses the problems related to language used by litigants especially women in courts, problems related to ignorance of law and procedures of the court and the problems related to the divergence between state law and customary law. In one way or another, what has been stipulated in this literature falls within the ambit of my study. For instance what has been discussed in this literature is more likely the same with the quantification issues, lack of knowledge and awareness on their rights etc which are the gist of my research. They further pointed out some cases which are useful in illustrating this. As in the case of Constansia Anatori v Taidini Snaga, Matrimonial (Primary Court) Civil Appeal No 35 of 1977, High Court of Tanzania, Bukoba, original Primary Court Rulenge (Ngara District)

Civil Case No 8 of 1977. The wife had filed a petition in the Primary Court for divorce and division of property acquired during her marriage with the respondent husband. In the course of their twenty-two years of marriage, they had acquired a considerable amount of property. In what appears to be either a misuse of words or a misunderstanding of the legal concepts behind them, the Primary Court granted the divorce and ruled that the wife was a '*mtumishl*' (servant) of the husband and awarded her Tshs 600/- as '*fidia*' (compensation). The wife appealed to the High Court. In her memorandum of appeal she complained that she was not a servant, but a wife. But she was herself also caught up in a similar language trap when she claimed, in the same memorandum, '*kwa mujibu wa sheria za ndoa nipewe kiinua mgongo kilicho halali na wala siyo fidia.*' Literally translated, this means: 'in accordance with the laws relating to marriages, [I pray] for payment of retirement benefits and not compensation.' Such payment, of course, can legally be given only to an employee under the laws governing relations between employers and employees and never to a wife or husband in their capacities as such. The case of Veronica Kondela v Samuel Nyando Primary Court Sengererna Civil Case No. 77 of 1984 illustrates a similar problem. Here too the wife's use of the term '*fidia*', which literally means 'compensation', was rather in the sense of '*ugawaji wa mali ya ndoa*', which is the Kiswahili terminology used in the law to refer to 'division of matrimonial property' (section 108 (b) of the LMA. The wife petitioned for divorce in the Primary Court at Sengerema and claimed for '*fidia*' (compensation) for her two years of marriage with the respondent husband. The court did not consider this claim at all which it should have taken to mean 'division of matrimonial property'. Instead, it merely issued an order of divorce and made no mention of the wife's claim for '*fidia*'. Similarly, in Christina Gati v. Chinato Mwita Matrimonial (Primary Court) Civil Appeal No 7 of 1985, High Court Mwanza, original Tarime District Court Civil Appeal No 8 of 1984, and Primary Court Mtana Civil Case No 59 of 1984 the wife presented a claim for '*fidia au masurufu*' (literally meaning compensation or allowances). She won partially in the Primary Court and was awarded four head of cattle. The husband appealed to the District Court. The District Magistrate found her claim for '*fidia au masurufu*' to be of no substance. He thus proceeded to quash the Primary Court's order and dismiss her claims. On appeal to the High Court, Mr. Justice Munyera uncovered the wife's linguistic mistake, which appeared to have confused the District Magistrate. But in the process, the learned Judge made a not-so-dissimilar mistake himself. To quote his own words:

The claim is for what the appellant called '*fidia au masurufu kwa muda nilioishi naye na kumfanyia kazi*'. The admitting judge observed that the District Magistrate misdirected himself as to the nature of the claim. It was an issue of division of matrimonial assets and not maintenance.. I agree with the learned judge although the appellant misrepresented her claim when she called it '*fidia au masurufu*', something not provided in law.

Wanitzek, U. (1990) in an article 'Legally unrepresented women petitioners in the lower courts of Tanzania: A case of Justice Denied?' discusses for the problems women petitioners face when they try to pursue their matrimonial claims in court, because of lack of knowledge of their substantive rights, difficulties in articulating their claims and ignorance of procedures that many courts do not give them the needed information and assistance which in one way or another are the gist of my research.

Nyanduga, B.T and Manning, C. (2006) in a Guide to Tanzanian Legal System and Legal Research, observe that the judicial system of Tanzania mainland is largely based on common law, as stated previously, but is also accommodates Islamic or customary laws, the latter sources of law being called upon in personal or family matters. The judiciary is formed by the various courts of judicature and is independent of the government. Tanzania adheres to and respects the constitutional principles of separation of powers. The Constitution makes provision for the establishment of an independent judiciary, and the respect for the principles of the rule of law, human rights and good governance. The Judiciary in Tanzania can be illustrated as follows. The Judiciary in Tanzania has four tiers: The Court of Appeal of the United Republic of Tanzania, the High Courts for Mainland Tanzania and Tanzania Zanzibar, Magistrates Courts, which are at two levels, i.e. the Resident Magistrate Courts and the District Court, both of which have concurrent jurisdiction. Primary Courts are the lowest in the judicial hierarchy. The higher court system of Tanzania is as follows:

Court of Appeal: The Court of Appeal of Tanzania, established under Article 108 of the Constitution, is the highest Court in the hierarchy of judiciary in Tanzania. It consists of the Chief Justice and other Justices of Appeal. The Court of Appeal of Tanzania is the court of final appeal at the apex of the judiciary in Tanzania. The High Court of Tanzania (for mainland Tanzania) and

the High Court of Zanzibar are courts of unlimited original jurisdiction, and appeals there from go to the Court of Appeal.

High court: The High Court of Tanzania was established under Article 107 of the Constitution and it has unlimited original jurisdiction to entertain all types of cases. The High Court's exercise of original jurisdiction on matters of a constitutional nature and have powers to entertain election petitions. The High Court's Main Registry, (which includes the sub-Registries) caters for all civil and criminal matters. The High Court (mainland Tanzania) has established 10 sub Registries in different zone of the country. It also has two specialized divisions, the Commercial Division and the Land Division. All appeals from subordinate courts go to the High Court of Tanzania.

Subordinate courts: These include the Resident Magistrate Courts and the District Courts, which both enjoy concurrent jurisdiction. These courts are established under the Magistrate Courts Act of 1984. The District Courts, unlike the Resident Magistrates Courts, are found throughout all the districts in Tanzania (the local government unit.) They receive appeals from the Primary Courts, several of which will be found in one district. The resident magistrates Courts are located in major towns, municipalities and cities, which serve as the regional (provincial) headquarters.

Primary court: The primary courts are the lowest courts in the hierarchy and are established under the Magistrates Courts Act of 1984. They deal with criminal cases and civil cases. Civil cases on property and family law matters which apply customary law and Islamic law must be initiated at the level of the Primary Court, where the Magistrates sits with lay assessors. (The jury system does not apply in Tanzania)

Kamowa, C. P. (2008) in "Informed thumb sucking: the challenges and problems faced by the Magistrates Courts in the distribution of matrimonial property on the dissolution of matrilineal customary marriages in Blantyre, Malawi." raises the quantification problems of women in relation to their contributions on the acquisition of marital assets upon divorce. It further pointed out women's lack of knowledge and awareness on their rights upon divorce as well as the importance of NGO's on the whole process of petitioning for divorce and division of the marital assets upon divorce which in one way or another are the gist of research.

What is absent from the existing literature is a consideration of the courts' discretion to award or not to award any portion, quantification issues of both monetary and non monetary contribution, factors which hinder women from claiming their shares as well as the NGO's importance which are the gist of my research.

2.5 CONCLUSION

This remains a difficult and contentious area of the law and it is evident that there are still a lot of problems related to division of matrimonial assets upon divorce in Ilala District and Tanzania generally.

CHAPTER THREE

3.0 METHODOLOGICAL FRAMEWORKS AND DATA COLLECTION METHODS

3.1 METHODOLOGIES

The study used various theoretical frameworks to analyze the position of women in relation to division of matrimonial assets upon divorce in Ilala District, Dar Es Salaam-Tanzania. In order to come up with the best results, the theoretical frameworks used complemented each other. The emphasis is placed on the women's law approach which has a greater concern for women as a starting point in relation to their needs and lived realities.

In order to analyze the legal position of women under the Tanzanian Law of Marriage Act of 1971 (CAP. 29 R.E. 2002) and to facilitate amendment of section 114(2)(b)³ to include clear guidelines on the division of matrimonial property pursuant to their non monetary contributions on divorce. I had to develop an appropriate research framework so I used women's law approach which helped me to take women lived realities as the starting point. In order to examine and understand the lived realities of women in Ilala Dar Es Salaam in as far as division of matrimonial property upon divorce is concerned. I looked at the position of women as stipulated in the LMA specifically under section 114 (2) (b) and the realities on the ground. This methodology relies on empirical data collected on the ground focusing on women's lived realities and experiences as a starting point for the analysis of the position of women in law and society (Bentzon *et al.*, 1998). In so doing I interviewed women and men in Ilala District. I listened to them as they related their experiences in division of matrimonial property upon divorce.

WLSA 1991 argues that "when examining the complicated interplay between law and life in relation to women, it is necessary to take the starting point in life rather than in law" and then investigate how the law responds to women's needs and conflict of their lives.

³ Section 114 (2) In exercising the power conferred by subsection (1), the court shall have regard-
(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

This is to say that it was prudent to start from the ground to examine the women's lived realities in relation to division of matrimonial assets upon divorce and then compare it with what the law says. Examples of what the laws provide versus the lived realities of women on the ground; Section 114 (2) (b) of the LMA requires the court to order the division between the parties of any assets acquired by them during the marriage by their joint efforts with regard to the extent of the contributions made by each party in money, property or work towards the acquisition of the assets. While the lived reality of women is that most women are house wives and that their house works are not considered as a valuable contribution towards the acquisition of the properties in question. Further, women being house wives are assumed to make non monetary contributions towards the acquisition of the properties hence when it comes to division of the same, women are given less because they contributed less.

This methodology stipulates how the women's lived realities relate to law and the implementations of the law in relation to women and men. All this issues can be explored using the women's law approach which allowed me to investigate the intersection between the laws and the lived realities of women on the ground.

I chose this methodology mainly because I took advantage of its interactive process in which data, theory and lived realities about the perceptions and norms are constantly engaged with each other (Bentzon, *et al.*, 1998). This helped me to decide what data to collect and how to interpret it. For example, having realized the problems women of Ilala District Dar Es Salaam were experiencing as regards division of matrimonial property upon divorce, I carried out this study to establish the possible causes of the problem and the corresponding interventions.

In an effort to analyze the position of women in relation to division of matrimonial property upon divorce I also engaged grounded theory. In this regard; Grounded theory may be defined as: '*the discovery of theory from data systematically obtained from social research*' (Glaser and Strauss 1967: 2). The aim of grounded theory is '*to generate or discover a theory*. It has four developmental stages; the theory building, next question technique, concept building and constant comparative method.

I commenced the research with the notion that women go to courts to institute their matrimonial cases for divorce and further division of matrimonial assets acquired during the subsistence of their marriages. With the help of my supervisor who noted what I did not note (response of unrepresented men when women are represented by TAWLA/private advocates); Grounded theory enabled me to come up with sub themes (categories) and to adjust my initial assumptions. The initial assumptions were adjusted to include the response of men when women are represented by TAWLA as well as when women are represented by private practitioners while men are not represented at all, apart from that of women who seek advice from TAWLA may get equitable share I had before going to the field. For instance; from the interviewees it emerged that when women are being represented by TAWLA men respond urgently as TAWLA is a vibrant women rights organization in town so men act immediately when TAWLA gets in. This made me to develop an interest to explore more and using this method I had to peruse TAWLA and Ilala District Court files to find out its reality.

The use of human rights approach is inevitable when analyzing women's position in as far as the division of matrimonial property upon divorce is concerned. This is simply because property rights are fundamental human rights. Human rights approach is a framework based on International human rights standards directed towards promoting and protecting human rights. I used this approach to ascertain the compliance of human rights standards and the lived realities of women as far as the division of matrimonial assets upon divorce is concerned because my research questions were based on human rights with special focus to women's property rights. These rights are enshrined in different International human rights instruments ratified by Tanzania including; CEDAW, SADC Gender Protocol. Women's Protocol just to mention a few.

The use of human rights approach helped me to determine that S. 114(2)(b) of the LMA is discriminatory because its operation is not in line with the International human rights standards which provides for equality between men and women specifically articles 8 (3) (b) of SADC Gender Protocol, art 16 (1) (h) of CEDAW and art 7 (d) of Women's Protocol which all together provides for equality between spouses in relation to equitable share of property jointly acquired (state parties to enact and adopt appropriate measures to ensure that where spouses separate, divorce or have their marriage annulled, they shall have equitable share of property acquired during their relationship)

I also engaged a feminist legal perspective to law which entails; “(1) a description and evaluation of existing law, (2) an identification of areas of strong legal support, weak legal support and judicial voids where ‘legal’ issues have not even been addressed and (3) discussion of whether and how the body of law ought to be expanded, contracted or replaced.”(Dahl: 1987)

This methodology assisted me to understand the legal position of women in relation to division of matrimonial properties between spouses upon divorce. In this regard I had to start from the mother law the Constitution to ascertain the reality of the feminist legal perspective in law before going to the law related to division of matrimonial assets.

This methodology further assisted me to note the lived realities of women during my perusal of the court files. The lived reality is that majority of the women involved in litigation over the division of matrimonial assets cases are housewives. Most women are housewives, either full-time, part-time or overtime (Dahl: 1987). Therefore the perspective assisted me to come up with the recommendation that the existing discriminatory law should be amended to include house work as a valuable contribution towards the acquisition of matrimonial assets enough to entitle her to an equitable share of the same when the marriage breaks down.

Further the study engaged the actors and structures approach which assisted me to analyze the importance of different actors and structures that women face when going through their matrimonial cases especially in division of matrimonial assets upon divorce. Apart from the magistrates and court clerks there are other actors who are equally playing an important role in solving matrimonial disputes. The research by using this approach revealed legal officers at TAWLA, CHURCHES and BAKWATA⁴ as some of the actors.

Sex and gender analysis was also employed to analyze the position of women in relation to division of matrimonial assets. Sex is the physical distinctions between men and women, where gender is a social construction. Sex and Gender analysis assisted me to analyze the way one’s sex

⁴ Marriage reconciliatory board for Moslems

can determine the type and value of property that he/she will get when distributing matrimonial assets on divorce.

In this methodology, I had to consider different roles assigned to men and women in the family and/or society generally. In most cases family gender roles determine valued and unvalued works done by family members. It was found that the work performed by men outside the home is valued than the work performed by women in the homes. That, most women are placed in a private sphere unlike men who are in public sphere doing paid works therefore capable of contributing monetarily, hence when it comes to division of matrimonial assets women are given little because they were in a private sphere and that they contributed non monetary contributions in the acquisition of the property in question. This is to say that their house works are not valued as a valuable contribution towards the acquisition of the matrimonial assets.

3.2 DATA COLLECTION METHODS

I explored my own experiential data as a legal/program officer at TAWLA and FIDA Kenya. I invoked my initial reactions when I was attending clients as well as drafting their petition for divorce papers over divorce matters both at FIDA Kenya and TAWLA. This method assisted to inform the research process especially when I was formulating the research assumptions and it also assisted me in the actual collection of data as well as when analyzing the court records

I also used individual in-depth interviews as one of the methods of collecting data. I used this method to interview the Magistrate, court clerk, private Advocates, community members, TAWLA and Law Reform Commission State Attorneys. At TAWLA it was easy to secure an appointment because of being an insider unlike at the court and Law Reform Commission where I was a stranger I conducted a total of 20 interviews. One with the Magistrate, two with the court clerks, seven with community members i.e three men and four women, three with the private Advocates, four with TAWLA and three with State Attorneys from the Law Reform Commission of Tanzania. I introduced myself and the topic for the study. With the help of the interview question guide I was able to ensure that all important issues were dealt with accordingly. Using this method I was able to see the existing gaps between the law and practice evidenced by the

aspect of jurisdiction in the sense that the magistrate had to extend her jurisdiction when presiding over the division of matrimonial assets cases.

I perused 11 decided court files to find out what assets were given to women by the court in relation to their prayers. I studied Ilala District court files where decided files of January to December 2012 were studied. I decided to study the 2012 files because the files of 2013 were still proceeding (not decided). From the files it came out clearly that most of the petitioners in these matters were women.

Additionally, other source of data involved the perusal of TAWLA files. I perused 13 files as from January to November 2013 but only two were decided. The findings will further be discussed later in the findings and discussion chapter

3.3 LIMITATIONS OF THE STUDY

It is a mandatory requirement to get permission from the Court of Appeal Registry office-training department before commencing any research within the lower courts in Tanzania. In this office I experienced some difficulties before commencing my research. I presented my introduction letter and was told that I will be informed of the progress of the permission but as a result they didn't inform me. I waited for almost a month without success and that is when I decided to do some follow ups and discovered that my letter was misplaced and that it didn't reach the person responsible for issuing permissions. But after a thorough follow up later my problem was fixed after presenting another introduction letter. I was then given the letter to take to the Magistrate in charge of Ilala District court as an introduction for me to start my research.

At the Ilala District Court the Magistrate in Charge received my letter and ordered the clerk in charge to order another clerk to assist me to get the files I wanted. That is where the problem started; the clerk ordered kept on postponing the process for reasons better known to her like today I have a running stomach so come tomorrow, when I came the other day she told me that her husband is sick so she was leaving to the hospital. But this time she introduced me to the other clerk who seems to be an intern and that is the one who assisted me to the end.

With regards to the Ministry of Community Development, Gender and Children that; in this Ministry I totally failed to get access after presenting my introduction letter. I was told to do

some follow ups as the one responsible to process my letter was not around on the material date. The next date I went the story was the same but one of the staff told me to be patient and continue with the follow up so as to track the process of my letter. I did that several times but without success. Up until I started the write up and even now I still have not got any information in relation to this Ministry keeping in mind that it is the Ministry where I was supposed to get among other information the information related to policy on gender affairs as it is the Ministry mandated to develop policy on gender affairs.

3.4 CONCLUSION

This Chapter discussed the research methodologies and methods employed during the study. It explained how each of the methodologies and methods were used to analyze the position of women in relation to division of matrimonial property upon divorce. The chapter further shows the limitations encountered during the study.

CHAPTER FOUR

4.0 RESEARCH FINDINGS AND DISCUSSION

4.1 INTRODUCTION

The findings presented in this chapter were drawn from the information gathered through various research methods employed during the study being the interviews, TAWLA records and court records. The main source of data were the interviews (WLSA Project 1991, 5:71)

In this chapter, I intend to discuss and analyze the findings of the study basing my discussion on the themes emerged from the study on the lived realities of women, the role of the court and the role played by TAWLA(non state agency) on the division of matrimonial assets upon divorce as follows;

4.2 THEMES

4.2.1 LEGAL FRAMEWORK

Section 114 (2)(b) of the Tanzanian Marriage Act provides for the guidelines on property rights on separation and divorce that;

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

(a) to the custom of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquisition of the assets

The study revealed that the position of the law on division of matrimonial property upon divorce lead to unequal share for women. This is because in most instances women are not in a position to show direct contribution towards the acquisition of the matrimonial property through any form of acceptable documentation as they are house wives. This is contrary to CEDAW articles 2 and 16(1)(h), Women's Protocol article 7(d), SADC Protocol article 8(3)(b): which together provides for equality between spouses in relation to equitable share of property jointly acquired.

The above provision has brought a lot of controversy when it talks about the parties respective contribution, as it appears on the face of it that it is only fair to look into individual contribution. The question becomes what is contribution? This means that the operation of the law is not benefiting women who are placed in private sphere. The fact that a wife stays at home, takes care of the house and the children enabling the husband to perform well his duties outside the house has not been taken as a valuable contribution.

4.2.2. IN THE COURT ROOMS

From the field it came out clearly that the presiding Magistrates believe they have discretion to award or not to award any portion of matrimonial property upon divorce. This happens when a party fails to prove his/her contribution towards the acquisition of the property in question or where the property is not rendered matrimonial property due to the form of ownership. The discretion will largely depend on the material facts brought and evidence adduced before the court in relation to the contribution made by each party

I found that some women Magistrates are more inclined to award women equitable share when they base their decision on humanitarian point of view unlike men who largely base on the extent of contribution. Women Magistrates consider that it's a woman who always carries the workload of all the care taking before and after divorce. As it was pointed out by one of the female litigants that I interviewed;

“At the primary court it was a male magistrate who tried our case and came out with the decision that because I contributed less as I was not working hence capable of contributing to the acquisition of the assets then whatever I was given was enough. Then I went to TAWLA where I got assistance and appeal to the District court where the magistrate was a woman who head my cry that my housework assisted my husband to acquire the properties in question. At the end I got what I wanted...one of the houses”

Likewise in the case of Mwajuma Mohamed Njopeka vs Juma said Mkorogoro (HC) 1998 discussed above where; The appellate judge used the Tanzania Bill of Rights as well as International human rights norms to decide the appeal. The Judge cited article 13(1) of the URT Constitution which provides for equality before the law and equal protection of the law. The Judge further referred to article 9(f) of the Constitution which requires state authority and all its

agencies...to direct their policies and programmes towards ensuring that human dignity is preserved in accordance with the spirit of the UDHR. Finally the appellate court cited article 2 of CEDAW which require states parties to condemn discrimination against women in all forms and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

The lower courts had failed to apply properly section 114 of LMA because they allowed the former husband to keep the two houses acquired during the subsistence of the marriage. They had thus not given due weight to the contribution of the appellant for 9 years and this had resulted in leaving the appellant without shelter. The lower court`s decision was discriminatory and in contravention with article 13(1) of the Constitution. It didn`t put into consideration the right to equal protection of and equality before the law (Rwezaura Bart. (1999)

If all magistrates were acting in line with the Constitution and human rights standards women of Tanzania would have been in another world in respect to the division of matrimonial assets acquired during the subsistence of the marriage. From the above case it is clearly that “equality will only be achieved by gender sensitive judges who see women`s work in the home as being on par with men`s work outside it” (Fareda Banda, (2005)

From the court`s files I perused; a case of 2012 revealed that some Magistrates count housework as a valuable contribution when they use/rely on the decided case of Bi. Hawa Mohamed of 1983. In most cases they even consider small contribution and other duties done by a woman during the lifetime of the marriage. As it was seen in one of the court file where the petitioner (woman) was awarded a plot and a car out of four cars and five plots acquired during the lifetime of their union. In that case it was further provided that

“the petitioner is considered as a former wife of the respondent and she made contribution to the acquisition of matrimonial assets as in the case of Bi Hawa Mohamed v. Ally Sefu (Court of Appeal of Tanzania at Dar Es Salaam) court of Appeal No 9 of 1983 where it was held that “the welfare of the family is an essential component of the economic activities of a family, man or 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”

Noted that presiding Magistrates have discretion to award or not to award any portion of matrimonial properties upon divorce; for example; In one of the 11 court files both parties were unrepresented. A woman was a house wife while the man was employed. The parties had 4 cars, 5 plots and one house. They had two issues (children). On division the wife was awarded one car and one plot. The house was given to the children and the mother was the custodian while the father was responsible for maintenance and all school related needs

During the study I found that in Tanzania it is a mandatory requirement to pass through the marriage reconciliatory board before going to court. The board should try to solve the matter so as to avoid the bulkiness of cases before the court because some can be solved out of the court. If one will go straight to the court then the court return her/him back to the boards which are TAWLA, CHURCHES and BAKWATA. In most cases women are referred to TAWLA probably because TAWLA is the leading women's rights Organization in Tanzania, Further, it is a vibrant legal entity privileged to issue a certificate of exemption of paying court fees from the beginning of the case to the end to some clients who deserve it.

All the three marriage reconciliatory boards; TAWLA, CHURCHES and BAKWATA receive women and try to solve their issues by calling their husbands to respond to the claims brought before them by women. When they succeed to solve the matter they draw an agreement to be signed by both parties and every party gets his/her copy. When they fail to solve the matter then a woman is given a letter to take to the court showing that the board has tried to solve the matter but in vain for the court to take up the matter. This is provided for under Section 102(5) of the LMA which provides that; If the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings. Section 102(6) provides that; A Board may append to its certificate such recommendations relevant to the matter or dispute referred to it as it may think fit.

However; in most cases these boards acts against women's wishes as they tend to favor men mostly. As it was pointed out by one of the respondents that women choose to go to TAWLA than BAKWATA because at BAKWATA men are favored under the umbrella of religion. Under the Islamic religion they have their ways of calculating party's shares which mostly favor men.

That is why women prefer to go to TAWLA where they refer the matter to the court. Some Christian women said: ‘Even when you go to the Church you won’t get what you want because the priest insists that the marriage is ought to last forever so there is no chance of divorce’. Hence all this acts as a barrier to divorce and effective awards of property to women as they are forced to remain in the marriage against their will.

4.2.3. QUANTIFICATION OF CONTRIBUTION

The study revealed that, it is difficult for women to quantify monetary contribution because whenever they contribute they don’t see the importance of keeping records as they trust their husbands. Women believe that marriage is built within mutual trust. It was found that when women buy assets they rather write their husband’s names than their’s even if they are the ones who pay. At the end women are the ones who face lots of problems as they fail to prove that they are the real owners of the assets in question. As it was said by one of the interviewees that;

“I was the one who collected money from the women’s association where I was a member and we used those monies to buy a plot with but the title was in my husband’s name. When we got divorce I tried to tell the Magistrate but he would not believe me”

It was revealed further during the research that it is difficult for women to quantify labor/ non-monetary contribution because in most cases women are placed in private sphere where they are performing unpaid care work which is not considered as valuable enough.

It came out of the study clearly that women fail to quantify their contribution simply because of lack of information dissemination. As pointed out by Wanitzek, U. 1990 that “some women have only a vague idea of their legal rights in this regard, which makes it impossible for them to articulate their claims under the Law of Marriage Act”. And as she further pointed out the ignorance of substantive law that “many women are not well informed about their substantive rights; eg only small minorities of women claim maintenance, division of matrimonial property, custody and maintenance of children”. This is contrary to article 18(b) of the Tanzanian Constitution which provide that—every person has out right to seek, receive and, or disseminate information.

Noted further that it is difficult for women to quantify both monetary and labour contributions before the court in relation to the acquisition of the property in question hence they end up getting least shares. This happens when they are not represented by TAWLA or private Advocates.

4.2.4 FACTORS WHICH HINDER WOMEN FROM CLAIMING DIVISION OF MATRIMONIAL PROPERTY RIGHTS ON DIVORCE;

4.2.4.1 LACK OF KNOWLEDGE AND AWARENESS

The study revealed that lack of knowledge and awareness on their rights brought by low level of education and family background hinder women from claiming division of matrimonial property upon divorce because as a matter of fact- if you don't know your rights is a problem- one must know her rights and how to claim them.

The study revealed further that in some cases lack of knowledge and awareness on their rights hinder women from claiming their rights simply because it is not easy for them to get information from relevant authorities and as a result their rights are infringed. This is contrary to article 18(b) of the United Republic of Tanzania Constitution which provides that; every person has a right to seek, receive and, or disseminate information regardless of National boundaries.

4.2.4.2 ECONOMIC FACTORS

I discovered during the study that women feel like they did not contribute towards the acquisition of the assets because they were just house wives hence they do not think they had a right to seek division of matrimonial assets. The Women's Protocol article 13(h) requires state parties to take the necessary measures to recognize the economic value of the work of women in the home. This was also pointed out by CEDAW General Recommendation No. 21 (Fareda Banda. (2005). Tanzanian LMA is inadequate on this issue as it fails to specify the criteria which division should inform the division of matrimonial assets.

On the other hand, women are placed in a difficult position by the provisions of s60 of the LMA as they do not own the means of production as they are usually placed in the private spheres. Further women are unable to generate income for litigation costs and even bus fares

(Economically women fail to claim because they do not have money for litigation costs and transport)

4.2.4.3 FEAR AND STIGMA FROM THE SOCIETY

Fear and stigma is created by extended family members was cited by respondents as a way to threaten women not to take their relatives to court. These relatives see divorce and division of marital assets issues as family issues which should be the subject of negotiations between family members and brought to the public arena in through litigation.

Therefore threats and discouragements from their extended family members and their own reticence to go against family attitudes hinder women from seeking court orders on division matters as they fear to be stigmatized by their families. As pointed out by Letuka P. 1991, 5:153 that “women will therefore not prosecute their claims for fear of publicity. The question asked is “what will people say?” Even the public itself becomes hostile once a woman takes her husband to court.

It is men’s perception that women abandon men so as to seek division of matrimonial assets for them to benefit out of it as they are believed to contribute non monetarily. It was pointed out by one of the male respondents that some women are now making business out of division of marital assets. Some community members see women who seek court orders on division of marital assets as just wanting to fix their husbands; this is to say that women are seen as just revenging from the wrong deeds of the respondent husbands by taking them to court in the name of divorce and further division of the assets.

Fear and stigma from the extended family members of the respondents makes women not to claim division of marital assets upon divorce from the court and opt for negotiations with their spouses or former spouses. Women further pointed out that they sometimes fear to seek divorce and further division from the court due to fear of creating enmity between themselves and their husbands plus the extended family members of the respondents.

4.2.4.4 CUSTOMS

Section 114 (2)(a) of the LMA requires the court to consider the customs of the community to which the parties belong when dividing matrimonial property upon divorce. But in reality the legislature failed to consider the fact that most customs in Tanzania favor men than women in matters related to marriage. The current study revealed that the customary leaders believe that men are the sole bread winners in most families hence they are the ones with the capacity to acquire and own property. In this regard when it comes to the division of the spouses property women are given less as they are believed to contribute less or nothing as they are placed in private spheres mostly. This hinders women from claiming division of matrimonial property on divorce as they believe that the application of customs will not allow them to get their shares.

4.2.5. NGOs Importance

It came out of the study clearly that TAWLA is an important source of women's rights because of the following reasons;

TAWLA is an organization formed by a group of women lawyers who are committed to empower, improve and protect women and children rights especially those who are most vulnerable. It offers legal aid to women, hold sensitization trainings and forums on women's rights, conducting self representation trainings for its clients, representing its clients before courts, drafting court documents for its clients etc. TAWLA also organize meetings to raise awareness to women and children towards their rights. It also holds various talk shows through the radio and television to sensitize women on their rights therefore it plays a major role as far as women's rights are concerned.

Among other objectives of TAWLA; TAWLA's Strategic Objective 1 is to provide legal aid services to indigent women and children. TAWLA proved to be the women's rights organization because of what it does to help indigent women and children in Tanzania. This is provided for under TAWLA website as follows:

Legal Aid; Provision of Legal aid services has been the flagship of TAWLA since inception. Without compromising on the quality of justice accessed to the needy woman, the Legal Aid Team emphasize on the speed of delivering it. TAWLA provides legal aid services to indigent women and children in the society through their offices based in Dar es Salaam, Dodoma, Arusha and Tanga Regions. TAWLA staff attends to clients every Monday and Wednesday from 9.00 am to 5.00 pm.

Legal Representation; This ensures that no needy client is denied justice due to inability to raise court-filing fees. A litigation fund set up under this intervention goes towards support of direct legal representation and filing of cases in court.

Self Representation; This initiative empowers women to be able to claim their rights through the formal court system. This is mainly for simple cases that do not require technical legal requirements and includes child custody and maintenance cases, divorce and separation if there are no issues with division of matrimonial property, child custody and maintenance etc.

Reconciliation as a way of resolving family disputes; TAWLA is a Family Mediation Centre and seeks to encourage women to take up Alternative Dispute Resolutions (ADR) as they are faster and more acceptable among disputing parties. It is a voluntary process and has been able to assist in civil cases such as succession, division of matrimonial property, women land and inheritance and other civil cases. Mediation has been quite successful as an ADR mechanism with more women making preference to Mediation as opposed to other Legal Aid Interventions. This has prompted TAWLA to train its partners in the community as mediators to preside over issues that affect women at the community level. TAWLA's mediation form is appended for reference.

Pro Bono lawyers' scheme; The scheme consists of a large number of lawyers who have signed up to 'give back to the community' through volunteering their time and legal services to the women of Tanzania. They mainly take up cases filed far away from the four offices thereby bringing TAWLA services closer to the women. It consists of practicing advocates who share TAWLA's vision and mission of enhancing access to justice for poor and needy women

It came out clearly that women who seek assistance from TAWLA are in a position of getting equitable share on divorce. This is because they are well equipped with the required information concerning their rights over the matter in question. Hence they are in a better position to get equitable share unlike those who cannot afford legal representation.

Women seem to be ignorant of their rights because of their education background where they were denied their right to education due to early marriages. Girl children were more exposed to marriage by their parents due to either poverty or culture of their parents which is predominant in Dar Es Salaam especially in Ilala and Temeke Districts. With the help of TAWLA which play great role women get equitable share. This is mostly because TAWLA use a standard form which gives women guidance on what to be put in their petitions. This is in conformity with what is provided for under section 106 of the LMA which provides for contents of a petition for divorce. This has an impact as it assists women to know what they should include in their petitions in

relation to history of their marriage and what has being acquired during the lifetime of the marriage:

S106.-

(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.

(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: Provided that such certificate shall not be required in cases to which the proviso to section 101 applies.

Women came to know about TAWLA due to its location i.e it is located at Ilala Bungoni near Amana Hospital and my research was done at Ilala District as well. TAWLA runs a radio program every Tuesday titled “*Kumepambazuka Sheria*” via Radio One Stereo which is popular and with vast coverage in Dar Es Salaam so its easy for women to know about it.

It was found that when women are being represented by TAWLA while men are not represented, men get scared and positively respond in favour of their wives or former because TAWLA is a vibrant women rights organization which fights for women and children rights.

Found further that when women are being represented by TAWLA and get equitable or almost to equitable shares men get dissatisfied hence they end up appealing against the given decision. This is because men do not want women to get what they believe is theirs. In the two cases I dealt with men’s grounds of appeal are that the trial Magistrate erred in law and in fact by lacking the assessors opinion or that the Magistrate included the property which is not the property of the parties in question.

4.3 CONCLUSION

This chapter was about what has been found during the study in relation to the legal position of women in Tanzania as far as the division of matrimonial property upon divorce is concerned.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Tove Stang Dahl observed that “law as an institution to a large extent contributes to the maintenance of the traditional male hegemony in society”. She notes nonetheless that law is also fertile soil for the cultivation of rules which can provide a foundation for vast changes, including the relationship between the two sexes. If the position of women is to be improved, this must also be done through the law, and this is acknowledged by today’s law makers (Dahl, 1987, p14). It is in this context that we seek to look at the position of women and the law, not as the only but one of the means through which their status may be improved. That in many African societies property is mostly owned by men despite the existence of Constitutions which give equal opportunities to all.

The recommended amendment of section 114(2)(b) of the LMA will improve women’s status when done in compliance with the International human rights standards and the Constitutional provisions cited above. This is to say that, if we need to improve the position and status of women we need to start with the law among others.

5.2 RECOMMENDATIONS

5.2.1 RECOMMENDATIONS FOR LAW REFORM

Article 8(f) of the Women’s Protocol provides for Access to Justice and Equal Protection before the Law that; Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: reform of existing discriminatory laws and practices in order to promote and protect the rights of women. Further Article 18(3) of The African (Banjul) Charter on Human and People’s Rights provides that:

“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in

International declarations and conventions”

In this regard; Section 114 (2) (a) of the Act should be removed because it is out dated on its applicability because the LMA was put in place to curb the plurality of laws being customary and religious which in most cases bring about inequalities between spouses. (Rwebangira, M.K (1996); In order to counter the legal plurality, inherent in Tanzania’s triple heritage of traditional, Islamic and colonial influences the LMA stated categorically that it superseded customary and Islamic law in its 2nd schedule, amended the Judicature and Application of Laws Ordinance, Cap. 453 by virtual of section 9 (3A) which states:

Notwithstanding the provisions of this Act, the rules of customary Law and Islamic law shall not apply in regard to any matter provided for in the LMA, 1971.

Section 114 (2) (b) of the Act to be amended to comply with different human rights Instruments which requires division to be effected in an equitable manner. Further the section should reflect article 13 of the URT Constitution which stipulates about equality between men and women.

Not only that but also section 114 (2) (b) of the Act should be amended to include house work as valuable contribution towards the acquisition of matrimonial assets enough to entitle women to an equitable share of the same when the marriage breaks down. As pointed out by Rwebangira, M.K (1996) in Bi Hawa’s case...where the Court of Appeal held that “a spouse’s domestic services rendered during the existence of the marriage, amount to an “effort” and are a “contribution” within the provisions of section 114 of the LMA. This decision was a significant landmark in matrimonial property relations in Tanzania. Firstly, it acknowledged that housework and child care amounted to contribution entitling one to division of matrimonial assets. Secondly, the court recognized that marriage is an economic venture in which spouses invest for their current and future needs (Rwezaura, 1989).

That the law should be clear on how division between spouses should be carried out between spouses on divorce. This will help to curb the current situation of judicial officers’ discretion which is unjust and unfair for women. Therefore the LMA should provide clear guidelines on how exactly marital assets should be shared between spouses after divorce.

5.2.2 TRAINING

There is a need to capacity build all Administrators of justice i.e Magistrates and Judges on gender sensitivity for them to adjudicate matrimonial cases based on equality as provided for under the Constitution and different human rights Instruments instead of only relying on the gendered provision of the LMA which denies women their entitlements. This was also pointed out by the Tanzanian Chief Justice and reported by Fatma Abdu, 19 September 2013 “Tanzania: Magistrates Urged to Observe Human Rights where:

CHIEF Justice, Mr. Mohamed Chande Othman, has urged magistrates in the country to make timely decisions in conformity to laws and tenets of human rights. Mr. Othman made the remarks in Dar es Salaam during the official launch of training on Human Rights in the Administration of Justice for Resident Magistrates in the country. The aim of the training is to create awareness among the magistrates and help them increase efficiency when performing their duties under good governance system of leadership. "It is required to ensure that human rights in courts are observed along with other provisions in the constitution which say that all humans have the right to get justice at the right moment, without any excuses for delays," he said. Mr. Othman said that delays in administering justice especially to inmates were among other challenges in Africa especially in Tanzania. "The training will create awareness for magistrates in the country by building their capacity in performing their duties through respecting human rights. I call upon all magistrates in the country to avoid violation of human rights and administer timely justice to all," he said. The Chairman of the Commission of Human Rights and Good Governance (CHRAGG), Mr. Amiri Maneto, spoke well of the forum which he said provided an opportunity to the magistrates to remember about respect of human rights, exchange ideas and share experiences. He recalled the adage that justice delayed is justice denied insisting that the magistrate should remember that life was the undeniable right to all human beings. The forum was the third in a series of training workshops organized by the commission in collaboration with the Office of the High Commissioner for Human Rights, East African Region-Addis Ababa bearing the theme "Human Rights in the Administration of Justice." (Available on allafrica.com/stories/201309190526.html retrieved on 5th April 2014)

This is relevant because it shows that even the government has seen the importance of training to the administrators of justice so as to deliver timely justice for all which will be in conformity with the Constitution and human rights tenets.

Judges and Magistrates to be trained on the importance of thinking out of the box so as to reflect women's needs in order to improve their status as well as bringing equality between spouses in matters related to family relations.

The need to conduct mass awareness campaigns aimed at educating women and the general public on marriage laws as well as deconstructing the societal perceptions that disempower women from accessing justice as far as division of matrimonial assets upon divorce is concerned.

To educate the society on the importance of valuing house hold work as a valuable contribution enough for one to get equitable share of matrimonial assets acquired during the subsistence of the couple's marriage.

Consciousness raising; to raise awareness to women to address the issues affecting them through conducting forums for discussion of issues fueling subordination brought by the social constructions of the societies to bring about women social change which will help to free women from oppressive gender roles which places women in lesser positions in almost all aspects of life. In other words the need to listen to women's voices; that in the process of liberating women from inequalities one need to listen to their voices i.e lawyers use feminist conscious raising through the provision of legal aids where they listen to the voices of women and receive information's on what are the gaps between law and reality (Hilaire, B. ()).

Need for policy and legislative reforms; that there is a need for the likeminded women's rights organizations to lobby and advocate for policy and legal reforms related to all discriminative laws against women with the responsible Authority which in this case is the Chief Justice through courtesy visits. Thus, women rights organizations need to organize themselves to form a coalition and appoint a representative who will conduct courtesy calls/visits and follow up with the Chief Justice to address all provisions of the laws which discriminate against women.

Conduct intensive discussions with the Law Reform Commission and to propose and initiate a technical working group under the Law Reform to undertake continued dialogue on reforming the laws and develop SMART action plans (time bound) to ensure that existing laws are reformed to

eliminate all types of discrimination against women which brought about subordination to women (HTD- June 2011:25).

Again, “Where culture is a problem then education is the key component strategy through encompassing media campaigns, legal awareness, training of lawyers and legal personnel as well as paralegals (Schuler, 1986:4) in Tsanga A and Stewart J (eds) 2011)”. Deconstruction of social constructions which fuels subordination of women, this is to say that, all the social constructions “truth” set out by cultural leaders, political leaders, and religious leaders that perpetuate subordination need to be highlighted and pointed out so as to free women from all forms of discrimination. This is to say that we need to engage lawyers and advocates toward the concept of volunteerism, that they need to give back to the society by organizing forums aiming at addressing issues perpetuating women’s subordination in Tanzania by producing and disseminating Information, Education and Communication (IEC) materials on selected laws to enhance both women and men understanding of women’s rights and use the same laws to protect women against any forms of discrimination.

Dealing with women issues is a two way thing, that we need to include men in addressing women issues by initiating activities which addresses women subordination so that they participate to tackle problems of women subordination and identify valuable solutions and at the same time to encourage men to become advocates for combating women’s subordinations. In this way it will be possible to tackle the problem as the whole society will be aware of what’s going on so they will collaborate.

5.3 CONCLUSION

One can conclude that in order to liberate women from all forms of subordinations. We need to focus not only on legal constraints but also from the truth originated from a set of customary and social constructions; which influenced the enactment of the land laws which then plays a great role of blocking women from a successful enjoyment of their social and legal rights. as stipulated in the mother law-Constitution of the United Republic of Tanzania, other domestic laws as well as various human rights instruments ratified by Tanzania.

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Rukia Diwani Konzi Vs Abdallah Issa Kihenya (Matrimonial Cause No. 6 of 1977 - unreported)

Veronica Kondela v Samuel Nyando Primary Court Sengererna Civil Case No. 77 of 1984

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Tanzania Law of the Marriage Act, No. 5 of 1971 (CAP. 29 R.E. 2002)

The Magistrate’s Courts Act No. 2 of 1984 (CAP. 11 of Revised Laws)

LIST OF HUMAN RIGHTS INSTRUMENTS

African (Banjul) Charter on Human and People's Rights (Banjul Charter)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

International Covenant on Civil and Political Rights (ICCPR)

Protocol to the African Charter on the Rights of Women in Africa, 11 July 2003, 11 July 2003
(Women's Protocol)

Southern African Development Community (SADC Protocol on Gender and Development)

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/811 (1948)

APPENDIXES

Appendix 1; TAWLA MEDIATION FORM

REF: TAWLA /MEDIATION//201.....

DATE:

MR:

OF

RE: TO BE CALLED FOR A CLAIM

AGAINST.....

The person mentioned above is our client. She came in our office with the claims against you. For us to be able to assist her accordingly, we would like to hear from you also. Therefore we are herein asking you to come to our office situated at Ilala Shariff Shamba Plot No. 33 on Day of
At

Failure to come without notice will lead us to take legal actions against you.

We expect cooperation from you.

Thank you.

(NAME).....

(SIGNATURE)

FOR: HEAD OF LEGAL AID DEPARTMENT

Appendix 2; TAWLA LEGAL AID CLIENT'S DETAILS FORM



Legal Aid unit: Client's Registration form

Aim: To take TAWLA'S legal aid clients details

Direction: The copy to be filled by a legal aid client and handle it to the attending officer (the officer should give this form to the Secretary)

Name		Date (D/M/Y)	
P.O. Box		Ward	
		District	
Phone No.		Region	
Age			

<p>Education</p> <p>Primary</p> <p>Secondary</p> <p>University/College</p> <p>Non</p>	<p>Marriage Status</p> <p>Not married</p> <p>Living together</p> <p>Married</p> <p>Divorced</p> <p>Widow/Widower</p> <p>Separated</p>
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<p>Employment</p> <p>Permanent</p> <p>Entrepreneurship/self employed</p> <p>Not employed</p> <p>Casual worker</p>

Farmer

Other (specify)

If employed, how much do you get per month?

Are you disabled in any way?	Yes
Please tick where appropriate	No

Number of children

Problem/Claim (please tick where applicable)

Marriage	Employment	Citizenship issues
Probate	Child labour	Land
Violence	Forgery	Trafficking
Maintenance	Rape	Legal aid generally
Forced marriages	Reproductive health rights	Other (specify)
Detained children		

Have you reported about this issue any where else?

Please tick where applicable

Yes	If Yes- tick where appropriate
No	Private Advocates Office
	Social Welfare Officer
	Police
	Local government leaders
	Other Legal Aid Organizations (specify)
	Family
	Religious leaders

Legal aid providers Other (specify)
--

Is there anyone who advised you to come to TAWLA straight? (Please tick where applicable)	
Yes No	If Yes- tick where applicable Private advocate offices Social welfare Police Friend Local government leaders Other legal aid organizations? (specify) Other (specify)

Is your problem in court already?	Yes	No
If Yes, which court?		

Where did you get the information about TAWLA? (Please tick where applicable)		
Through Radio	Social welfare officer	Through family member
Through a friend	Police	TV
In court	Other legal aid providers	TAWLA Website
Newspaper	Newsletters/Articles	Other (specify)

.....

To be filled by TAWLA Staff

Location of the office	
Name of attending officer	
Name(s) of assistant attending officer(s)	
Date when online form was filled	
Type of the case assigned (Put number)	
File number of the client	
1=Matrimonial 2=Citizenship issues 3=Probate 4=Land issues 5=Security of children and maintenance 6=Reproductive health rights 7=Employment issues 8=legal advice generally 9=GBV (home violence) 10=Rape 11=Child labour 12=Defamation and corruption at work 13=Forgery 14=Detained 15=Other (specify).....	

IN THE DISTRICT COURT OF ILALA

AT SAMORA

MATRIMONIAL CAUSE NO.....OF

ABC..... PETITIONER

VERSUS

DEF.....RESPONDENT

PETITION FOR DIVORCE

Your humble Petitioner named here in above sworn/affirm and state as follows:

- 1. That the Petitioner is an adult, Christian/Muslim, and Tanzanian citizen, works for gain in Dar Es Salaam, for the purpose of this case the address for service is :

ABC

P. O. Box

DAR ES SALAAM

2. That the Respondent herein is an adult person, Christian/Muslim by faith, Works for gain in Dar Es Salaam, for the purpose of this case the address for service is:

DEF

P. O. Box

DAR ES SALAAM

3. That the parties named herein contracted a Christian/Islamic/Civil Marriage in at The copy of marriage certificate is attached herewith as annexure “ABC -1” of which the petitioner craves leave of this Honourable court to refer to it as a part of this petition.
4. That the marriage between the parties was blessed with issue(s). Name(s)..... A copy of birth certificate(s) is annexed herewith as annexure “ABC – 2 of which the petitioner craves leave of this Honourable court to refer to it as part of this petition.
5. That the couple lived happily until when misunderstanding and quarrels started between them.
6. That (Short history of the misunderstanding and quarrels).
7. That the Petitioner further states that the Respondent stopped careering and maintaining the family since

8. That on the Respondent throw out the petitioner from their matrimonial house without any sufficient reasons.

9. That the Petitioner have also discovered that the Respondent is having an affair with one and that the Respondent has rented a house for her at

10. That the said couple went to conciliatory Board for conciliation however in vain. A copy of certificate showing failure to reconcile the parties is annexed herewith as annexure “ABC – 3 of which the petitioner craves leave of this Honourable court to refer to it as part of this petition.

11. That the marriage has broken down irreparably.

12. That the parties have jointly acquired several properties during their marriage. A list of properties acquired during their marriage are as follows;

Two houses;

(a) One house located at

(b) One house located at

Two plots;

(One at and another at

House utensils

13. That the matter arose within the jurisdiction of this Honourable Court.

WHEREFORE: The Petitioner prays for judgment and decree against the Respondent as follows:

- (i) This Honourable Court be pleased to grant divorce.
- (ii) Division of matrimonial properties.
- (iii) Any other relief(s) this Honourable court shall deem just and fit to grant.

VERIFICATION:

I, **ABC** being the Petitioner do hereby state that what is stated above in paragraph 1 to 13 is true to the best of my knowledge and belief.

Dated at Dar es Salaam this.....day of 201.

.....

PETITIONER

SWORN at Dar es Salaam by the said]

ABC who personally]

Known to me or is identified]

To me by.....The latter be]

Known to me personally]

.....

Thisday of201]

DEPONENT

BEFORE ME:

.....

COMMISSIONER FOR OATH

Presented for filing this Day of201.

.....

COURT CLERK

DRAWN GRATIS BY:

Tanzania Women Lawyers Association (TAWLA)

TAWLA House, Plot No. 33, Ilala Sharif Shamba

P.O BOX 9460

Dar es salaam.

FILED BY:

ABC

P. O. Box

DAR ES SALAAM

COPY TO BE SERVED UPON:

DEF

P. O.Box

DAR ES SALAAM.