Dissolution of marriage, custody of children and division of assets.

The Contract of marriage is a sacrosanct union treated differently before the law compared to other ordinary contracts. Due to its peculiarity, the government plays major role in ensuring parties who opt to enter into such contract on their own free will comply with their respective obligations therein.

Contract of marriage can only be called to an end after a court of law is satisfied with tangible evidence tendered by the parties to the extent that the marriage is broken down irreparably. It is only after this that an order of divorce or separation can be issued. It is important to take note that it is only a court of law vested with mandate to terminate marriage contract unlike other ordinary contracts.

It is a matter of law that once an order of divorce or separation is issued, then the court is always duty-bound to deal with questions of first, custody of children sired in that marriage and second, division of matrimonial properties.

The above two aspects are natural consequences of the contract of marriage which must be overseen by the court. This article takes you through some of the key highlights on the question of division of matrimonial property while the aspect of custody of children shall be expounded on in the next article.

Emphasis here is that division of matrimonial properties is among areas with good number of disputes within families when an issue of divorce or separation emerges. Therefore, it is imperative for the spouses to be aware of basic knowledge on the same instead of relying on misleading information about division of matrimonial assets.

Unlike the Republic of Kenya, where there is separate act of parliament dealing with all issues of division of matrimonial assets namely the Matrimonial Property Act No 49 of 2013; in Tanzania this issue is covered under a single provision namely Section 114 of the Law of Marriage Act.

In subsection 3 of the above provision, two circumstances are provided to described assets namely (i) assets acquired during the subsistence of marriage and (ii) assets acquired before entering into contract of marriage but which were substantially improved by other spouse during the subsistence of marriage.

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For example, if a husband owned a semi-finished house before entering into contract of marriage while completion of the same house was done during the subsistence of marriage in which the wife plays some roles to ensure the house is finished, then the aforesaid house may be subject to division as it is a matrimonial property within the meaning of the law.

As for the registration of properties in the name of one spouse, it is a settled principle in our jurisdiction that a property registered in the name of one spouse either acquired during subsistence of marriage or prior to marriage is presumed in the eyes of the law to belong to the registered spouse unless there is sufficient evidence to rebut the said presumption as stipulated in section 60 of the Law of Marriage Act.

The duty of the other spouse is to adduce evidence to rebut the said presumption that the property was substantially improved by that spouse although the same was acquired before entering into contract of marriage. An example is the land case No 7 of 2018 between Sikudhani Rajab vs Ecobank Tanzania Ltd and 4 others.

But if the property is registered under both names, then the law presumes each party has equal beneficial interest, unless it is proven otherwise.

Section 114 (1) of the law of Marriage Act requires the court to exercise its power under two ways in respect of matrimonial properties: (i) to order for division of matrimonial properties or (ii) to issue an order of sale of matrimonial properties and its proceeds be apportioned to the spouses.

Now the question which is frequently being asked is what are the conditions used by the court to either divide matrimonial properties or proceeds of the sale of matrimonial property?

There are four major conditions which courts ought to consider at the time of division of matrimonial assets as provided in Section 114(2) of the Law of Marriage Act.

Condition one is customs of the community to which the parties belong. Here the court takes into account the possibility that a property owned by one spouse may be for future generations of family and community and most of these properties are ancestral land bequeathed from that spouse's parents. Evidence tendered by that spouse and its location normally determines whether the same is owned customarily or otherwise.

Condition two is the extent of contribution made by each spouse towards acquisition of that asset. Contribution can be made by way of monetary or non-monetary such as domestic work like housekeeping, childcare and others.

In the Matrimonial Case No 6 of 1977 between Rukia Diwani Konzi vs Abdallah Issa Kihenga, the High Court of Tanzania in Dar es Salaam clearly said that domestic work must be regarded as part of joint efforts or contribution towards acquisition of assets.

This was a liberal approach to those spouses who do not go to work but remain at home and take care of children of the marriage and matrimonial properties.

Condition three dwells on any debts owed by either party which were contracted for their joint benefits. Here, the court is required to look into the said matrimonial properties which were deposited as security but only for the benefit of the family. In that case, both spouses are charged with that liability until the same is discharged or otherwise. Condition four considers the needs of infant children, if any. The court considers which party should stay with such children before matrimonial home is apportioned for the purposes of upbringing of such minors.

Sometimes, circumstances may not allow issuances of an order of sale or division of a matrimonial home. In such circumstances, the court may issue conditional order in a sense that one spouse remains with children in the matrimonial home and once children attain the age of majority, then the same can be sold and its proceeds divided between spouses in the decided allotment.

Lastly, let's take a look at these two wrong or misleading perceptions which have been circulating in our society. One is that the spouse who caused the breakdown of marriage is not entitled to division of matrimonial properties. That is not correct position of the law.

The fact is the spouse whose actions contributed to the breakdown of marriage by seeking issuance of an order of separation or divorce by the court cannot lose his or her entitlement in the division of matrimonial properties.

Legal grounds for dissolution of marriage are different from grounds for division of matrimonial properties. In the case of Robert Aranjo vs Zena Mwijuma (1985)1984 page 7, the appellant disputed why the subordinate court awarded the respondent equal share of their matrimonial properties while she was the sources of breakdown of the marriage.

The court held that grounds for dissolution of marriage are different from grounds for division of matrimonial assets. In division of matrimonial assets, the court is required to deal with grounds provided in section 114 in connection with evidence on record.

The second misleading perception is that entering into a contract of marriage gives an automatic ownership of properties to either party. This is A wrong perception because section 58 of the law of marriage allows a spouse to own personal properties in their name unless that position is rebuttable under section 60 of the law of marriage.