

CASE NOTE
**DIVISION OF MATRIMONIAL ASSETS UPON DIVORCE PROCEEDINGS: ARE THE
COMPANY ASSETS THE SUBJECT OF THE DIVISION?**

Hanifa T. Massawe (PhD)*¹

Faculty of Law, Mzumbe University

1.0 WHAT BEFELL THE PETITIONER IN THIS CASE?

In **Safina Ally v. Daku Abdallah**,² the appellant (Safina- wife) was married to the respondent (Daku Abdallah - husband) under Islamic marriage in 1986. In 2017, their marriage was dissolved by the Musoma Urban Primary Court. Subsequent to dissolving the marriage, the Primary Court awarded the appellant 25 percent of the immovable assets, while the respondent was awarded 75 percent. In addition, the court made an order to both parties to pay Tsh. 1,000,000/= to Faida Marco, being an outstanding loan taken for some business. The Primary Court refrained from distributing assets owned by the company in which the husband was a shareholder. The appellant was aggrieved by this decision. She unsuccessfully appealed to the District Court and the High Court. In the High Court, the relevant grounds of appeal which forms the basis for this case note reads as follows: (i) the courts below erred in law and fact for holding that the company (industry) owned by the parties is not subject to division of matrimonial assets (*sic*). The High Court held that the courts below were justified to decline distribution of the industry duly registered through the Companies Act.

2.0 ARGUMENTS OF THE PARTIES IN THE HIGH COURT

The parties were unrepresented in the High Court. The appellant argued that the first appellate court erred in law by distributing the matrimonial assets to the appellant at the rate of 25 percent, while the respondent was awarded 75 percent. The respondent countered the appellant's argument by simply stating that the lower courts decisions were just and fair, the distribution of immovable assets at the rate of 25 percent and 75 percent, was due to the fact that, the appellant was a mere housewife adding that a company was a different legal entity. In her rejoinder, the appellant submitted that she was entitled to 50 percent out of the immovable assets, as she was engaging in various domestic activities. In view of the court record (judgment), it would appear that, the issue of company assets was not canvassed by the appellant although it was superficially touched on by the respondent. It could be argued that the matter was left to the court to decide. The High Court on her part decided that a company registered under the Companies Act, Cap 212 Revised Edition 2002, has its own way of dissolution or winding up in the event of bankruptcy and related event(s).

The above High Court decision forms the basis of this commentary. The issue to be answered is whether assets owned by a company could form part of matrimonial assets, hence, subject to division upon dissolution of marriage. In making this commentary, the general principles governing division of matrimonial assets in Tanzania are considered first. Thereafter, the paper

¹ Dr. Iur. Hanifa T. Massawe is a Lecturer in Law at the Faculty of Law, Mzumbe University.

² High Court of Tanzania Mwanza Registry, PC. Matrimonial Appeal No. 41 of 2017 (Arising from Musoma District Court, Civil Appeal No. 37 of 2017, Original Matrimonial Cause No. 3/2017, Musoma Primary Court)

shall focus on the legal rules depicting the foundations of corporate entity, its attributes, and principles relating to corporate property ownership.

3.0 LEGAL PRINCIPLES ON DIVISION OF MATRIMONIAL ASSETS IN TANZANIA

Upon dissolution of marriage relationships, a number of issues including but not limited to maintenance of children produced out of a marriage and division of matrimonial property, require meticulous legal attention to enable the rights of both parties to be well accommodated. The legislation governing division of matrimonial assets in Tanzania is the Law of Marriage Act Cap. 29, R.E 2019 hereafter LMA. The legislation empowers the court to order division of assets acquired by the spouses during marriage through their joint efforts under s. 114(1) of the same Act. The implication of this section is to empower courts to recognize matrimonial assets in their physical nature existing in the names of parties in a marriage relationship.

In the exercise of its duty, the court is required to take into account many factors pertaining to the consideration of the customs of the community to which the parties belong,³ and the extent of contributions made by each party in money, property, or work done in acquisition of the assets.⁴ Others include the existence of any debts owed by either party contracted for their own benefit,⁵ and the needs of infant children if existing in the same marriage.⁶ The law directs the courts further on the inclination of equal division of matrimonial property subject to the existence of the above elements.

To satisfy itself on the genuineness of the claim, the courts take into account the relationship of the parties on whether a legally contracted marriage or a *de facto* union exists. Thereafter, the courts will inquire on the property, which forms the centre stage of the dispute to examine the extent of the party's contribution therein. The extent of contribution is hinged upon the evidence adduced by both parties pointing towards the types of economic activities they were engaged in during their spousal relationship. The justification on the spousal extent of contribution to the matrimonial property has been squarely articulated within the limits of s. 114(2)(b) of the Law of Marriage Act, Cap. 29 R.E of 2019.

It is important to note that the practice reflects on our courts regard to specific tangible properties as opposed to properties owned by corporate entities connected to either spouse in matrimonial proceedings. These properties have been mostly in the form of vehicles, farms, cattle, or houses owned by either spouse. Unfortunately, there has never been a situation whereby the division of matrimonial property by the spouses in a matrimonial conflict focused on properties connected to a corporate entity within which the husband or wife is a shareholder. Thus, there is low jurisprudence in the area. One may vividly note courts' attention towards tangible or physical property as opposed to properties owned by companies. Thereafter the focus on proof of ownership of such properties is established in order to justify each spouse's contribution thereto before the decision is made in terms of division of such property.

³ Section 114 (2) (a) of LMA

⁴ Section 114 (2)(b) of the LMA.

⁵ Section 114(2) (c) of the LMA.

⁶ Section 114(2)(d) of the LMA

The courts in Tanzania take into account tangible/physical property as illustrated in the case of **Zawadi Abdallah v. Ibrahim Iddi**⁷ wherein the petitioner (Zawadi) claimed for a share of assets jointly owned by herself and her husband. The assets in question, included two houses and a motor vehicle acquired during their marriage. In **Mariam Tumbo v. Harold Tumbo**⁸ the petitioner one Mariam Tumbo was praying for division of one built house at Chamwino Area, 2 radio cassettes, one radiogram, one refrigerator and one maize Shamba. In another case of **Bi. Hawa Mohamed v. Seif**,⁹ the appellant one Bi Hawa Mohamed consciously moved to the Court of Appeal despite a number of unsuccessful petitions to the High Court with regard to the division of a landed property.

The case of **Maryam Mbaraka Saleh v. Abood Saleh Abood**¹⁰ on the other hand reflects on the claims for division of matrimonial property being directed on the house, a landed property as similarly observed in the case of **Anna Kanungha v. Andrea Kanungha**.¹¹ In Kanungha's case the claim for division of matrimonial property by the applicant focused on livestock sheep, donkey and 4 houses forming part of the matrimonial property.

Based on the cases cited and discussed above one may easily note the trend of our courts in applying the rules for the division of matrimonial property and the type of property commonly forming the base of parties' prayers in such disputes in Tanzania. These cases offer a clear insight on how Tanzanian family courts are mainly accustomed to matrimonial disputes covering such types of properties either solely owned by spouses or in a partnership as opposed to those owned by corporate entities within which the spouses form part. In the end, in Safina's case as well as that of **Mariam Tumbo** and **Muthembwa v. Muthembwa** the judge relied on a number of case laws to arrive at the judgement.¹² Reliance on these case laws and application of section 114(2) of the LMA was to the effect that the court proved the existence of parties "joint efforts" towards acquisition of movable assets acquired in the marriage relationship. The findings rendered an overturn on the magistrate's decision only with regard to the rate of distribution of the matrimonial property.

The High Court judgment sees an increase of 20percent from the judgment offered in the District Court to the appellant and a decrease of 20percent from the respondent. To arrive at the current decision, the judge considered the weight of evidence adduced and concluded that the appellant was not a mere housewife as contended by the respondent rather she was also a businesswoman. This fact was construed to establish her role towards the production or acquisition of matrimonial assets as presented in the evidence and the right to an increase in her share contrary to what was awarded by the lower court.

The author is at ease with the increase in the appellant's share of the matrimonial property contrary to what was ordered by the lower courts. However, the court's handling of the appellant's first ground of appeal is a matter of concern to the author in this paper. The appellant raised ground

⁷ [1981] TLR 311.

⁸ [1983] TLR 293.

⁹ [1983] TLR 32 (CAT).

¹⁰ Civil Appeal No. 1 of 1992, Court of Appeal of Tanzania (CAT) (Unreported).

¹¹ [1996] TLR 195.

¹² [2002] 1 E.A. 186, 194 (C.A.K) (Kenya).

with regard to the lower courts error for holding that the company assets as an industry owned by the parties is not subject to the division of matrimonial assets. This issue calls for the analysis on the position of corporate property in matrimonial disputes as discussed in the next section.

4.0 DIVISION OF COMPANY ASSETS IN MATRIMONIAL PROCEEDINGS

The substance of the appellant's first ground of appeal aimed at bringing the High Court's attention to the question as to whether a company/industry owned by the parties may be subject to the division of matrimonial assets. In other words, the issue ponders on whether a business organized in the form of a company and the properties therein may or may not be considered a marital property especially where one is claiming against the assets belonging to the corporate entity. The inclination of the Judge's decision with regard to this issue replicates that of the District Court, which manifests a complete disregard on the division of corporate assets purportedly owned by parties in a matrimonial dispute.

It is understood that corporate entities represent significant media for business undertakings in the global context. It is important to note that business forms other than corporate forms of doing business represent simple arrangements, which may be entered into and dissolved easily by either party even without a written contract. However, the situation is different where the vehicle for carrying out business is established in the form of a corporate entity.

Upon incorporation, the corporate entity is a separate person from its subscribers including the spouses who may be party thereto as elaborated in **Salomon v. Salomon and Company Ltd.**¹³ It is a settled legal principle that once incorporated the corporate entity earns a new status as a separate legal person [hereafter SLP], which is capable of owning property. The SLP attribute enables the company to own property as its own and not that of its shareholders *cum* members. The SLP attribute is to the effect that corporate property and assets belong to the company and not to the shareholders. The situation is however different where the corporate entity is either dissolved or liquidated in which the shareholders acquire rights to a share in the division of corporate assets following a discharge of corporate creditors.¹⁴ It is therefore trite law that where a corporate entity holds property, such property is legally owned by the very same company and not otherwise.¹⁵

Aligning corporate formation and management with the case at hand one may appreciate that spouses in a matrimonial relationship may venture into business transactions in different forms. The business forms may include sole proprietorship by either one of the spouses, a one-person company, as shareholder in a private company or as a partnership. However, amidst matrimonial disputes leading to dissolution of marriages, situations may occur where the matrimonial properties involved in the disputes involve business in corporate form to which either of the spouses forms part of the shareholders.

In this situation there is a need of highlighting the legal considerations where matrimonial disputes for the division of matrimonial properties is directed towards properties owned by either spouse in the form of shares held by him/her in a company, sole proprietorship or properties invested in a company as part of capital. The management of property held in sole proprietorship and in a

¹³ [1897] AC 22.

¹⁴ Cassim F., *et al* (2012) Contemporary Company Law, 2nd Edn, JUTA &CO LTD, Pietermaritzburg, p.36.

¹⁵ **Dadoo Ltd v Krugersdorp Municipal Council** [1920] AD 530 at 550-1.

partnership as opposed to companies does not pose much practical difficulty. This is due to the existing clarity that the owner is personally liable for his or her business's debts and losses. There is no distinction made between personal and business income, and the business terminates upon the death of the owner unless a specific arrangement is made for someone to inherit the business.

The separate legal personality principle seems to be the driving principle in the decision of both courts in the lower level and in the High Court in which the magistrate and the judge contended that the entity in question was a corporate entity in a strict sense of the law. Corporate property rights as enabled by its legal personality have firmly grounded the intricacies around the judge's decision on the appellants prayers in this case, as the applicant's prayers touched on the division of properties claimed to be owned by the company. The author does not dispute the judge's contention regarding the difficulty of dealing with corporate property, as an entity created by the law thus should be dealt with only by following the established legal procedures. Perplexity rather arises, as the judge refers to the said entity as a company on one hand and an industry on the other thus no clarity on whether the entity referred to as a corporate entity is synonymous to an industry as per the judge's apprehension. It is thus not clear whether the basis of decision in this case focused on the entity as a corporate person or an industry. Such imprecision poses difficulty in understanding the High Court decision.

In a setting within which both the magistrate and the judge refers to the entity as a corporate body *cum* industry thus a base for denial to award the appellants prayer, accord to the requirements of the relevant law in this context the Companies Act was an imperative factor. Nonetheless, this fact was not taken into account thus difficult to comprehend the base of the courts' decision. This is perpetuated by the fact that nowhere in the proceedings and judgment that the court inquired and was presented with evidence which suggests that the entity being referred to as a company is actually so. This fact carries substantial weight in the decline to divide the property claimed for by the applicant (Safina) because the same was not owned by the parties to the matrimonial dispute rather corporate property. As an important piece of evidence carrying significant value to the court's decision much was expected in the evidence basket.

It was expected that the court would have made thorough inquiry on the status of the entity, which was at the centre of the claim in terms of its nature, and registration status as required by the relevant law. It is well known that once incorporated, the corporate documents are stored at the relevant authority for inspection in the sense that any member of the public may take constructive notice of. Therefore, relevant documents including but not limited to certificate of incorporation, memorandum and articles of association ought to have formed part of the evidence tendered before the court of law to verify corporate existence.

Apart from the confusion on whether an industry or company are synonymous entities, it is also worth noting that no evidence from either party suggests that the entity or industry in question satisfies the requirements of a corporate entity as referred to by the judge. On the other hand, the court did not take deliberate efforts of inquiring on its nature thus an indication that more had to be done as one may have an opinion that the parties being ignorant of what entails a corporate entity in a legal sense could have misconceived or misconstrued the same thus its misrepresentation. In view of this gap, a number of questions can be raised pertaining to whether this entity was really a company, if so, what was the evidence before the court of law? Does the

evidence satisfy the characters/elements of a company *per se*? It is possible that this was a different scheme of business used by the parties to carry out their business as a partnership or sole proprietorship. If evidence suggests an affirmative answer then this would mean a different court decision from what has been currently decided by the court of law.

Considering the courts reaction to the first issue, the author fails to comprehend how the court arrived at such a decision, which presupposes its assumptions on the existence of a company (industry). Unfortunately, no specific mention of the company name was made in the evidence, which brings in a pertinent question as to whether the court took time to inquire on its name or registration status. An affirmative answer on whether the company (industry) in the context of this case reflects the traditional definition of a company as defined in our corporate laws could have a different implication on the outcome of the case altogether. However, this information could not be obtained from the facts of the case as presented.

It was not even clear whether Safina was a shareholder in the company. if at all she was a shareholder, what was her shareholding capacity in the same? This raises another point for contestation as to how the judge decided the case as in that manner by holding that the company (industry) claimed for by the applicant in the first issue was a registered entity under the Company Act, Cap 212, Revised Edition 2002. However, this fact was neither disclosed by the applicant nor inquired for by the court. The court could have made an effort of inquiring from the applicant on the verification of applicant's allegations through submission of relevant documents thereto.

In line with the provisions of section 114(2)(a) of the LMA, the courts of law have been accorded wide discretionary powers to decide when dealing with distribution of matrimonial property during divorce. However, in order for the court to exercise its discretion properly, the petitioner has a duty of proving his or her claims on the balance of probability to assist the court thereto.¹⁶ Hence, the applicant (Safina) was duty bound to prove the existence of the company, which she alleged to have held the properties for which the court ought to distribute in her favour.¹⁷ However, this was not the case but the court went further holding the entity as a company despite insufficiency of the evidence. This raises the question would the court's decision have remained same with the facts at hand.

In an educating perspective, the judge's reliance on section 157 of the Companies Act R.E of 2002 on page 3 of the respective judgement as a justification for declining distribution of corporate assets as matrimonial assets is erroneous. The section provides for the Registrar's power to extend accounting period, information quite contrary to the subject of the matter at hand. It is suggested that the judge ought to have placed reliance on section 267 of the CA that offers guiding principles on corporate winding up modes.

5.0 CONCLUSION

The matrimonial dispute between Safina Ally (the applicant) and her spouse Daku Abdallah (the respondent) among other issues aimed at bringing attention of the court to the question as to whether properties in a business run in the form of a company, may or may not be considered for division purposes in a matrimonial proceeding. The inclination of the judge's decision with regard

¹⁶ Rule 29 of the Law of Marriage (Matrimonial Proceedings), Rules, 1971, GN.136.

¹⁷ Section 110 (1) and (2) of the Tanzanian Evidence Act No. 15 R.E of 2007.

to this issue complements that of the lower court, which has manifested a complete disregard on division of property held by a corporate entity. In evaluating the courts' responses, it is pertinent to observe an embrace of the dominant separate legal personality principle as laid down in the famous Salomon's case.¹⁸ The petitioner's prayer on properties held by a corporate property is quite a misnomer as it goes contrary to the legal principle that dictates corporate capacity to own property upon its birth.

Nonetheless the petitioner's prayer is viewed as very unconventional in a Tanzanian perspective as compared to prayers for tangible assets including but not limited to houses and farms typically raised by most petitioners in matrimonial proceedings as discussed under 3.0. The consequence of the proceeding is downplayed by the applicant's low evidential weight indicated by uncertainty as to whether the entity from which the petitioner is claiming the property satisfies the requirement of a corporate entity in a legal sense. This raises questions as to the validity of both the courts' judgments given the uncertainty on validity of such entity as being a company or another scheme of business adopted by the spouses to carry out business. In other words, a viable question remains, would the judgment remain the same subject to submission of evidence to the contrary? Would the petitioner's (Safina's) fate remain the same in such a situation?

¹⁸ *Supra note 13.*