

BOOK REVIEW

INTRODUCTION TO FAMILY LAW IN TANZANIA By Clement J. Mashamba, LawAfrica Publishing (K) Ltd, 2017

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The author, in the preface of the book, tells readers that this second edition was published in order to update recent developments in the Law of Marriage regime and address some of the issues raised by the critics on the first edition. The question one would pose is to what extent has the author succeeded in achieving these objectives? This question will be answered in this review. The book is divided into four parts of twelve chapters, all of which will be reviewed in this paper.

Part I (pp. 1-74) focuses on the concept and nature of marriage. This part is divided into two chapters. Chapter one (pp. 1-37) is on the understanding of the changing nature and the concept of marriage. The author carefully shows how the Roman Catholic Church, now recognizes the indissolubility of marriage (p.7), unlike in the past when it did not. Another aspect shows the changing nature of marriage in Tanzania where women ask men for a hand in marriage (p. 9), the conduct which was regarded as abnormal in the past. These are good observations. On the concept of marriage (item 1.2), the author examines the same from a religious point of view (Roman Catholic Church (p.4) and Islamic Law (pp.12-13), which I find strange. In Tanzania, the Law of Marriage Act (LMA) defines clearly the concept of marriage (s. 9 LMA). The Court of Appeal of Tanzania in *Maryam Mbaraka v. Abood Saleh Abood*, Civil Appeal No. 1 of 1992, (CAT at DSM), p. 8, held that Islamic law does not apply with regard to any matter provided for in the LMA.

The author presents very well the aspect of sanctity of marriage (pp. 10-12). The only omission is the observation that wives' accommodation rights emanating from section 63(1) of the LMA are protected in a very narrow scope via section 59(1) of the LMA. It is only matrimonial homes, which are protected. Accommodation facilities such as rented houses, service tenancies, and residential premises offered by families are not covered.

Part II (pp.75-194) covers the legal aspects of marriage in Tanzania, namely, promises to marry, preliminaries to a valid marriage, celebration of marriage, and rights and duties of spouses in a marriage. The overall treatment of these aspects is good. There are few areas of improvement. First, the author regards Kirakwe's case [1989] TLR 215 as a good case that defines the concept of presumption of marriage well. However, this case law misses two points: the capacity to marry, and who qualifies to celebrate marriage under customary law? The author cites *Jonas Kimario v. Sophia Mashema*, High Court of Tanzania at Dar es Salaam, Civil Appeal No. 86/2002(unreported) (p. 131-132) as an authority. In that case, a Nyiramba from Singida and a Chagga from Kilimanjaro, were held not qualified to marry under customary law because the two did not belong to the same community. The author concludes the discussion on this point, thus, '... for the parties to celebrate a valid customary marriage, they must all belong to the same community

bound by the same customary norms and tradition...' (p.133). This may be considered as a rush conclusion. The LMA does not demand for the parties to belong to the same community or to be bound by the same customary norms to be able to celebrate a marriage under customary law. It simply states that a marriage may be contracted in Tanzania where the parties belong to a community or to communities that follow customary law, in civil or according to the rites of the customary law. If the rites of a particular community are chosen, then, marriage may be contracted according to customary law of that community.

The author mentions one of the rights of a couple after marriage being enjoyment of 'joint matrimonial home and assets'(p.155). This is a misnomer. A matrimonial home, must be an asset belonging to one spouse, but occupied by the couple. The case of *Leons Challamila v. Mayalla Edward Masunga*, High Court of Tanzania at DSM, Civil Appeal No. 150/1999(unreported)(p. 157) cited by the author is not the correct example of a matrimonial home. This is because the author quotes Justice Manento saying that 'no spouse can dispose of the matrimonial property jointly acquired during the marriage without the consent of the other spouse'. (p. 157). The cross referenced case in the footnote, the case of *Mtumwa Rashidi v. Abdallah Iddi & another*, Civil Appeal No. 22/1993, CAT at DSM, is a typical example of a matrimonial property case and not an example of a matrimonial home. Mtumwa Rashidi had her name on the letter of offer, but the husband secretly removed her name enabling Abdallah Iddi to be the sole proprietor, hence, selling the property to the buyer (second respondent).

Part III (pp.197-308): The Place of Children in Matrimonial Relations. This part is divided into two chapters, Chapters Six and Seven. Chapter Six focuses on children rights in the family while Chapter Seven focuses on childcare and protection in the family. The author presents the basic principles of the Convention on the Rights of the Child (CRC), which have been domesticated by the Law of the Child Act, namely, the best interest of the child, survival and development and participation. The author makes good observations when noting that members of the extended family in African context are also part of those responsible for the upbringing and development of a child (p. 216).

Part IV (pp.315-438) is on settlement of matrimonial disputes, comprises four chapters. The section discusses the broad spectrum of determining matrimonial disputes in Tanzania. At first, the author explains the informal mechanisms (negotiation and mediation) of settling matrimonial disputes. The author correctly points out that mediation is one of the most preferred mechanisms in resolving matrimonial disputes (p. 321). Next, formal dispute settlement mechanisms are discussed, namely, marriage conciliation boards (MCBs) and courts of law. The author mentions the two forms of MCB (p. 342) in general terms. The author should have named the Ward Tribunals established in every ward and religious boards of various institutions, which are in the name of Communal Conciliatory Boards.¹ The mechanisms through which they operate are well explained, although the section does not disclose the challenges, which MCBs are facing, namely issuing defective certificates and failure to command successfully attendance of the parties before them.

¹ Reference to Boards means the Boards established either under section 102 (1) of the Law of Marriage Act, Cap. 29 R.E. 2019 as amended by the Law Revision (Miscellaneous Amendment) Act or the designated Communal Conciliatory Boards (see Act No. 9/1996). For ease of reference, section 102 (1) of Cap. 29 R.E. 2019 reads: "The Ward Tribunals established in a ward under the Ward Tribunals Act shall be the Marriage Conciliation Boards for that ward for the purposes of this Act."

This part explains the two legal requirements to be met by the party wishing to file a petition for divorce or separation in the court of law (s. 101, LMA): two-year rule and reference to MCB. On the latter, the author suggests that the court is empowered to give dispensation to the party facing an impracticable situation to file a petition for divorce or separation while the matter is already in court (p.349). The author states,

'Therefore, it is the law that where the court is satisfied that reference to the Board is nugatory, it can dispense with such requirement and proceed to determine a petition for divorce without necessarily going through the reconciliation process before the Marriage Conciliation Board'.

This legal position is vague. When is dispensation supposed to be granted? It has to be noted that, the dispensation of referring the matrimonial difficulty to the MCB must be formally sought prior to the filing of the case in court. It cannot be assumed (see *Cyril Fred Kabarole v. Zena Sarota & Andrew Mushi*, Civil Revision No. 77/2001, and HC of Tanzania at DSM (unreported), Kyando, J, and recently the case of *Anna Sundi v. Aloyce Rutahya*, Matrimonial Cause No 1 of 2019, HCT at Mwanza District Registry (unreported), A.Z. Mgeyekwa, J.). The grounds for divorce (pp. 325-338) and the procedures for instituting petitions for divorce and separation (pp. 341-387) are well explained, although they lack case law to elaborate them.

The division of matrimonial property is another main component covered under Chapter Eleven. The chapter discusses the main factors, which a trial court should consider when dividing matrimonial assets. The factors discussed by the author are customs of the community, the extent of contribution, debts owed, needs of the children born during the subsistence of marriage, and the party who wrecked the marriage. The author has convincingly managed to offer a good explanation on each of the above factors. However, observations ought to be made on two aspects: customs of the community and needs of the children in the marriage. Regarding customs of the community to which the parties belong, the courts are free to consider such customs so long as they do not cause injustice to any of the parties to the case. This is why, the custom of giving dowry to the wife has never been interfered with by the courts (see: *Bi Hawa Mohamed v. Ally Sefu* [1983] TLR 32). The rule in *Maagwi Kimito v. Gibeno Werema* [1985] TLR 132, which is to the effect that customary law and statutory law are of equal status, in this context; this is no longer good law. The Court of Appeal of Tanzania in *Maryam Mbaraka v. Abood* (supra), made it clear that in areas where the LMA applies, customary law does not apply.

On the needs of the children of the marriage being considered in the division of matrimonial property, this is an aspect, which is no longer a factor for consideration. The principle enunciated by the High Court in the case of *Anna Kanungha v. Andrea Kanungha* [1996] TLR 195 is no longer good law. This principle is superseded by the decision in *Isidori S. Balaga v. Chezalina Balaga*, Civil Appeal No. 41/1995, CAT at DSM (unreported), where it was held (p.6 of the word-processed judgment) that in deciding the question of distribution of matrimonial assets between spouses, children's interests is a subsidiary consideration as the matter only concerns spouses. The section does not cover division of matrimonial property involving polygamous marriages and concubines.

Chapter Twelve of this part highlights well the basic matrimonial offences found in statute books in Tanzania (pp. 429-437). However, one observation deserves mentioning, what is provided for under item 12.2.4 (p. 430): Marrying a Person who is of minimum Age. According to the Sexual Offences (Special Provisions) Act, 1998, marrying a child below 18 years is a commission of a statutory rape punishable by imprisonment for life.

Finally, it should be noted that the author has tremendously updated his book. It is hoped that in his third edition, he will manage to fill up the remaining gaps and do better.