ISSN No: 0856-9878

THE LAW REFORMER JOURNAL

Volume 6, November 2025

Published by the Law Reform Commission of Tanzania

ISSN No: 0856-9878

THE LAW REFORMER JOURNAL

Volume 6 November 2025

Published by the Law Reform Commission of Tanzania

Law Reform Commission of Tanzania

University of Dodoma

Mkalama Road

Academic Building No. 1

P.O Box 1718,

Dodoma

Telephone: +255 734356685-6

Email: lrct@lrct.go.tz

Website: www.lrct.go.tz

The Law Reformer Journal should be cited as LRJ, Vol. 6, 2025

Review Process of the Law Reformer Journal

1. After submission of a manuscript, the Editor in Chief reads it and forms the first opinion on whether the manuscript is worth going through the publication process. The Editor may suggest corrections as he or she deems appropriate and return the manuscript to the author for necessary corrections. The author will resubmit the article after such corrections.

2. The Editor in Chief will then send the manuscript to the blind reviewer for evaluation and advise the Editorial Board on the following aspects:

   a. Originality of the work

   b. Contribution to knowledge and legal reforms

   c. Adherence to the prescribed format

   d. If the article should:

      - be published as it is,
      - be published after incorporating changes pointed out by the reviewer, or
      - not published at all.

3. Where appropriate, the author will resubmit the article to the Chief Editor after implementing the changes or improvements recommended by the reviewer.

4. The review team is composed of members of the academia, senior government officials and private practitioners who have expertise in various legal areas. A manuscript is sent to the reviewer based on expertise.

Instructions to Authors

The Chief Editor of the Law Reformer Journal welcomes submissions of manuscripts to be considered for publication in the journal.

Submitted manuscripts must strictly comply with the Guidelines for Authors available at https://www.lrct.go.tz/publications/law-reformer-journal

All manuscripts to be considered for publication should be addressed to:

The Editor in Chief,

The Law Reformer Journal,

P. Box 1718,

Dodoma.

Email: lawreformerjournal@lrct.go.tz

The Law Reformer Journal is available for free.

TABLE OF CONTENTS

FOREWORD

Greetings and welcome to the Law Reformer Journal, Volume 6. The primary objective of the Journal is to establish a platform for legal researchers to engage in intellectual discussion of significant issues necessitating legal reforms in accordance with current circumstances. It is with great honor that the journal will be published annually.

In this sixth volume, the Journal encompasses four themes: Analysis of Data Protection Laws for Suspects of Crime in Tanzania; An Appeal for Reform of Tanzania's Legal Framework on the Chain of Custody; Division of Matrimonial Real Property in Polygamous Marriages: A Kenya–Tanzania Comparative Study; and Case Commentary: Ouster of Court's Jurisdiction in Cooperative Societies' Disputes: Arusha Soko Kuu SACCOS Ltd et al vs. Wilbard Urio et al.

I would like to express my sincere gratitude and appreciation to the authors, blind peer reviewers, the Chief Editor, the Editorial Board, and the Secretariat for their hard work and dedication in ensuring the issuance of this journal.

George Nathaniel Mandepo

Executive Secretary

Law Reform Commission of Tanzania

EDITOR'S NOTE

Dear Readers,

It is with great pleasure that I present yet another Volume of the Law Reformer Journal, a publication devoted to exploring a wide range of legal discourses. The contributors to this Volume have once again explored a variety of topics, with very insightful information.

I extend my sincere appreciation to the authors for sharing their insights, knowledge, and expertise. I also express my gratitude to our peer reviewers, whose diligent perusal ensures the standards of quality of the articles published.

Dear readers, please engage with the articles in this Volume with a critical eye and where necessary, provide your views on them. These will help us in the process of reforming laws. Please also feel free to submit manuscripts for publication in the next Volumes of the Journal.

Prof. Hamudi I. Majamba

Editor in Chief

Analysis of Data Protection Laws for Suspects of Crime in Tanzania

Paul Joseph[1*]

ABSTRACT

This article critically analyses Tanzania's legal and institutional framework for protecting the sensitive personal data of crime suspects. It brings to the fore the tension between public interest and individual privacy rights in this area. Indeed, the Constitution of the United Republic of Tanzania and the Personal Data Protection Act recognise the right to privacy. However, serious gaps remain, particularly in law enforcement surveillance practices. The laws emphasise requirements of public interest such as national security, crime prevention, and public order over individual rights. These broad exceptions provide room for state actors to access, process, and share personal sensitive data with minimal oversight, thus, heightening the risk of misuse and unlawful surveillance. Key weaknesses include vague definitions of "public interest and sensitive data," absence of judicial oversight, and limited enforcement capacity. These shortcomings compromise privacy protections, particularly for vulnerable groups such as crime suspects who may face stigma or abuse. The article advocates for an urgent review of the Personal Data Protection Act to appropriately balance security needs with fundamental rights. It recommends clearer legal definitions, stronger safeguards, and robust accountability mechanisms to ensure that surveillance efforts genuinely serve the public interest without undermining individual privacy.

Keywords: Crime, Privacy Rights, Confidentiality, Personal Data Protection, Tanzania

*Assistant Lecturer, St. Augustine University of Tanzania (SAUT), (Main Campus) at Mwanza, Email. Josephnsangano17@gmail.com.

1.0 Introduction

The growing reliance on surveillance by law enforcement agencies in Tanzania has brought to the forefront a critical tension between public interest and individual rights.[2] Under the justification of maintaining national security, combating crime, and preserving public order, authorities frequently compel public and private institutions to disclose sensitive personal data of individuals suspected of criminal activity. Such institutions include the Tanzania Communications Regulatory Authority (TCRA), the National Identification Authority (NIDA), CRDB, NBC, and NMB. Others are telecom providers, such as Tigo, Vodacom, and Halotel. While such practices are often defended as necessary for the protection of the public and the effective administration of justice, they raise fundamental concerns about the erosion of individuals' right to privacy.[3]

At the core of this issue lies the delicate balance between the state's duty to protect the public and an individual's right to personal privacy and dignity. The unchecked collection, access, and use of sensitive personal data are frequently carried out without adequate procedural safeguards or independent oversight. This poses serious risks to transparency, accountability, and the moral rights of individuals, particularly crime suspects who are presumed innocent under the law. In many instances, surveillance practices are carried out in a legal grey area, exploiting vague statutory provisions that favour the abuse of broad state powers over personal liberties.

This article critically examines the legal recognition and protection of sensitive personal data of crime suspects within Tanzania's legal framework, with a particular focus on surveillance as a law enforcement

2 Privacy International, "A Guide for Policy Engagement on Data Protection*: Keys to Data Protection," 62 Britton Street, London. EC1M5UY, United Kingdom, 2018, pp 1-98, at pp. 9-10.*

3 Privacy International, "*Tanzania Human Rights Defenders Coalition, Collaboration on International ICT Policy in East and Southern Africa (CIPESA) Stakeholder Report Universal Periodic Review:* The Right to Privacy in the United Republic of Tanzania," 2015, pp. 3- 7, at p 4.

tool. It evaluates whether current laws, including the Personal Data Protection Act and related regulations, strike an appropriate balance between advancing the public interest and upholding individual rights. Furthermore, the article identifies key gaps and challenges in enforcement, examines the role of oversight institutions, and questions the adequacy of existing judicial and legal mechanisms to ensure accountability. By framing the discourse around public interest versus individual interest, the article contributes to policy and legal reforms that foster both national security and the protection of fundamental human rights in the digital age.

2.0 Description of Terms

2.1 Personal Data Protection

Personal data protection plays a vital role in safeguarding individuals' privacy by preventing unauthorised access, disclosure, or misuse of their information. It helps protect personal space, reputation, and integrity from potential harm or embarrassment, while also securing private communications and ensuring the confidentiality of sensitive data.[4] In jurisdictions like the United States, the concept has evolved to include constitutional dimensions, with the Supreme Court affirming protections against unlawful searches and recognising the right to associate freely without government interference.[5]

2.2 Privacy Rights

Privacy rights can be examined from various perspectives, including ethical, legal, philosophical, and practical angles, each contributing to a broader understanding of their significance in society.[6] Legally, they are protected through frameworks that enable individuals to exercise control over their personal information, while philosophical and ethical views regard them as essential to individual autonomy and dignity.[7]

[4] Quinn, P *et al* (2021), The Difficulty of Defining Sensitive Data—The Concept of Sensitive Data in the EU Data Protection Framework, *German Law Journal* (2021), 22, pp. 1583–1612 doi:10.1017/glj.2021.79 pp. 1-79 at pp. 22-24.
[5] Carey, P., "*Data Protection: A practical Guide to UK and EU Law," 2022, at* p 327.
[6] Emmanuel, K., "*Groundwork of the Metaphysics of Morals," 1785, at* p 57.
[7] *Oxford Law Dictionary, 5th Edn, 2001, at* p 435.

Practically, privacy rights reflect societal norms around confidentiality and acceptable boundaries.[8] Over time, these rights have come to be recognised as fundamental, and their violation often entitles individuals to legal redress. This recognition has contributed to the development of human rights frameworks, which establish universal standards for protecting individual dignity and regulating the relationship between citizens and the state, particularly in areas such as education, privacy, and property.[9]

2.3 Confidentiality

Confidentiality, while varying across contexts, fundamentally involves managing personal information and setting boundaries to protect individuals from societal intrusion. It upholds core values such as trust, security, freedom, and autonomy, enabling people to make decisions without external interference. Often intertwined with privacy, confidentiality also encompasses the right to solitude and personal space.[10] Neethling's theory views privacy as protection from unwarranted publicity, a notion supported by courts in various jurisdictions. As a fundamental human right, confidentiality empowers individuals to control the disclosure of their personal information, safeguarding their bodies, homes, and identities. This right is especially critical in law enforcement, where officials are obligated to protect sensitive data and prevent unauthorised disclosure. It is critical to ensure confidentiality in protecting suspects of crimes from unlawful surveillance and intrusion to maintain their constitutional rights.

8 Mary, A., "*A World Made New: The Universal Declaration of Human Rights,*" 2001, at p 28.

9 David, B., "*Global Trades in Privacy Protection*: An International Survey of Privacy, Data Protection and Surveillance Laws and Developments, 18 J. Marshall J. Computer and Information Law," 1999, at p 6.

10 Grumbling, E., "*Privacy Research and Best Practices: Summary of a Workshop for the Intelligence Community*, National Academies of Sciences, Engineering, and Medicine," 2016, at p 2.

3.0 The Legal Framework

3.1 International Level

International legal instruments have played a significant role in shaping data privacy standards and ensuring the protection of sensitive personal data. These instruments reflect the ongoing challenge of balancing the individual's right to privacy with the public interest, particularly in the context of national security, public safety, and law enforcement. This analysis examines key international laws, such as the *Universal Declaration of Human Rights (UDHR)*[11], *International Covenant on Civil and Political Rights (ICCPR)*[12], *Convention 108+*[13], and the *EU General Data Protection Regulation (GDPR)*[14] with a focus on how each addresses this crucial balance.

3.2.1 The Universal Declaration of Human Rights, 1948

The UDHR provides a foundational global framework for human rights, including the right to privacy as articulated in Article 12.[15] This article prohibits arbitrary interference with a person's privacy, family, home, or correspondence, and protects individuals against attacks on honour and reputation. While it champions the individual's interest in personal privacy, the UDHR also implicitly recognises that certain intrusions may be justifiable in the public interest, particularly where issues of national security or public order are concerned. The challenge lies in ensuring that such intrusions are lawful, necessary, and proportionate.[16]

In practice, particularly in countries like Tanzania, Article 12 serves as a safeguard against unlawful state surveillance, especially in criminal investigations.[17] It protects crime suspects' personal data, emphasising due process and respect for human dignity. However, the UDHR allows states some discretion in balancing surveillance powers for public safety with respect to individual freedoms.

---

11 The Universal Declaration of Human Rights of 1948.
12 The International Covenant on Civil and Political Rights of 1976.
13 The Convention, (ETS No. 108), of 1950.
14 The EU General Data Protection Regulation (GDPR) of 2018.
15 The Universal Declaration of Human Rights of 1948.
16 Ibid.
17 Ibid.

3.2.2 The International Covenant on Civil and Political Rights, 1966

The ICCPR builds on the UDHR and provides stronger legal mechanisms for enforcement. Article 17 guarantees protection from arbitrary or unlawful interference with privacy, family, home, or correspondence, and from unlawful attacks on honour and reputation.[18] The individual's interest in privacy is clearly outlined, but the ICCPR also acknowledges that public interest, such as preventing crime or ensuring national security, may necessitate some degree of lawful data access or surveillance. To strike a balance, the Covenant demands that any interference must meet the standards of legality, necessity, and proportionality.[19]

Although Tanzania is not a signatory to the ICCPR, it remains an important benchmark for evaluating privacy protections. It influences international norms that inform national policies even in non-ratifying countries regarding surveillance, data retention, and access to sensitive personal data.

3.2.3 Convention (ETS No. 108/108+)

Convention 108, amended in 2018 to become Convention 108+, is the only legally binding international treaty dedicated specifically to data protection. It provides a comprehensive framework for balancing the individual's right to data privacy with the public interest in data access, particularly for security, economic, and administrative purposes. Key principles such as lawfulness, fairness, purpose limitation, accuracy, and data minimisation are established to protect individuals.[20] At the same time, the Convention recognises that public authorities may have a legitimate need to process personal data in the interest of national security, law enforcement, and public health.[21] However, such processing must follow clear legal procedures and safeguards to avoid abuse.[22]

18 International Covenant on Civil and Political Rights, 1996.
19 Ibid.
20 Chapter II of the Convention (ETS) No. 108.
21 Preamble of the Convention (ETS No. 108/108+).
22 Ibid.

For countries like Tanzania, which have not ratified the Convention, it still serves as a model legal framework for data governance. It encourages the development of national laws that protect individual rights while allowing room for public interest considerations under strict legal oversight.

3.2.4 The EU General Data Protection Regulations (GDPR), 2018

The GDPR represents one of the most advanced and stringent legal frameworks for data protection and privacy. It emphasises the individual's control over their personal data while also providing flexibility to serve public interest objectives such as public health, national security, and the prevention of crime. [23]Articles 5 to 10 establish guiding principles like lawfulness, transparency, purpose limitation, and data minimisation, which form the basis for data processing. Articles 12 to 32 elaborate on the rights of individuals, such as the right to be informed, the right to erasure, and rights related to automated decision-making.[24] However, the GDPR also permits public interest exemptions, for example, Article 23, which allows restrictions on data subject rights where necessary for national security, public order, and law enforcement, provided these restrictions are proportionate and legally justified.

The GDPR's enforcement mechanisms ensure that public interest considerations do not override individual rights without accountability. Supervisory authorities in member states oversee the application of these rules, ensuring balance through audits, investigations, and penalties for misuse.[25] Although not directly applicable in Tanzania, the GDPR has influenced data protection laws globally, encouraging countries to develop frameworks that respect individual privacy while addressing public policy objectives.

[23] Preamble to EU General Data Protection Regulations, 2018.
[24] Ibid.
[25] Preamble to EU General Data Protection Regulations, 2018.

3.3 National Level

3.3.1 Constitution of the United Republic of Tanzania

As the supreme law, the Constitution recognises the right to privacy under Article 16(1), asserting that every person is entitled to respect and protection of their person, private life, and communications.[26] Article 18(c) extends this protection to freedom from interference in personal communications, laying the foundation for individual interest in personal data protection.[27] However, the Constitution also acknowledges the public interest in maintaining order and justice. Law enforcement authorities may lawfully interfere with individual privacy if it serves the interests of national security, public order, or crime prevention. The challenge lies in ensuring that such interference is proportionate and justified, without being arbitrary or abusive.[28]

3.3.2 The Personal Data Protection Act

This Act marks a significant milestone in codifying the protection of personal data in Tanzania. It affirms individual interests by establishing rights, such as informed consent, data access, and control over sensitive personal data, including data related to crime suspects.[29] The creation of the Personal Data Protection Commission underscores the commitment to enforce these rights. However, Section 33(2)(b) raises significant concerns: it allows law enforcement surveillance without consent or court authorisation, justified by public interest in preventing crime.[30] This provision clearly tilts the balance of power towards state power, potentially undermining individual rights if not subjected to rigorous oversight.

3.3.4 The Personal Data Protection Regulations (2023)

These regulations operationalise the 2022 Act by providing detailed procedures and principles such as data minimisation, purpose limitation, consent, security, and transparency, all strengthening individual interest

[26] Cap. 2.
[27] Ibid.
[28] Ibid.
[29] Cap. 44.
[30] Cap. 44.

in privacy. Yet, even within these safeguards, exceptions for public interest (e.g., national security, law enforcement) exist, allowing data processing without consent under certain conditions.[31] The tension arises when these exceptions are broadly defined or poorly regulated, opening the door for privacy violations under the guise of public protection.[32]

3.3.5 The Criminal Procedure Act

This Act outlines procedures for investigations, including search and seizure powers for law enforcement.[33] While Section 10 emphasises confidentiality and privacy, the same law permits invasive methods such as surveillance and data seizure. Here, the public interest in prosecuting crime directly conflicts with the individual interest in data privacy especially when suspects' data is accessed without their knowledge.[34] The law lacks clear safeguards to prevent excessive or arbitrary data collection, raising serious privacy concerns.

3.3.6 The Cybercrimes Act

This Act allows the state to conduct cyber surveillance and data retrieval in criminal investigations, addressing the public interest in cybersecurity.[35] Section 21 permits law enforcement to access sensitive data of suspects, but it also mandates confidentiality. Nonetheless, the lack of independent oversight and limited accountability mechanisms weakens protections for individual privacy.[36] Without checks on surveillance powers, the law disproportionately favours state interest over individual protections, especially for suspects.

3.3.8 The Tanzania Communication Regulatory Authority Act

This Act regulates telecommunications and electronic services and requires service providers to protect user data. Section 24 of the TCRA Act prohibits unauthorised disclosure of customer information,

31 Regulation 31, GN. No. 350 of 2023.
32 Ibid.
33 Section 2, Cap. 20.
34 Section 5 & 22, Cap. 20.
35 Cap. 443.
36 Cap. 443.

thus upholding individual privacy. However, section 17 permits the government access data under written requests or warrants, justifying it under public interest.[37] Again, while such access is legitimate in law enforcement, the lack of clear procedural transparency and oversight risks infringing on individuals' rights.

3.3.10 The EPOCA (Data Protection) Regulations, 2020

These regulations bolster individual privacy through principles like transparency, data minimisation, informed consent, and time-bound retention.[38] They attempt to build a framework resembling international best practices, aligning individual and public interests.[39] Nevertheless, the application and enforcement of these principles remain weak, especially in criminal matters. The state's ability to override consent requirements during investigations leaves the individual vulnerable to overreach.

3.3.12 The Tanzania Intelligence and Security Service Act

This security-focused law gives the Tanzania Intelligence and Security Service (TISS) broad powers to collect sensitive data for national security. While confidentiality is emphasised, the Act allows surveillance without judicial approval under certain conditions.[40] Such powers, although justifiable under public interest, lack sufficient checks to protect individual rights, especially those of crime suspects.[41] The absence of transparency or independent oversight raises concerns about potential abuse of surveillance powers.

3.4 Government Policies

3.4.1 National ICT Policy, 2003

The National ICT Policy paved the way for the enactment of *the Personal Data Protection Act of 2022,* which provides a comprehensive

[37] Ibid.
[38] GN No. 538 of 2020
[39] Regulation 11, GN No. 538 of 2020.
[40] Section 10, Cap. 406.
[41] Ibid.

framework for the protection of personal data. This Act establishes the rights of individuals with respect to their personal data and imposes obligations on organisations, entities and individuals handling such data.[42]This policy was meant to provide guidance on how institutions or government departments collect, process, store and protect personal data. It seeks to ensure compliance with data protection laws as it safeguards individuals' privacy rights and mitigates risks associated with data breaches or unauthorised access. A data protection policy establishes clear guidelines and procedures for managing personal data, respectively ensuring transparency and accountability.

The policy embodies data protection principles in digital spaces, and the processing of personal data in alignment with international standards. Data protection police include provisions on lawful data collection, explicit user consent, data minimisation, retention limits and security measures to prevent breaches. It also deals with the data protection rights of a data subject, such as accessing and correcting their data and lays out roles and responsibilities for data controllers and processors.[43]

3.4.2 The National Data Protection Policy (2019)

The National Data Protection Policy is the cornerstone of Tanzania's data protection legal framework.[44] It lays out a comprehensive policy framework for the collection, processing, storage and sharing of personal data. The primary objective of the policy is to ensure the protection of individuals' personal information in a way that promotes privacy while enabling the effective use of data in line with national interests.[45] It includes key provisions such as the establishment of the principle of consent for data processing and provides individuals with the right to access, correct, and delete their personal data. It also makes provision for data security in emphasising the need for organisations to implement strong data security measures to prevent unauthorised access, loss or misuse of data.

---

42 The National ICT Policy, 2003.
43 Ibid.
44 The National Data Protection Policy, 2019.
45 Ibid.

It also provides for cross-border data transfer conditions as guidelines for the transfer of personal data across borders by ensuring that data protection laws in other jurisdictions meet or exceed Tanzanian standards. It further provides for data protection authority (the Personal Data Protection Authority) (TDPA) as an independent body to oversee the implementation of data protection laws, monitor compliance and handle complaints.

3.5 Institutional Framework

3.5.1 Personal Data Protection Commission

The Personal Data Protection Commission was established under Section 6 of the Personal Data Protection Act. The Commission seeks to regulate and monitor sensitive personal data by ensuring compliance by data controllers and processors.[46] The Act mandates the registration of these entities and empowers the Commission to receive, investigate and resolve complaints regarding violations of sensitive personal data and privacy.[47] It also conducts inquiries and takes action against any breaches that may harm an individual's reputation.

Additionally, the Commission is responsible for educating the public about data protection and privacy by conducting research on technological advancements in data processing and establishing cooperative strategies with international data protection authorities. It advises the government on effective data protection implementation and performs various functions to achieve its objectives. As an independent body with corporate status, the Commission can initiate legal action or be sued for violations of data privacy principles established by the Act.[48]

The Data Protection Board has been established under Section 8 of the Act. Its Chairperson is appointed by the President.[49] Others members are a vice-chairperson and five members appointed by the relevant

[46] Section 6, Cap. 44.
[47] Cap. 44.
[48] Ibid.
[49] Ibid.

minister with the Director-General of the Commission serving as the secretary. Its responsibilities include overseeing the Commission's functions, providing strategic guidance, formulating policies and maintaining operational standards.[50]

The establishment of the Board enhances oversight of the Commission's daily activities in protecting privacy and sensitive personal data including information related to crime suspects in Tanzania.[51] This article focuses on the legal recognition of sensitive personal data related to crime suspects, the effectiveness of the legal framework governing this data and the challenges to its protection. It operates under the assumption that the current legal regime is insufficient in safeguarding the sensitive personal data of crime suspects.

3.5.2 Judiciary

The judiciary is one of the three branches of the state established by the Constitution of the United Republic of Tanzania, (Constitution) Article 107A, which outlines its authority to dispense justice.[52] The *Constitution* emphasises several key principles in the administration of justice. Firstly, justice must be administered impartially and without discrimination. Secondly, it should be provided within a specified or reasonable timeframe. Thirdly, reasonable compensation must be awarded where appropriate. Fourthly, the judiciary has a duty to promote and enhance dispute resolution and finally, court proceedings should not be hindered by unnecessary technicalities.[53]

The fundamental role of the judiciary is to interpret laws enacted by Parliament and ensure justice is served. It has the power to create legal precedents (case law) that lower courts can reference, including those involving violations of privacy rights.[54] Through its interpretations, the judiciary plays a crucial role in promoting and protecting human rights related to privacy in Tanzania.

---

50 Section 8, Cap. 44.
51 Ibid.
52 Cap. 2.
53 Ibid.
54 Ibid.

3.5.3 The Police Force

The police force (police) in Tanzania is established by Article 147 of the Constitution which mandates its role in defending the territory and ensuring the security of the people.[55] The Constitution recognises the police as an essential institution providing a constitutional basis for its operations. It empowers Parliament to enact laws that govern the structure, responsibilities and duties of the police force by ensuring they maintain peace and security for the state and its citizens. Further, Section 8 of the *Police Auxiliary Service Act* specifically prohibits unlawful surveillance by police officers on the premises of crime suspects during investigations.[56]

This Act emphasises the importance of confidentiality concerning sensitive personal data related to investigations and mandates that such information be safeguarded to protect the privacy of crime suspects.[57] Additionally, the law outlines guidelines for police surveillance during searches. It provides that any devices or evidence gathered must be relevant to the crime under investigation.[58] It underscores the need to protect all information obtained from crime suspects throughout the investigative process. This article operates under the assumption that the current legal framework governing sensitive personal data related to crime suspects is ineffective in ensuring adequate protection. It aims to address these concerns and propose solutions to improve privacy safeguards in Tanzania.

4.0 Consent

The Personal Data Protection Act, 2022, was enacted to regulate personal data, including sensitive data related to crime suspects, as outlined in Section 3(a). However, the Act contains significant gaps that allow the surveillance and collection of such data without sufficient safeguards to protect privacy. While Section 30 emphasises the need for a suspect's consent before data processing, Section 33(2)

[55] Cap. 2.
[56] Section 8, Cap. 322.
[57] Cap. 322.
[58] Ibid.

(b) permits law enforcement to collect sensitive personal data during investigations without that consent. Furthermore, Section 23(3)(e) provides that data collection serve a lawful purpose, but the Act fails to define what qualifies as a "lawful purpose," creating ambiguity. This lack of clarity opens the door to potential abuse by law enforcement in handling the sensitive personal data of crime suspects.[59]

In conclusion, the Personal Data Protection Act, 2022, despite its foundational intent to protect personal data, fails to adequately balance the competing interests of public security and individual privacy. To restore this balance, the Act requires an amendment to introduce clearer definitions of key terms such as "lawful purpose," establish strict conditions under which consent can be bypassed, and implement robust oversight mechanisms. Only through such reforms can Tanzania ensure that public interest objectives do not lead to unjustified expense of individual rights, particularly in the handling of sensitive personal data of crime suspects.[60]

5.0 Legal Gap under the Personal Data Protection Act

The Personal Data Protection Act, 2022 (the Act) was enacted to regulate personal data, including sensitive personal data related to crime suspects under section 3(a) of the Act.[61] Despite this, there is a gap in the law that permits surveillance of sensitive personal data related to crime suspects without adequate safeguards to protect data privacy. Section 33(2) (b) of the Act permits surveillance of a crime suspect in investigating and the collection of sensitive personal data. Additionally, section 23(3) (e) provides that, subject to data collection the process must be in compliance with the lawful purpose, yet the Act does not provide for the criteria on what constitutes to a lawful purpose when exercising surveillance. This leads to unclear and uncertainty of the provision creating a loophole that can be used to abusive data privacy by the law enforcers when collecting sensitive personal data of suspects of crimes.[62]

[59] Cap. 44.
[60] ibid.
[61] Ibid.
[62] Ibid.

Furthermore, the Act lacks clarity on the term "public interest," which law enforcement officers may cite when accessing sensitive personal data related to crime suspects under the guise of national security. The absence of a clear definition for "public interest" and criteria raises questions about its parameters and how it can be verified to be exercised for public purposes. This could lead to the violations of data privacy of a crime suspect as provided for under Article 16(1) of the Constitution.[63]

6.0 The Impact

Tanzania's legal framework lacks clear definitions and guidelines for the term "public and individual interest," which law enforcement often invokes to justify accessing sensitive personal data of crime suspects under the pretext of national security. This ambiguity creates uncertainty regarding the scope and verification of "public interest," increasing the risk of violations of the privacy rights guaranteed under Article 16(1) of the Constitution. Thus, the current legal regime provides insufficient safeguards to protect sensitive personal data during investigations conducted by authorities.

7.0 Exceptions

Tanzania's legal framework includes several laws and institutions that govern the protection of sensitive personal data related to crime suspects. Under section 33(2) of the Personal Data Protection Act, there are specific exceptions that allow data controllers to collect personal data without notifying or obtaining consent from the data subject. These exceptions apply in situations where the personal data is inaccurate, when the data is involved in ongoing investigations, or when a court has prohibited notification. Despite these exceptions, if the personal data is collected for a public purpose, the law requires that the data subject be notified in accordance with section 23(2) of the Act. This provision reinforces the constitutional right to privacy under Article 16 of the Constitution, ensuring that even when exceptions apply, data collection must still respect fundamental privacy protections.

[63] Cap. 2.

8.0 Legal Challenges Hindering Effective Protection

8.1 Judicial Oversight in Surveillance

The article notes that the Data Protection Act is unclear about who authorises surveillance conducted by law enforcement against crime suspects. While section 23(2) requires informing the data subject before data collection, section 33(2)(b) permits surveillance without notification when sensitive personal data is involved in an investigation. This contradiction creates confusion over whether authorisation lies with the judiciary, law enforcement, or the data subject's consent, undermining the Act's legal clarity.[64]

In *Freeman Mbowe and Others v. The United Republic of Tanzania*[65], the legality of surveillance was challenged on privacy grounds. The court examined whether due process was followed, balancing the prosecution's need for evidence against protecting individual rights. Although a demand note was sent to Tigo Communication Company for a warrant, no judicial warrant was issued, leading to dismissal of the charges. This article concludes that the lack of clear authorisation rules and conditions for surveillance weakens the protection of sensitive personal data and compromises privacy rights.

8.2. Limitation Clauses

The Constitution, as the supreme law, includes limitation clauses within the Bill of Rights that restrict certain freedoms, including the right to privacy. These "claw-back clauses" phrases like "in accordance with the laws," "by virtue of the law," and "for public purposes and national security" indicate that privacy rights are not absolute and can be overridden under certain conditions. This article concludes that such claw-back clauses significantly weaken the effective protection of sensitive personal data related to crime suspects.

[64] Cap. 44.

[65] *Freeman Mbowe & Others v Republic* [2021] TZCA 16 (unreported) Court of Appeal of Tanzania at Dar es Salaam.

8.3 Definition of Public Interest

Article 30(2) of the Constitution states that any law limiting fundamental rights must be lawful, non-arbitrary, and necessary to achieve a legitimate purpose. While this provision restricts privacy rights to allow surveillance for public security, it often comes at the expense of crime suspects' privacy. However, the law does not clearly define "public interest," creating uncertainty about its scope, especially in regulating law enforcement surveillance. This ambiguity weakens the protection of individuals' privacy rights.

A major challenge arises from law enforcement conducting surveillance under the claim of national security, frequently violating the privacy of crime suspects. The vague definition of "public interest" in existing laws often leads to unlawful surveillance, justified by political motives, which undermines privacy protections. Additionally, many people lack awareness of their rights, viewing law enforcement's handling of privacy as discretionary during investigations of crime suspects.

8.4 Literacy on Data Privacy

The article notes further that many Tanzanian citizens lack awareness and understanding of their right to privacy, especially regarding the protection of sensitive personal data related to crime suspects. Although some sources affirm it as a fundamental right protected by the Constitution, inadequate implementation has left many unaware of its significance in safeguarding sensitive data. This lack of public awareness is a major barrier to effectively protecting such data. The article concludes that limited education on privacy rights contributes to vulnerabilities, increasing the risk of abuse by law enforcement officers in Tanzania.

9.0 Legal Challenges

9.1 Judicial Authorisation and Oversight

This article notes that the Data Protection Act does not clearly specify who is authorised to approve surveillance conducted by law enforcement against crime suspects. While section 23(2) requires that data subjects be informed before data collection, section 33(2)(b) permits surveillance without notification when sensitive personal data is involved in an investigation. This contradiction creates uncertainty about whether authorisation lies with the judiciary, law enforcement, or requires the data subject's consent. Such ambiguity undermines the legal clarity of the Act.[66] The article concludes that this lack of clear authorisation and defined conditions for surveillance significantly weakens the protection of sensitive personal data and compromises privacy rights.

9.2 Limitation Clauses

The Data Protection Act contains limitation, or "claw back," clauses that restrict individuals' lawful rights and freedoms regarding data collection, potentially leading to violations of data privacy. Terms like "in accordance with the laws," "by virtue of the law," and "for public purposes and national security" limit the right to data privacy, showing that these rights are not absolute. Mbunda critiques Articles 30(2) and 31 for overshadowing all legislation and granting excessive power to state authorities under the guise of public interest.[67] This has contributed to the view that privacy is a secondary right. Consequently, this article concludes that these claw-back clauses significantly weaken the protection of sensitive personal data related to crime suspects.

9.3 Definition of Public Interest

The Data Protection Act states that when data is collected for investigation purposes, consent from the data subject is not required under section 33(2)(b). However, any law that limits fundamental rights must be lawful, non-arbitrary, and necessary to achieve a legitimate goal that aligns with public expectations. While this provision restricts privacy rights and grants surveillance powers under the banner of public security, it often comes at the expense of crime suspects' privacy. The Act does not clearly define "public interest," creating uncertainty about its scope, especially regarding law enforcement surveillance.[68] This vagueness weakens the protection of individuals' privacy rights.

[66] Cap. 44.
[67] Cap. 2.
[68] Cap. 44.

A major challenge to data privacy is law enforcement's use of national security as a pretext for surveillance, which frequently violates crime suspects' privacy. The unclear definition of "public interest" in existing laws enables unlawful surveillance, often justified by political motives, further undermining privacy protections. Additionally, many people lack understanding of their rights related to public interest and data privacy, viewing law enforcement's respect for privacy as optional during surveillance of crime suspects.

10.0 Recommendations

The following are recommendations to address the identified challenges.

(i) The Legislature

The laws governing sensitive personal data in Tanzania currently lack sufficient legal recognition and effective regulation of crime suspects' privacy, providing inadequate protection. Therefore, amendments are necessary to ensure these laws offer comprehensive legal coverage that recognises and effectively safeguards sensitive personal data related to crime suspects.

Specifically, the laws are silent on the definition of "public interest," creating ambiguity and legal uncertainty. To address this, amendments should include a clear interpretation of "public interest," outlining what precisely constitutes it, given its broad nature. Additionally, the laws should establish clear legal consequences for breaches of privacy rights by law enforcement during surveillance of crime suspects.

There is also a need to introduce provisions that regulate surveillance practices and provide remedies for crime suspects affected by unlawful surveillance. Clear remedies would help set limits on access to privacy rights during investigations, ensuring the effective legal protection of sensitive personal data and upholding constitutional rights to privacy and the presumption of innocence.

Furthermore, amendments to the Constitution of the United Republic of Tanzania, 1977, are necessary to address challenges posed by technological advancements. This includes removing or refining limitation (claw back) clauses such as "for public interest," "according to the law," and "for national security" which currently restrict access to privacy rights and are often misused by law enforcement to infringe on privacy due to their vague language.

Finally, the laws should explicitly require judicial authorisation for surveillance, clearly defining the limitations and oversight of law enforcement during investigations. This will help ensure the effective protection of crime suspects' privacy rights concerning sensitive personal data.

(ii) The Executive

There is a need to establish an independent Data Protection Commission in every region in the country to ensure easy access for individuals and institutions involved in data processing and handling. This Commission would oversee and supervise law enforcement authorities to guarantee the legal recognition and effective protection of sensitive personal data, including that related to crime suspects. The current ineffective protection largely stems from the absence of such regional Commissions to monitor compliance with the Personal Data Protection Act.

Additionally, public awareness campaigns should be intensified to educate both law enforcement officers and the general public about their privacy rights, especially concerning the protection of sensitive personal data related to crime suspects. The government must take an active role in promoting understanding of these rights, ensuring that privacy is respected during surveillance operations. Furthermore, laws granting powers for national security must clearly define limits to prevent unnecessary interference with the privacy rights of crime suspects.

(iii) Law Enforcement Officers

To improve the protection of sensitive personal data related to crime suspects, law enforcement officers need to shift their mindset away from assuming suspects are guilty before being proven so. They should conduct lawful surveillance and data collection in a way that respects the suspects' right to privacy and the principle of presumption of innocence. Instead of limiting privacy, officers must prioritise protecting it throughout their investigations.

Additionally, the concept of "public interest" as it applies to law enforcement needs clearer legal recognition and education. Currently, Tanzanian laws do not clearly define what constitutes public interest in relation to surveillance, creating ambiguity and legal uncertainty. To close this loophole and safeguard suspects' privacy, the term must be clearly interpreted and communicated so law enforcement understands its proper scope and does not misuse it to unjustifiably infringe on privacy rights.

11.0 Conclusion

Protecting sensitive personal data related to crime suspects is vital for safeguarding their privacy, as privacy and data protection are inherently linked. Effective management of this data ensures that privacy is respected, especially during law enforcement surveillance. Law enforcement authorities have a responsibility to uphold data privacy by strictly following established laws and codes of conduct that regulate the collection, processing, and handling of sensitive personal information. This commitment is key to strengthening the privacy rights of crime suspects in Tanzania.

An Appeal for Reform of Tanzania's Legal Framework on the Chain of Custody

Abdulrahman O.J. Kaniki*

Abstract

In criminal trials, the prosecution is required to adduce evidence to prove that the accused has committed the offence. Among the evidence tendered are exhibits. However, before exhibits are produced in court, the prosecution needs to establish that the exhibits were properly handled and managed from the time they were collected and preserved by investigators until they are tendered in court as evidence. Thus, the prosecution should prove that the chain of custody of the exhibits was maintained at all times. This article assesses the importance of the chain of custody of exhibits in proving criminal cases in Tanzania. The article is based on an analysis of secondary data and a review of the literature. The article notes that exhibits are often tampered with or mishandled in the course of preservation or collection. Thus, it leads to challenges in maintaining the chain of custody. Recommendations include a call for amending the Criminal Procedure Act to criminalise tampering with the chain of custody of exhibits; proper packaging, labelling and handling of exhibits should be enhanced. Also, there is a need to emphasise compliance with ethical values, enhancing law enforcement and effective supervision in the entire process relating to the chain of custody.

Keywords: Chain of custody, exhibits, investigation, legal framework.

1.0 Introduction

Under the adversarial system, in the course of a criminal trial, the prosecution needs to prove beyond reasonable doubt that an accused person has committed a crime. This is because the Constitution of the United Republic of Tanzania of 1977 (Constitution) provides that an accused person is presumed innocent until proved guilty.[1] Among the evidence tendered in court by the prosecution to prove the case against the accused person are exhibits. These form an integral and critical part of successful evidence to be adduced in court. This article assesses the role played by proper handling and management of the exhibits through maintaining the chain of custody during the investigation process until the time when the same are tendered in court in Tanzania.

2.0 Definitions

2.1 The Concept of an Exhibit

In the judiciary system of Tanzania, "exhibit" refers to a document, record or any other tangible object formally admitted in court as evidence.[2] It is any physical or digital object used in court as part of evidence. It includes personal property, firearms, documents, photographs or bodily parts or fluids such as blood, DNA samples, drugs, videos, e-mails, text messages, etc. that were collected or discovered at scenes of crimes. It also includes any item that comes into possession of the police or any other law enforcement agency that may be relevant in proving the commission of an offence by the accused person in the course of a criminal trial. The Tanzania Police Force (Force) through Police General Orders (PGOs) classifies exhibits to include proceeds of crime:

---

* LL. B (Hons), LL.M (Dar); Master Degree in Security and Strategic Studies (National Defence College-Tanzania); PhD (Law), Dar; Senior Lecturer and Dean, Faculty of Law, Catholic University of Mbeya, Tanzania. This author can be contacted at abdulkaniki@yahoo.com; abdulrahman.kaniki@cuom.ac.tz.

[1] Article 13 (6) (b), Cap. 2 [R.E. 2023].

[2] The Judiciary of Tanzania, Exhibits Management Guidelines, September 2020, p. 3.

any property obtained from criminal conduct the possession of which may be subject of criminal prosecution; objects which may connect a person with an offence or incident, such as articles bearing fingerprints, footprints particles of dust, blood stained clothing, hairs and fibres; instrumentality of crime which is an object assisting to commit crime, such as guns, knives, cartridges, etc.; documents which are relevant in the investigation of an offence.[3] The police are responsible for each exhibit from the time it comes into it's possession until it is admitted by the court in evidence, or returned to its owner, or otherwise disposed of according to instructions.[4]

2.2 The Chain of Custody

The chain of custody is the witnessed, unbroken and written chronological history of the person in possession of the evidence from the time of collection until it is presented as evidence in court.[5] It is a chronological paper trail that exhibits are collected, handled, analysed, or otherwise controlled from seizure to exhibition.[6] In principle, the chain of custody denotes the chronological documentation or paper trail showing the seizure, custody, control, transfer, analysis and disposition of physical or electronic evidence. Hence, the chain of custody clearly shows the trail of where the exhibits originated and under whose hands they passed through. From the above definitions, it is apparent that the chain of custody of the exhibit establishes that the exhibit is the same associated with the crime for which the accused person is charged and that the said exhibit has not been tampered with.[7] The chain of custody of the exhibit is obtained when the investigator labels, records,

[3] Police General Orders (PGOs) of the Tanzania Police Force, 3rd Edition, 2021, Government Notice No. 315/2021published on 26/3/2021, PGO No. 229(1) underscores the importance of proper handling of exhibits by providing that exhibits are vital evidence such that their preservations or loss will depend upon the manner in which they are handled and examined.
[4] The Police General Orders of the Tanzania Police Force are issued by the Inspector General of Police by virtue of the powers bestowed on him under section 7(2) of the Police Force and Auxiliary Services Act, Cap.322 (R.E. 2023].
[5] Order 2(a), PGO No. 229.
[6] Swanson, C.R. et al., Criminal Investigation, 8th Ed., 2003, p. 33.
[7] The Judiciary of Tanzania, op cit., 14.

packs and keeps in custody the exhibits. More so, such details as to the item, the place, date, time it was recovered, and by whom it was recovered, and anyone who is required to handle it are very important in describing the link in the chain.

All evidence collected at a crime scene, or received at or during a crime scene investigation, needs to be labelled and packaged before it is taken away from the scene in order to prevent loss or contamination. In order to maintain the security and value of the physical evidence or trace evidence, investigators should cover the items with suitable material. Short of that, they may be exposed to contamination, loss during transit or suffer mechanical damage due to jolting or crushing; leakage, explosion, ignition, etc. In order to avoid all these, investigators are duty-bound to adhere to all rules of collecting, packaging, labelling and transporting the evidence found at the scene of a crime or elsewhere.

Complete continuity in the chain of custody is essential to the admissibility of an item as evidence in judicial proceedings. It is a question of proper handling of exhibits that is emphasised here. All the procedures and requirements envisaged under the PGO No. 229 should be followed and adhered to.[8]

3.0 Legal Framework on the Chain of Custody of Exhibits

The chain of custody of exhibits is governed by several laws. As already noted above, objects which can later be referred to as exhibits in court can either be obtained at scenes of crime or after a search is conducted into any premises and items connected with the commission of a crime are seized. All these are part and parcel of the criminal investigation process, as provided for under section 10(1) of the Criminal Procedure Act[9] below:

---

[8] Among the aspects that are governed by PGO No. 229 is labelling of exhibits. Paragraph 8 of PGO 229, which requires labelling of the exhibit provides that: *"The investigating officer shall attach an exhibit label (PF 145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the extent which requires examination."*

[9] Cap. 20 (R.E.2023).

> "*Where, from the information received or in any other way, a police officer has reason to suspect the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in person to the place to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender where the offence is one for which he may arrest without warrant.*"

As regards obtaining electronic evidence, which is governed by several laws such as the Cybercrimes Act[10] and the Personal Data Protection Act[11], law enforcement officers do not require consent to access personal data during an investigation.[12]

3.1 Scene of Crime

It is within the mandates of the above-quoted provisions of the procedural law that police officers proceed to the crime scene to conduct an investigation. Among the activities undertaken by an investigator at the scenes of crime is to collect physical evidence or exhibits which can corroborate statements made by the victim and witnesses. The collection of physical evidence from a scene can assist an investigator recreate the crime scene and establish the sequence of events. Physical evidence can also corroborate statements made by the victim, suspects and witnesses.[13] It is, among other things, on these reasons that the Tanzania Police Force has established and maintains the Scenes of Crimes Section at the Commission of Forensic Bureau,

[10] Cap. 443 [R.E. 2023]. This is an Act to make provisions for criminalizing offences related to computer systems and Information Communication Technologies; to provide for investigation, collection, and use of electronic evidence and for matters related therewith.

[11] Cap. 44 [R.E. 2023]. The Act was passed on 1st November, 2022 as a recognition to the right to privacy and personal security as enshrined under Article 16 of the Constitution. In the same vein, the Act sets minimum requirements for the collection and processing of personal data in Tanzania.

[12] Section 31, Cybercrimes Act, Cap. 443 [R.E. 2023] and Section 33(2)(b), Personal Data Protection Act, Cap. 44 [R.E. 2023].

[13] Kaniki, A.O.J., An Examination of the Law and Practice Relating to Asset Recovery in Tanzania, PhD (Law) Thesis, University of Dar es Salaam, 2020, p.136.

which works very closely with the Criminal Investigation Department (CID) Headquarters and that trickles down to Regional and District Crime Offices, respectively.[14] The scene should therefore be secured, protected and isolated from other areas in order to systematically and logically retrieve the evidence. It has been observed that:

> *"Successful crimes scene processing depends upon the policeman's or investigator's skill in recognizing and collecting facts and items of value as evidence, and upon his ability to protect, preserve, and later, to present these in a logical manner. This requires making careful and detailed notes and sketches; written statements and transcribing verbal statements of witnesses, suspects and marking and preservation of collected physical objects of evidentiary nature."*[15]

The protection of the crime scene is the most important aspect of evidence collection and preservation. This is to keep the pertinent evidence secured, as no contamination is allowed until it can be recorded and collected. The successful prosecution of a case depends on the state of the physical evidence at the time it is collected. Thus, the initial responding police officers or other law enforcement officers at a crime scene are duty-bound to secure and preserve any evidence by preventing the entry of unauthorised persons and ensuring that no items at the scene of the crime are removed or tampered with before the arrival of an investigating officer.[16] The initial responding officers enter the scene cautiously to note any persons, vehicles, events, potential evidence or environmental conditions.[17] They should treat the scene as a crime scene and also establish perimeters by cordoning the area where crime occurred by using police tapes, ropes and other means required to isolate the scene.[18]

---

[14] PGO No.235 read together with PGO Nos. 229 on exhibits, 230 on fingerprints and 231 on identification by photographs.

[15] Philippine National Police, Criminal Investigation Manual (Revised) 2011, Directorate of Investigation and Detective Management, Quezon City, 2010, p.8. Source: *www.pnp.gov.ph/images/Manuals_and_guides,* accessed on 8th July, 2025.

[16] National Police Service, Roadmap to Transformation: Reforms Handbook, National Police Service, Nairobi, 2016, p.119.

[17] Ibid.

[18] Bruce, L.B. and John, J.H, Criminal Investigation, (3rd Ed.) McGraw-Hill, Inc., New York, 1998, pp. 20-21.

Recording or documenting the crime scene is one of the important stages in the proper processing of a scene of crime in order to keep memory for future use. Expectations are that all investigative aspects of evidence obtained at the crime scene are carefully explored. The record is for keeping evidence that would be available for presentation in court or for any investigative purpose whenever required.[19] This explains the need to maintain a chain of custody of exhibits.

3.2 Search and Seizure

Search and seizure are also aspects of investigation through which exhibits are collected.[20] The primary purpose of a search and seizure is to collect evidence that will assist law enforcement in the investigation. Searches of persons on arrest and places, and seizure of things obtained therefrom, form part of the physical evidence that the investigators strive to collect and gather. As such, this kind of evidence is very crucial in the criminal investigation. Such a thing or things, when found and seized, can thereafter be tendered as exhibit(s) if the case goes to court. All this is aimed at furnishing the court with physical evidence, which would help it find the accused guilty. Thus, search and seizure are fundamental aspects of criminal investigations, allowing law enforcement agencies to gather evidence and enforce the law. The two form an important part of crime investigation aimed at obtaining evidence. They are a fundamental aspect and a significant stage in the process of effective criminal investigation, allowing law enforcement agencies to gather evidence and enforce the law.

---

19 Kaniki, A.O.J., op cit., p.137.

20 When applied to criminal investigation, the term "search" refers to the examination, exploration, looking for or going through or about by a police officer or any other authorized person, to a person's body or premises with the view to ascertain the presence of a thing, which is alleged to have been stolen or obtained through unlawful means. Such a thing or things when found and seized can thereafter be tendered as exhibit(s) if the case goes to court. All this is aimed at furnishing the court with physical evidence, which would help it find the accused guilt.

It is critical that the laws that govern the search and seizure process should be followed to the letter. This is so because search and seizure encroach on a person's privacy and personal security and the right to own property as entrenched in the country's Constitution.[21]

Hence, search and seizure are the most powerful investigating tools in the course of detecting and solving crime. Search and seizure, are governed by section 38 of the Criminal Procedure Act. The Cybercrimes Act[22] also makes provision for searching for electronic evidence. It empowers a police officer in-charge of a police station or a law enforcement officer of a similar rank to enter into any premises and search or seize a device or computer system. Such a police officer does so upon being satisfied that there are reasonable grounds to suspect or believe that a computer system may either be used as evidence in proving an offence or is acquired by any person as a result of an offence.[23]

According to the Criminal Procedure Act[24] read together with the Cybercrimes Act, no search of premises should be conducted without the following being in place: one; search warrant, two; the presence of the owner of the premise, occupier or his near relative at the search premises, three; the presence of an independent witness who is required to sign to verify his presence and four; issuance of a receipt acknowledging seizure of property. The rationale behind the requirement of police officers conducting the search to be in possession of a search warrant lies in the protection of citizens' constitutional right to dignity and the privacy of a person.[25] Therefore, searches and seizures must be conducted where necessary with a view to achieving public objectives while officers comply with the law.

---

[21] See Articles 16 and 24 of the Constitution of the United Republic of Tanzania of 1977, Cap. 2 [R.E. 2023].
[22] Cap. 443 [R.E. 2023].
[23] Section 31, Ibid.
[24] Section 38, Cap. 20 [R.E.2023].
[25] The Constitution of the United Republic of Tanzania of 1977, Cap.2 [R.E. 2023], Articles 12(1) and 16.

3.2.1 Legal framework on Search and Seizure

The Criminal Procedure Act should be read together with the Police Force and Auxiliary Service Act[26] with regard to the search and seizure processes by the Police. For instance, the Acts provide under sections 38 and 35 respectively, power to a police officer in charge of a police station, on reasonable grounds of suspicion, to search or issue a written authority to any police officer under him to enter into any premises and conduct a search. As such, a police officer may enter into any premises and conduct a search if he believes on reasonable grounds that there is tainted property on such premises. It is further provided that the Police General PGO No. 229 controls the chain of custody by providing guidance on the handling of exhibits by the police from seizure to exhibition as evidence in court.

According to various laws such as the Police Force Auxiliary Services Act[27], Proceeds of Crime Act[28], the Prevention and Combating of Corruption Act[29] and the Forest Act[30], the administration of seized items is vested in the Inspector General of Police (IGP) or other officers authorised by the IGP. It means that the IGP or officers so authorised should arrange for proper custody of the seized items. They must also ensure that reasonable steps are taken to preserve them throughout the investigation up to the time they are tendered in court as exhibits.
In practice, it is through officers of different ranks who perform police duties under the instructions of the IGP in and throughout the country. Such duties include the investigation of cases that are reported at police stations. In fact, the Police is the lead investigative organ. It is the only law enforcement agency mandated by different laws to conduct criminal investigations. Other law enforcement agencies

---

[26] Cap. 322 [R.E. 2023]. Other Acts, which have provisions on search and seizure include the Section 22(1), Economic and Organized Crime Control Act, Cap. 200; Section 31, Cybercrimes Act, Cap.443 [R.E. 2023], Section 48 (2) and (3), Drug Control and Enforcement Act, Cap. 95 [R.E. 2023], and Section 31 (1), Proceeds of Crime Act, Cap. 256 [R.E. 2023].
[27] Ibid.
[28] Section 35, Proceeds of Crime Act, Cap. 256 [R.E. 2023].
[29] Cap. 329 [R.E. 2023].
[30] Section 94, Cap. 323 [R.E.2023].

have been conferred powers to conduct investigation in specific areas in accordance with specific laws.

Such agencies as envisaged above include the Prevention and Combating of Corruption Bureau (PCCB), established under the Prevention and Combating of Corruption Act.[31] The PCCB's mandates extend from prevention to awareness raising and law enforcement. The PCCB is an independent public body, which is empowered to investigate and, subject to the directions of the Director of Public Prosecutions (DPP), prosecute offences involving corruption. The Drug Control and Enforcement Authority is another agency established by the Drug Control and Enforcement Act.[32] The Act spells out functions of the Authority to include taking measures to combat drug trafficking including conducting comprehensive investigations and operations on drug trafficking and other related activities. That means the Authority has legal powers to arrest, search, seize, and investigate drug-related matters.[33] However, in the absence of such specific laws the Police, under general command, superintendence and directions of the IGP, is the custodian of the seized items subject to tendering them as exhibits in courts during trials.[34]

3.2.2 Management of Seized Items

All seized items during the commission of a crime should be well managed for the purposes of maintaining their evidential value as well as economic value. According to PGO No. 229(3), The Police is responsible for each exhibit from the time it comes into the possession of the Force, until such time it is admitted by the court. All the exhibits are registered in the Exhibits Register.[35] Proper management of such

[31] Cap. 329 (R.E. 2023).
[32] Cap. 95 (R.E. 2023).
[33] See Section 4, ibid.
[34] See Kaniki, A.O.J., "An Inquiry into the Effectiveness of Illegally Acquired Asset Management System in Tanzania," Journal of Law and Criminal Justice, June 2019, Vol.7, No.1, pp.11-22, p.18.
[35] Oder 16, PGO No.229.

assets is expected in the course of handling and safekeeping. Among the duties and responsibilities of the Police, as provided for under PGO No. 229, is safe custody and proper handling of exhibits. This legal obligation stems out of the position that when the case goes to court, the prosecution is required to prove the chain of custody by presenting evidence that the exhibit that is to be tendered in court as evidence, e.g. that the white power is, in fact, cocaine, or that the blood sample, actually came from the accused; that there was a continuous possession of the evidence by the Police from the time it was seized until it was presented in court; and that the evidence remained in substantially the same condition from the time each time it was transferred.

However, so far, there are inadequate storage or custody facilities in several police stations where seized items are kept under custody as exhibits in the country.[36] There is some laxity in handling state items that were seized and put under custody by some investigators. Also, some exhibits are tampered with by unscrupulous investigators while under police custody. As a result, the chain of custody, which is very important in tendering exhibits as part of evidence, is broken. Such malpractices feature prominently in drug trafficking cases.[37] In most cases, corruption is the driving factor. Criminals who deal with drug trafficking realise huge illegal profits.[38] As such, they tend to use any available opportunity to conspire with some dishonest investigators to tamper with genuine exhibits by destroying them or replacing them with fake material. They tamper with the exhibits deliberately for personal gain.

---

[36] Jamhuri ya Muungano wa Tanzania, Muhtasari wa Ripoti ya Tume ya kuangalia Jinsi ya kuboresha Taasisi za Haki Jinai Nchini, Dodoma, Julai, 2023, ukurasa wa19. See also Kaniki, A.O.J., "An Inquiry into the Effectiveness of Illegally Acquired Asset Management System in Tanzania," op cit.

[37] Jamhuri ya Muungano wa Tanzania, ibid. See also Kaniki, A.O.J., An Examination of the Law and Practice Relating to Asset Recovery in Tanzania, op cit., p.266.

[38] Kaniki, A.O.J., ibid.

4.0 Importance of the Chain of Custody of Exhibits in the Administration of Criminal Justice

Exhibits are vital evidence in that they play a major role in the investigation and administration of criminal justice. They are critical to successful prosecutions, thereby contributing to upholding the integrity of the judicial system. However, before they are tendered in court, the chain of custody must be established. Therefore, their handling, examination/analysis and storage should be given an upper hand. The chain of custody of exhibits begins from the scene of the crime itself and continues until the evidence is presented in court. Thus, a record of who has handled the evidence, who has accessed, edited, or altered it, is imperative to ensure that it has not been tampered with in any way that could prejudice an investigation. The following items demonstrate the importance of the chain of custody in the whole process of tendering evidence in court:

(a) Assurance of Transparency

The chain of custody exists to ensure full transparency of the process of how the physical evidence is collected, handled, and stored. As such, every record of the evidence from the date of collection to the date of presentation in court should be maintained. Once such records are maintained, the fact that the chain of custody of exhibits helps to establish that the alleged evidence (exhibit) is in fact related to the alleged crime shall be meaningful.[39] It also helps to maintain the integrity and authenticity of the evidence by careful and cautious handling. When a proper chain of custody is maintained, it prevents investigators and other law enforcement officers from tampering with the evidence.

(b) Assurance of Evidence

The chain of custody works to ensure that the evidence is what it purports to be. It has not been tampered with or altered and has been appropriately handled and tested. In essence, it is important to assure the trial court that the tendered exhibit is authentic and the same as

[39] Oder 8(b), PGO No. 229.

the one that was seized at the scene of the crime or anywhere else. Without such safeguards, trial courts may base a conviction on inaccurate test results, or an item that was never gathered or collected at the scene of the crime. So, the proper chain of custody guarantees that the exhibits tendered in court and relied upon to decide the matter were accurately recorded and properly handled.

(c) Demonstration of Integrity

The chain of custody demonstrates the integrity of the investigation upon which an item tendered in court was obtained. It is a crucial factor in tendering physical evidence in a criminal trial. It has been observed that:

> *"The chain of custody aims to establish the integrity of physical evidence produced during a criminal trial. Thus, maintenance of the chain of custody itself must be proven beyond reasonable doubt (standard of proof in criminal law) before the court evaluates the evidence."*[40]

While meticulously handled, the chain of custody avoids tampering with or contamination of the exhibit. It further indicates the transparency of the procedure that is followed in presenting physical evidence in court. Thus, properly documenting the details of evidence ensures that the original piece of evidence is not altered or tampered with. Altering or tampering with evidence can occur with the intent to influence a specific outcome, thereby negatively impacting the integrity of the evidence. In fact, an improper chain of custody of evidence creates the possibility of a ground for the defence to challenge the chain of custody of a piece of evidence by questioning whether the evidence presented at trial is the same evidence as what was collected at the scene of the crime. The defence may raise some challenging questions on how the exhibit was seized, stored, labelled, controlled, transferred, analysed/tested or disposed of. As a result, an improper chain of custody of evidence can lead to the evidence being unreliable and hence inadmissible in court.

---

[40] Kumar, P., "Chain of Custody for the Integrity of Evidence: A Critical Examination", The Indian Police Journal, July-December 2023, pp.44-54, p.46.

(d) **Possibility of Tracing Exhibits**

Apart from the chain of custody of exhibits ensuring the integrity of the exhibits and their admissibility in court, it also makes it possible to trace the exhibits. The unbroken and written chronological history of who had the exhibits from the time of collection until it is presented as evidence in court provides traceability with certainty. This becomes possible where there is proper documentation of an item from the moment it is collected, any transmission from one person to another, up until it is tendered as an exhibit in court.

(e) **Observance and Maintenance of the Chain of Custody to Avert Tampering with Exhibits**

It is apparent that exhibits have an important role to play in criminal trials. Practice shows that while a witness testifies in court, he may at times refer to the thing he wishes to present and produce in court. There is a connection between the exhibit and testimony as the two form part of the evidence. Taken in totality, the exhibits support the statements given by witnesses and thus add weight to testimonies. Thus, the role of exhibits in evidence cannot be underestimated.[41] However, the role of exhibits in criminal trials can be well appreciated if they are well handled and managed according to the laid-down procedures and practices. The handling should cover all stages, namely, search, seizure, custody, transfer, analysis and tendering in court for the exhibit.

Exhibits corroborate an argument adduced through oral evidence to sufficiently support a finding that the matter at issue is what the prosecution claims it to be. Exhibits are often admitted into evidence to buttress the oral evidence given by the prosecution. They establish that the item presented at trial is the same item that was in the possession or taken from the accused. It is expected that such evidence is handled properly from the time of investigation by police or other law enforcement agencies until the time it is used in court. This chain of custody of exhibits must be maintained throughout the time when

---

41 Kaniki, A.O.J., An Examination of the Law and Practice Relating to Asset Recovery in Tanzania, op cit., p. 266.

exhibits are in the hands of criminal investigation agencies until they are produced in trial courts as evidence. The rationale behind this is to ensure that the integrity and evidential value of the collected and gathered items at scenes of crime are preserved so that their identity remains intact. In the absence of any explanation on record showing in whose safe custody they are in each period; they lose their evidential value. Thus, observance and maintenance of the chain of custody avert tampering so that exhibits maintain their states of originality.

5.0 Consequences of Breaking the Chain of Custody

An exhibit is to be taken with due care so that the chain of custody is not broken from the time of arrest to the court. It is well settled that in order to prove chain of custody, the prosecution must establish an unbroken chain of custody in order to get an exhibit into evidence. To realise all this, the police and other law enforcement agencies vested with the investigation of criminal offences should maintain the proper chain of custody of exhibits from the time it is collected to when they are presented as evidence against the accused in court trials.

However, sometimes the chain of custody is broken. This occurs when an exhibit in the hands of the prosecution for production in court cannot be identified or traced to anyone. For example, if the owner of the exhibit is unknown and it is not clear how it has found itself in the hands of the witness who seeks to produce it. The chain of custody may be treated as broken in case of a lack of proper documentation, discrepancy in different documents, lack of proper seal, inconsistency between statements of witnesses or gaps in the statements over the movement of the seized object, etc.[42]

Proper handling and analysis are said to have been maintained if the details of an exhibit on the seizure list are correctly mentioned, the seal is intact, and any opening/ handling of the exhibit in a laboratory has been documented.[43]

---

[42] Kumar, P., "Chain of Custody for the Integrity of Evidence: A Critical Examination", The Indian Police Journal, July-December 2023, pp.44-54, pp.47-48.

[43] Ibid., p.48.

The breaking of the chain creates an opportunity for malicious activity that may compromise the integrity of the item. Such instances may include items falling in into the wrong hands during the course of the investigation; labelling the items incorrectly; improper handling of evidence in that investigators may fail to properly handle physical evidence with gloves, or fail to gather the evidence with sterilised equipment, rendering the evidence contaminated; improper storage of evidence in place or in a manner thereby failing to let the evidence remain intact and untainted; failure to properly document evidence in the sense that law enforcement officers including detail precisely where the evidence was found or what case it pertains to.

Consequences of tampering with exhibits under police custody, have been noted by courts. In *Marando Suleiman Marando v. Serikali ya Mapinduzi Zanzibar ("SMZ")*[44], exhibits taken from the accused were different from the exhibits tendered in evidence against the accused person. The court noted that the failure to account for the difference clearly was fatal to the prosecution. As a result of such exhibit mishandling, the chain of custody, which is very important in tendering exhibits as part of evidence, is broken.[45] Courts have also emphasised the need for chronological documentation showing how each stage of holding of exhibits was done from seizure, custody, control, transfer, analysis, right to the exhibition in court.[46] Equally, investigators should comply with police procedures in their internal regulations on handling exhibits.[47] The need for compliance is aimed at ruling out possibilities of investigators tampering with the exhibits either negligently or deliberately for personal gain.

[44] [1998] T.L.R. 375.

[45] See the case of Paul Maduka and Four Others v. Republic, (Criminal Appeal No. 110 of 2007) [2009] TZCA 159 (28 October 2009), where the Court stated that the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it. The Court went on to state that without this linkage, the entire prosecution case is bound to crumble.

[46] Zainabu d/o Nassoro @ Zena vs Republic (Criminal Appeal No. 348 of 2015) [2015] TZCA 329 (15 October 2015).

[47] Director of Public Prosecutions v. Shiraz Mohamed Sharif, (Criminal Appeal No. 184 of 2005) [2006] TZCA 429 (17 November 2006).

Where there is a break in the chain of custody, nobody, including the investigators, can account for or control the movement of the property to be tendered in court as an exhibit. Such a break provides an opportunity for malicious activities such as tampering with exhibits, thereby compromising the integrity thereof. Any cut off or tampering with it in between renders the evidence inadmissible in court. As such, vital evidence is rendered legally worthless. This situation moved the Court of Appeal of Tanzania to set aside a conviction that was based on exhibit evidence that had gaps in the chain of evidence in the case of *Malumbo v. Director of Public Prosecutions*[48]. The Court stated in part concerning the importance of proper handling of exhibits that:

Properly maintaining and observing the chain of custody of exhibits should be a matter of concern among investigators in the Police and other law enforcement agencies that are mandated to investigate criminal cases. Failure by investigators to properly maintain and observe it has been among the reasons on which appellate courts have been allowing appeals and setting free the offenders.[49]

The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.[50] Where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence relates to the alleged crime.

It is well settled that in order for the principle of the chain custody to be adhered to, investigators should strictly and keenly observe and maintain proper documentation in the turn-over of evidence from one officer to another or one office to another. Otherwise, all arduous

[48] [2010] E.A. 280.
[49] See cases of Paulo Maduka and Four Others v. Republic, (Criminal Appeal No. 110 of 2007) [2009] TZCA 159 (28 October 2009) and Zainabu d/o Nassoro @ Zena v. Republic, (Criminal Appeal No. 348 of 2015) [2015] TZCA 329 (15 October 2015).
[50] Ibid.

investigative assignments they go through may prove futile. Courts have always been extra-careful on how the chain of custody is handled, especially in narcotic drug cases. Practice shows that any mishandling of the chain of custody has been one of the grounds upon which appellate courts have been allowing appeals.[51]

The decisions by the Court of Appeal of Tanzania, in the foregoing cited cases, are wake-up calls to investigators to adhere to rules and procedures pertaining to handling, labelling, packaging and transporting of physical evidence.

6.0 Handling of Exhibits in the United Kingdom: An Overview

In this part, we dwell, albeit briefly on how exhibits are handled in the United Kingdom. The aim is to have a comparative snapshot of how the two countries, namely, Tanzania and the United Kingdom, handle exhibits from the initial to the final stage when they are tendered at criminal trials. In the United Kingdom, the handling of exhibits is governed by a number of statutes. They include the Criminal Justice Act 2001, the Police and Criminal Evidence Act 1984 (PACE)[52] and the Criminal Procedure and Investigations Act 1996. There are also codes of practice made under the Police and Criminal Evidence Act 1984 (PACE). Among those codes is Code B, which is the Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises. This Code regulates, among other things, searching premises and seizing property. Under the Code, a police officer investigating alleged crimes has a duty to record and retain material which may be relevant to the investigation.

---

[51] See cases of Illuminata Mloka v. Republic [2003] T.L.R. 245; Malik H. Suleiman v. S.M.Z. [2005] T.L.R. 236; Zainabu d/o Nassoro @ Zena v. Republic, (Criminal Appeal No. 348 of 2015) [2015] TZCA 329 (15 October 2015); Paulo Maduka and Four Others v. Republic, (Criminal Appeal No. 110 of 2007) [2009] TZCA 159 (28 October 2009); Moses Muhagama Laurence v. The Government of Zanzibar, (Criminal Appeal No. 17 of 2002), [2003] TZCA 69 (31 October 2003) and Director of Public Prosecutions v. Shiraz Mohamed Sharif, (Criminal Appeal No. 184 of 2005) [2006] TZCA 429 (17 November 2006).

[52] Published for Home Office staff on 06 July 2020.

This is aimed at ensuring that the integrity and authenticity of the items seized from the premises are maintained in the sense that they remain intact. It was held in the case of *R. v. Lushington ex parte Otto*[53] that police constables have the power to retain for use in court things which may be evidence of crime. According to the case of *R. v. Stipendiary Magistrate at Lambeth and Another, ex parte McComb*[54] to produce the exhibits at trial.

From the analysis of the Tanzanian criminal jurisdiction on handling exhibits, it is apparent that there are similarities with the legal position in the United Kingdom on the handling of exhibits. In both jurisdictions, police officers are duty-bound to search and seize items found at scenes of crime relating to crimes. The police officers are also duty-bound to maintain the chain of custody of the seized items.

7.0 Conclusion

It is apparent that the chain of custody of exhibits is vital in maintaining the value of physical evidence. It has been demonstrated that the chain of custody seeks to explain where the item was seized or dealt with up to when it is tendered in court as an exhibit. It has been observed further that essentially the chain of custody involves the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic.

Further, it has been established that to maintain the chronological link, the items serving as the exhibits should be safely kept and not tampered with. It has been noted that some investigators have been mishandling some exhibits through tampering with the chain of custody due to reasons best known to themselves.

---

53 [1894] 1 QB 420.

54 [1983] 1 All ER 321.

8.0 Recommendations

The following recommendations are made to improve the administration of criminal justice generally and the chain of custody of exhibits in improving criminal cases in particular:

(i) Amendment of Laws: It is recommended that the Criminal Procedure Act be amended to incorporate the provision that criminalises the misconduct. The incorporation of such a provision in the Criminal Procedure Act shall accommodate not only investigators from the Tanzania Police Force but also other law enforcement agencies mandated by the law to carry out investigations.

(ii) Packaging, Labelling and Handling of Exhibits: There is a need for the Police and other law enforcement agencies to enhance proper packaging and labelling of items collected from scenes of crime or elsewhere. This can be done through, among other things:

   (a) Introducing the use of secure, tamper-proof containers so that items are packed in a way that prevents possibilities of contamination or degradation.

   (b) Using tamper-evident packaging with barcodes or seals to detect unauthorised access.

   (c) Introducing the use of technology by having the electronic chain of custody system in terms of digital logs, barcoding, installing CCTV monitoring cameras in the exhibit storage rooms, attaching Radio Frequency Identification (RFID) tags to exhibits in order to identify and track them through using radio waves, etc.

(iii) Upholding Ethical Values, Enhancing Law Enforcement and Effective Supervision: Several malpractices, including corruption, have permeated the fabric of society such that government machineries are not spared. This explains why there are some bad elements within law enforcement agencies, other actors and stakeholders in the whole administration of the criminal justice system. So a few officials have been continuously suffocating efforts that are aimed at making investigations of criminal cases a success. This explains why in some instances, there have been incidents where some exhibits are destroyed and the chain of custody tampered with.

Therefore, workable and implementable strategies aimed at upholding ethical values, enhancing law enforcement and having close supervision should be put in place. Among those strategies should include:

(a) Establishing clear guidelines on how investigators should handle exhibits effectively and efficiently. The guidelines should be hinged on the point that investigators have an instrumental and contributory role in the administration of criminal justice;

(b) Taking stern measures, including disciplinary, administrative and prosecution actions, against law enforcement officers who deliberately tamper with or destroy the chain of custody of exhibits for reasons best known to themselves;

(c) Improving transparency and accountability on the part of those who are in decision-making and supervisory positions. It should include sealing off all gaps that give rise to a weak chain of command and supervision. The aim is to uphold ethical values, enhance law enforcement, effective monitoring and improve close supervision;

(d) Efforts to prevent and combat corruption among unethical or corrupt officials within law enforcement agencies and other actors should be enhanced. Actions against corrupt elements should not only be taken but seen to be taken. This will in turn show the extent to which the country is committed to strengthening transparency mechanisms, respect for good governance and abiding by the rule of law.

Division of Matrimonial Real Property in Polygamous Marriages: A Kenya-Tanzania Comparative Study

Luckness William Jangu*

Abstract

Equitable division of matrimonial real property in polygamous marriages remains a significant challenge in most African States. This article examines Tanzania's and Kenya's laws and judicial practices. It reveals that Tanzania's law is inadequate in resolving property disputes in polygamous marriages in the event of divorce. The case is different for Kenyan law, which ensures fairer distribution. It is recommended that specific amendments be made to the Tanzanian law to establish a coherent, fair, and context-sensitive legal system for property division in polygamous marriages.

Keywords: Polygamous Marriages, Division of Matrimonial Real Property, Kenya and Tanzania.

1.0 Introduction

A polygamous marriage is a marriage where a husband is married to more than one wife simultaneously.[1] Polygamy is commonly practised in Islamic societies[2] where a husband can marry up to four wives.

* The Author is an Advocate, Lecturer and Intellectual Property Manager at the Nelson Mandela African Institution of Science and Technology. The Author is also Phd Graduate of the Open University of Tanzania. Email: janguluck@gmail.com or luckness.jangu@nm-aist.ac.tz.

[1] Flora, T., "An Exploration of Polygamous Marriages: A Worldview." Mediterranean Journal of Social Sciences Vol. 5, No. 27, 2014, pp, 1058–1065.

[2] Ja'far, A. Kumedi, Rudi Santoso, and Agus Hermanto. "A sociohistorical study of polygamy and justice." In 1st Raden Intan International Conference on Muslim Societies and Social Sciences (RIICMuSSS 2019), pp. 338-342. Atlantis Press, 2020, at 339.

Customarily, most Tanzanian societies have and are still practising polygamy.[3] For instance, approximately 25% of married women in Tanzania are in polygamous unions.[4] Polygamous marriages are influenced by regional, family, and community factors.[5] In Tanzania, the Law of Marriage Act,[6] which recognises polygamous marriages rooted in Islamic and customary practices,[7] governs asset distribution but lacks clarity and precision in addressing the complexities regarding the division of matrimonial property upon divorce in such unions.

All assets jointly invested and acquired during the polygamous marriage are distributed upon divorce.[8] Whether an asset is matrimonial or separate property is a question of law and fact to be established by evidence.[9] In *Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo,*[10] the Court of Appeal observed that the Law of Marriage Act has not defined matrimonial assets. The Court adopted the definition under Section 4(1) of the Matrimonial Property Act of India.[11] Matrimonial assets include the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during the marriage. This exclusion applies to gifts, inheritances, business assets, and other specified exceptions.

---

[3] Mgomba, F. A., "Right to Health: Polygyny and De Facto Polygyny May Increase Women's Vulnerability to HIV/AIDS in Tanzania." In East African Journal of Traditions, Culture and Religion, Vol. 3, No. 1, 2021, pp 1-11 at 2; see also Kiage, P., Family Law in Kenya; Marriage Divorce and Children, Law Africa Publishing (K) Ltd, Nairobi, 2016, p. 58.
[4] Howland, R. J and Ashley, K., "Divorce and Polygamy in Tanzania," in Social Justice, Vol. 15, 2014 at pp, 1-39, at 10.
[5] Sigilai, D.S., "The Practice of Polygamy and Church's Response: A Case Study of Africa Inland Church Losirwa in Uasin Gishu County, Kenya," Shahidi Hub International Journal of Theology & Religious Studies, Vol. No. 2, 2021, pp. 73-86. 74.
[6] Law of Marriage Act, No. 5 of 1971, [Cap. 29 R.E. 2023].
[7] Mwambene, L., "What is the Future of Polygyny (polygamy) in Africa?" in Potchefstroom Electronic Law Journal, Vol. 20. No. 1, 2017, pp 1-33, at p. 2. See also Thobejane, T. D., and Flora, T., "An Exploration of Polygamous Marriages: A Worldview." Mediterranean Journal of Social Sciences Vol. 5, No. 27, 2014, pp. 1058–1065., See also the Law of Marriage Act, Sections 10(1) (b), 10(2) (a) and 25(1) (c) and (d).
[8] Howland, R. J and Ashley, K., "Divorce and Polygamy in Tanzania," in Social Justice, Vol. 15, 2014 at pp, 1-39, at 10.
[9] Habiba Ahmadi Nangulukuta & Others vs Hassani Ausi Mchopa & Another (Civil Appeal No. 10 of 2022) [2022] TZCA 156 (29 March 2022, at p 18.
[10] (Civil Appeal No. 102 of 2018) [2020] TZCA 31 (20 February 2020).
[11] Cap. 275, R.E. 1989.

Polygamous marriages, where a husband may have multiple wives contributing differently to shared assets, blur the distinction between matrimonial and separate property, often leading to disputes that courts struggle to resolve fairly. Section 114 of the Law of Marriage Act empowers courts to distribute matrimonial assets based on the direct and indirect contributions of spouses. However, it is silent on the rights of first wives and non-divorcing spouses. Additionally, the Act lacks clear procedural guidance for resolving disputes over the division of real matrimonial property. The lack of a comprehensive legal framework leaves both departing and remaining spouses vulnerable to dispossession, legal uncertainty, and marginalisation during and after divorce.

This article critically assesses the adequacy of the Law of Marriage Act in dividing matrimonial property in polygamous marriages during divorce. It reviews the legal framework and identifies gaps. In the process, the article compares Tanzania's framework with Kenya's, highlighting lessons Tanzania can learn from.

2.0 Background

Matrimonial real property and its division in polygamous marriages during divorce in Mainland Tanzania is a complex issue. The problem is rooted in historical, cultural, interpretative challenges and noncompliance with international and regional standards. Likewise, the law lacks provisions governing property division in polygamous marriages. Until 1971, family affairs in Mainland Tanzania were governed by customary and religious laws.[12] Ownership of real property among spouses was largely unaddressed in land legislation.[13]

[12] Government of the United Republic of Tanzania (1969) 'Government proposals on Uniform Law of Marriage' (Government's Paper No. 1 of 1969 para 5, see also Rwezaura, A., "Tanzania: Building a New Family Law Out of a Plural Legal System," University of Louisville Journal of Family Law, Vol. 33, 1994, pp. 523–524. See also Migiro, Rose Mtengeti, "The Division of Matrimonial Property in Tanzania," Journal of Modern African Studies, Vol. 28, 1990, pp. 521–526.

[13] See Land Ordinance, No.3 of 1923, for Tanganyika Territory, An Ordinance to define and regulate the tenure of land within the Territory, [25th January 1923] Land (Amendment) of 1930 for Tanganyika Territory, No. 17 of 1930, An Ordinance to amend the Land Ordinance of 1923, 21st April, 1930.

This lack of formal incorporation into statutory law reflected the prevailing cultural norms, which often dictated property rights and marital responsibilities without legal recognition. Consequently, the intersection of family law and property ownership remained ambiguous, leaving spouses without clear rights in matters of real property during divorce. The impetus for establishing a legal framework governing marriage in Tanzania originated in 1961, when the late President Julius Nyerere emphasised the need to codify diverse personal laws of the country's various communities. Consequently, the law was codified in Government Notice 279 of 1963, which applied to the Bantu patrilineal society. However, this law proved a failure.[14]

The 1971 Law of Marriage Act in Tanzania is based on the recommendations of the Spry Commission report, established in 1968 in Kenya.[15] The Government of Tanzania initiated public debate on the reforms to the marriage law in 1969 through "*Mapendekezo ya Serikali Juu ya Sheria ya Ndoa*" (Government's Proposal on Uniform Law of Marriage) (Government Paper No. 1 of 1969). This was called the White Paper. It proposed significant reforms to the marriage law and, thus, sought public views. The proposed reforms were based on the Kenyan Spry report, which included a draft bill on the law of marriage. Following this initiative, a Bill concerning the uniform law of marriage was published and subsequently tabled before Parliament in 1970, marking a significant step towards legal reform in marital affairs in Tanzania.

This process ultimately led to the enactment of the Law of Marriage Act,[16] which sought to establish a comprehensive legal framework for marriage and family law in Tanzania, addressing various aspects of

---

[14] Rwezaura, Bart A., "The Integration of Personal Laws: Tanzania's Experience," Zimbabwe Law Review, Vols. 1–2, 1983–1984, p. 85.
[15] Hashim, A., "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation," Journal of Muslim Minority Affairs, Vol. 25, 2005, pp. 449–460. See also Read, J. S., "Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania," Journal of African Law, Vol. 16, 1972, pp. 19–39.
[16] Law of Marriage Act, Cap. 29 [R.E 2023].

marital relationships and property rights. From its enactment, the Law of Marriage Act has not included provisions regarding the division of matrimonial real property in polygamous marriages during divorce to date.

The article explores Kenya's legal system that address similar issues and compares these with the law on Mainland Tanzania to identify lessons for potential reform in matrimonial property division in polygamous marriages.[17]

4.0 Legal Framework in Mainland Tanzania

The Matrimonial laws and land statutes in Mainland Tanzania are not specific on the division of matrimonial property in polygamous marriages. The Constitution, as the supreme law of the land, guarantees the right to own property and prohibits its acquisition or deprivation without lawful authority and fair, prompt, and adequate compensation.[18] It further mandates legal protection of matrimonial life, family, and residence.[19]

In line with the Constitution, the Land Act[20], Village Land Act,[21] and the Law of Marriage Act[22] provide for the right of men and women, married or unmarried, to own, acquire, hold and dispose of property, whether movable or immovable.[23] The right to acquire or hold land cannot be derogated by any law, custom or tradition.[24] Section 57 of the Law of Marriage Act provides for the rights of equality of wives in polygamous marriage. Thus, co-wives should enjoy equal rights, be subject to equal liabilities and have equal status in law.

---

17 Fombad. C. M., "Comparative Research" in Contemporary African Legal Studies J. Legal Educ. Vol. 67. No. 4, 2017, pp.987, 984-1004 at p. 987.
18 The Constitution of the United Republic of Tanzania of 1977, [Cap 2 R.E 2008], Article 24(1-2).
19 Article 16(1), ibid.
20 Section 3(2), Land Act, Cap. 113 [R.E 2023].
21 section 3(2), Village Land Act, Cap. 114 [R.E 2023].
22 Section 56, Law of Marriage Act, Cap. 29 [R.E 2023].
23 Shaibu M. Rombola vs Rehema Donald (PC Civil Appeal 111 of 2018) [2020] TZHC 1565 (30 July 2020), p.9.
24 Fraisca A. Rugimbana & Others vs Augustine Anatory Rugimbana & Another (Land Appeal 73 of 2018) [2020] TZHC 4344 (13 November 2020) p. 14.

Section 114 of the Law of Marriage Act provides for the division of matrimonial property. For the property to be divided, it must meet the criteria that: i) the property must be matrimonial assets, ii) it must have been acquired by them during the marriage, and iii) it must have been acquired by their joint efforts of the spouses.[25] The three conditions must exist before the court's power to divide matrimonial assets under section 114 (1) of the Law of Marriage Act is exercised.

In dividing the matrimonial property, the court must look at the conditions stipulated under section 114(2) of the Law of Marriage Act namely (a) the customs of the community to which the parties belong;(b) the extent of the contributions made by each party m money, property, or work towards the acquiring of the assets;(c) any debts owing by either party which were contracted for their joint benefit; and (d) the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division. The Act is silent on how to divide matrimonial property in polygamous marriages.

Section 58 of the Law of Marriage Act recognises the right of spouses to own separate properties in marriage. However, separate property may be classified as matrimonial property if it was substantially improved by the non-owning spouse during the marriage per section 114(3) of the Act. In *Anna Benjamin Malongo vs Yohana Balole,*[26] the High Court, referring to section 114 (3) of the Law of Marriage Act, held that once a separate property involves the contribution of another spouse later during the existence of their marriage, such property becomes a matrimonial property.

Deliberations in parliament, captured by Hansard, reveal the intention of parliament. Accordingly, separate properties acquired before or after marriage, which are improved by a spouse, remain classified a separate property unless the owner explicitly designates them as matrimonial property by adding the other spouse to the ownership

---

[25] Samwel Moyo vs Mary Cassian Kayombo [1999] TLR 197.
[26] Matrimonial Appeal 1 of 2017, [2018] TZHC 2936, p. 9.

through an agreement.[27] This interpretation aligns with the case of *Mariam Tumbo vs Harold Tumbo*[28], where the court affirmed that a spouse may enter into an agreement for joint ownership of property otherwise considered separate under section 58 of the Law of Marriage Act. In the absence of such an agreement, marriage does not alter the ownership of rights of the property.

5.0 Legal Framework in Kenya

Kenya has taken significant steps regarding the division of matrimonial property in polygamous marriages at the time of divorce. The enactment of the Constitution of Kenya 2010 necessitated the enactment of the laws providing for matrimonial property in polygamous marriages that align with real property ownership between spouses.[29]

In Kenya, the right of spouses in matrimonial property is Constitutional.[30] Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.[31] Courts in Kenya have noted that equal rights of parties to a marriage do not mean that a spouse is entitled to an equal share (50:50) of the property acquired during the marriage unless his or her contribution is ascertained to have been equal to that of the other spouse.

In the case of *Joseph Ombogi Ogentoto vs Martha Bosibori Engentoto and 2 Others (Amicus Curiae)*[32] the Supreme Court of Kenya noted at page 38 of the decision that Article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse who has contributed nothing to its acquisition merely because they were or are married to

---

[27] Second Sitting of the National Assembly Deliberation on the Law of Marriage Bill (19 January 1971) Hansard No. 579281, p. 73.
[28] [1983] T.L.R 393.
[29] The Matrimonial Property Act of Kenya, Act No. 49 of 2013 R.E. 2014 and The Matrimonial Property Rules, 2022, Legal Notice No. 137 of 2022.
[30] Article 60(1) (a-g), The Constitution of Kenya.
[31] Article 45(3), Ibid.
[32] Petition No. 11 of 2020, January 27 of 2023, Supreme Court of Kenya.

each other. The court observed that to do so would mean that Article 40(1) and (2) of the Constitution, which protects property rights, would have no meaning and would not reflect the intention of the drafters.

Thus, under Article 45(3), equality at the time of dissolution of marriage entails that each party is entitled to their fair share of matrimonial property and no more. A marriage between parties does not automatically result in common ownership or co-ownership of property by the vesting of property rights between spouses. Therefore, there must be proof to show the extent of contribution towards the acquisition of the property, whether by direct or indirect contribution.

The Supreme Court cited with approval the country's Court of Appeal's decision in *PNN v ZWN,*[33] where it was noted that the Constitution does not explicitly state that equal rights include a 50-50 division of property. The Parliament, in enacting the Matrimonial Property Act of 2013, acknowledged that property is not automatically shared equally. Instead, the Act states that the division of matrimonial property between spouses should be based on their respective contributions to its acquisition.

Section 7 of the Matrimonial Property Act of Kenya makes provisions relating to the ownership of matrimonial property. The requirements include proof of matrimonial property based on contribution towards the acquisition, whether direct or indirect. The Matrimonial Property Act defines contributions to include monetary and non-monetary contributions and includes domestic work and management of the matrimonial home,[34] childcare,[35] companionship[36] management of family business or property[37] and farm work.[38]

In the case of *Joseph Ombogi Ogentoto vs Martha* Bosibori *Engentoto and 2 Others (Amicus Curiae),*[39] *the court, citing* Lord Justice Fox in

---

[33] [2017] eKLR. per Kiage, JA.
[34] Section 2(a), Matrimonial Property Act of Kenya.
[35] Section 2(b), Ibid.
[36] Section 2(c), Ibid.
[37] Section 2(d), Ibid.
[38] section 2(e), Ibid.
[39] Petition No. 11 of 2020 delivered January 27 of 2023, Supreme Court of Kenya, p. 47.

Burns v Burns [1984] 1 All ER 244, noted that contribution may include (i) Paying part of the purchase price of the matrimonial property, (ii) contributing regularly to the monthly payments in the acquisition of such property. (iii) Making a substantial financial contribution to the family expenses to enable the mortgage instalments to be paid. (iv) Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property. v) Caring for children and the family at large as the other spouse works to earn money to pay for the property.

The Matrimonial Property Act allows pre-nuptial agreements to determine property rights, and such agreements form an exception to matrimonial property division.[40] These agreements can be set aside by an application by a party to the agreement if they were made by fraud, coercion or if it is manifestly unjust.[41] The Act allows parties to any intended marriage to determine their property rights, which is enforceable provided that the agreement is not influenced by fraud, coercion or is manifestly unjust.[42]

The Matrimonial Property Act has provisions regulating property rights between spouses in a polygamous marriage[43]. The law provides that a matrimonial property acquired by a man and his first wife shall be retained equally by the man and the first wife only if such property was acquired before the man married another wife.[44] Furthermore, the Matrimonial Property provides that a property acquired by the man after a man marries another wife shall be regarded as owned by the man and the wives, considering any contribution made by the man and each of the wives.[45]

[40] Section 6(3), Matrimonial Property Act of Kenya.
[41] Section 6(4), Ibid.
[42] Federation of Women Lawyers Kenya (FIDA) vs Attorney General & another [2018] eKLR.
[43] Section 8, Matrimonial Property Act of Kenya.
[44] Section 8(1) (a), Ibid.
[45] Section 8(1) (b), Ibid.

The exception to section 8(1) (b) of the Matrimonial Property Act is pre-nuptial agreements determining the property rights of the spouses.[46] Thus, section 8(2) of the Matrimonial Property Act allows spouses in polygamy to enter into agreements that isolate matrimonial property between a husband and each wife. In such an agreement, the wife may own the property equally with the husband, without the involvement of other wives.

Additionally, the Matrimonial Property Act provides that a spouse may acquire a beneficial interest in the separate property of the other spouse, which was acquired prior to the marriage. This would happen where the contributing spouse has made improvements to that property. Such improvements confer a beneficial interest commensurate with the value of the contributions made but do not make the property a matrimonial property.[47] Therefore, private property does not automatically become a matrimonial property by a mere contribution by the other spouses, but a spouse acquires a beneficial interest to the extent of the contribution made.

Consequently, the Matrimonial Property Act provides property and rights of co-owners in polygamous marriages.[48] The Act protects separate property, the spouse's rights in a polygamous marriage[49] and a remedy of declaration of property rights or interest in a property.[50] This remedy can be requested by the spouse in polygamy during the marriage without any divorce proceedings to ascertain the right of that spouse. This provision would assist non-divorcing spouses to defend their interest in the matrimonial property.

6.0 Lessons from Kenya

Mainland Tanzania has a lot to learn from Kenya's matrimonial laws. While Kenya's matrimonial framework may not be entirely comprehensive, the following lesson can improve the law in Mainland Tanzania.

---

[46] Section 8(2), Matrimonial Property Act of Kenya.
[47] Section 9, Ibid.
[48] Ibid.
[49] Section 13, Ibid.
[50] Section 17, Ibid.

6.1 Property Rights in Polygamous Marriages

Kenya's Law of Marriage Act is silent on property rights in polygamous marriage. Kenyan laws have specific provisions that govern the division of property in polygamous marriage. These provisions ensure that property distribution is distributed fairly and equitably.[51] Under the Matrimonial Property Act of Kenya, property acquired by a man and his first wife during their marriage is jointly owned by them and is equally divided, provided it was acquired before the man married additional wives. This protects the first wife's property from the impact of subsequent marriages.[52]

In the case of *M.A.A vs. A.R.*,[53] the High Court of Kenya awarded the first wife (Plaintiff), 30% of Plot No. 37. The Court reasoned that the plaintiff had been married to the defendant for a longer duration than his other wives, and actively managed the property since 2012, including collecting rent for over ten years. The Court acknowledged that her contributions to the property had exceeded those of the other wives.

This judgment highlights the importance of the duration of the marriage in assessing the contributions of wives in polygamous marriages. Conversely, section 114(1) of Tanzania's Law of Marriage Act offers no specific protection for the first wife. Likewise, the Act fails to recognise the duration of the marriage as a factor to consider during the division of property upon divorce.

The Law of Marriage Act does not provide for a clear framework for assessing the contributions and interests of spouses in polygamous marriage during property distribution. Lack of the provision has affected fair and equitable adjudication of property rights, thereby undermining the delivery of justice. In *Hidaya Kondo vs Mohamed Shaban Mumbi and Another,*[54] the applicant applied for revision in the

[51] Section 8, Matrimonial Property Act of Kenya.
[52] Section 8(1) (a), Matrimonial Property Act of Kenya.
[53] [2018] eKLR 10.
[54] (Civil Revision 13 of 2017) [2020] TZHC 1392 (16 July 2020), p. 5.

High Court in respect of the decision of the District Court because the order of distribution of the matrimonial properties did not consider the applicant's contribution since she was not a party to the divorce. The High Court affirmed the District Court decision and stated that:

> "*Even if it were to be assumed that the applicant has any claim, her claim would obviously fail because if the assets belonged to the former marriage, it was upon the 1st Respondent to provide proof to that effect during the trial, but he never did.*"

In this case, the first wife (the applicant) was deprived of her rights to the matrimonial property in favour of the second wife. The court noted that there was insufficient evidence to substantiate the first wife's contribution to the property, given that she was not a party to the proceedings during divorce and property division. On the other hand, the court opined that the respondent should have proved the first wife's contributions, which reflects an incorrect approach to addressing the issue.

Additionally, Kenya's Matrimonial Property Act provides that property acquired by a man after marrying another wife is jointly owned by the man and his wives, looking at contributions made by the man and each wife.[55] Moreover, the exception to section 8(1) (b) of the Matrimonial Property Act recognises pre-nuptial agreements in determining property rights. Thus, where a pre-nuptial agreement grants exclusive property rights to a wife, such property is deemed jointly owned by the husband and that wife, and excluded from the claims of other spouses.[56] However, such stipulations are not included in Tanzania's Law of Marriage Act.

6.2 Declaration of Rights or Interest to Matrimonial Property

Kenya's s Matrimonial Property Act allows any person to sue a spouse, former spouse, or third party to protect their interest in the matrimonial property.[57] The claimant can apply for a declaration of interest

55 Section 8(1) (b)Matrimonial Property Act of Kenya.
56 Section 8(2), ibid.
57 Section 17 (1), ibid.

in matrimonial property following the procedure stipulated[58] or as a party to the petition in a matrimonial cause.[59] This is notwithstanding that a petition has been filed under the law relating to matrimonial causes.[60] Where a declaration of right in matrimonial property is contested between that person and a spouse or former spouses in a petition for dissolution of marriage under the Matrimonial Property Act of Kenya, the application is made as part of the relief in the matrimonial cause under the Matrimonial Proceedings Rules.[61]

Section 17 of the Matrimonial Property Act was a subject of judicial interpretation in the case of *JM vs SMK & 4 Others.*[62] The High Court, citing Muchelule, J in *N.K vs G.V.KC,*[63] held that under section 17 of the Matrimonial Property Act, a spouse may seek a resolution regarding their beneficial interest in matrimonial property, whether in a pending divorce or if spouses are under separation but not divorcing. Spouses can request declaratory orders to clarify their claims or entitlement without distributing beneficial interest.

Thus, section 17 of the Matrimonial Property Act protects the rights of spouses to matrimonial property where the marriage is still in existence. Tanzania's Law of Marriage Act lacks this provision. Section 17 of Kenya's Matrimonial Property Act offers *locus standi* to non-divorcing spouses to claim the right or interest over the matrimonial property before or during a divorce proceeding.

The other categories of people with *locus* include spouses,[64] any person against whom a spouse has made a conflicting property claim[65] and a trustee in bankruptcy, an executor under will and other testamentary grants, administrator or personal legal representatives of the spouse's

---

58 Section 17(2) (a), Matrimonial Property Act of Kenya.
59 Section 17(2) (b), ibid.
60 Section 17(2) (c), ibid.
61 Rule 7 (1), Matrimonial Property Rules.
62 [2022] eKLR.
63 [2015] eKLR at pp. 9-10.
64 Rule 4 (a), Matrimonial Property Rules.
65 Rule 4(b), ibid.

estate in respect of an order or declaration relating to status, ownership, vesting or possession of any specific property by or for the beneficial interest *of a spouse or formal spouse*.[66]

The Kenya's Matrimonial Property Rules stipulate the procedure and courts with jurisdiction. Rule 4(b-c) provides that the claim can be made during the subsistence of the marriage by originating summons with the necessary modification in form no MPI set out in the schedule[67] stating, among other things, the ground for which the claim is made[68] any claim made under these rules must be supported by an affidavit[69] stating the ground for which a claim is made[70] whether there are previous claims relating to matrimonial property in question, or whether the attempt to reconcile has been made.[71]

Furthermore, in cases of a claim for a transfer or settlement of assets, the assets in which the claim is made and the liability, if any,[72] are the assets to which the party against whom the claim is made is entitled, either in possession or reversion.[73] Additionally, in cases of a claim to vary an agreement made before their marriage setting out their property rights or an order of a court made in the determination of their property rights, all settlements, whether made before or after their marriage[74], funds brought into settlement by each party.[75] Consequently, in cases of a claim for cancellation of a transfer or other disposition of the assets to which the disposition relates, [76] the persons in whose favour the disposition is alleged to have been made.[77] In case of a disposition alleged to have been made by a way of settlement, the trustee and the beneficiary of the settlement.[78] Tanzania's equivalent law lacks these kind of provisions.

---

66 Rule 4(c), Matrimonial Property Rules.
67 Rule 7(3), ibid.
68 Rule 7(3) (a-b), ibid.
69 Rule 7(4), ibid.
70 Rule 7(4) (a), ibid.
71 Rule 7(4) (b), ibid.
72 Rule 7(4) (c) (i), ibid.
73 Rule 7(4) (c) (ii), ibid.
74 Rule 7(4) (d) (i), ibid.
75 Rule 7(4) (d) (ii), ibid.
76 Rule 7(4) (e) (i), ibid.
77 Rule 7(4) (e) (ii), ibid.
78 Rule 7 (4)(e) (iii), ibid.

Further, in proceedings relating to the division of matrimonial property or cancellation of a disposition that relates to immovable property, the affidavit in support of the application, in addition to particulars stipulated in rule 7(4), must state whether the title to the immovable property is registered or unregistered and, if registered, the details of registration.[79]

Furthermore, it must contain particulars of the charge or mortgage of property and any interest therein.[80] Likewise, it should provide details of the registered owner(s) of the property and, in case of more than one owner, how the property is held, whether as joint tenants or tenants in common.[81] All the applications must be supported by authenticated, evidential documents. List of witnesses and witness statements, if any, among other particulars that may be required are important.[82]

Rules 4 and 7 of the Matrimonial Property Rules allow any person who has an interest in matrimonial property to have rights. There is no such provision in Tanzania's law. A spouse or former spouse is required to make the application at any time after the dissolution of marriage under the Marriage Act,[83] as part of matrimonial cause under section 17 of the Matrimonial Property Act,[84] in case the applicant seeks a declaration of property right contested between the applicant, the applicant's spouse or the formal spouses,[85] and in respect of claims of interest under Rule (b and c) of the Matrimonial Property Rules the application must be made during the subsistence of the marriage.[86]

79 Rule 7(5) (a), Matrimonial Property Rules.
80 Rule 7(5) (b), ibid.
81 Rule 7(5) (c), ibid.
82 Rule 7(6) (a-c), ibid.
83 Rule 5(1) (a), ibid.
84 This application can be made by way of originating summons to a judge or magistrate's court with jurisdiction using form MPI set out in the schedule. This is stipulated under rule 7(2). The Matrimonial Property Rules. The application must state among other things the property rights or beneficial interest asserted in the claim in line with the Matrimonial Property Rules rule 7(2)(e).
85 Rule 5(1) (b), Matrimonial Property Rules,
86 Ibid.

The application for the declaration of a right to matrimonial property can be made within twelve months from when the decree absolute was made.[87] The court may, for sufficient reasons and grounds, extend the time after hearing the applicant and other persons interested in the property or persons likely to be affected by the order made and who have the right to be heard.[88] The application sought is made in line with the Law of Marriage (Matrimonial Proceedings) Rules[89] under rule 5(4) of the Matrimonial Property Rules.

The Matrimonial Property Rules provide the courts with jurisdiction to enforce the rights relating to matrimonial property.[90] These courts are the High Court, where the value of the matrimonial property exceeds the pecuniary value of the subordinate courts[91] and a subordinate court with civil pecuniary jurisdiction to entertain the matter.[92] *In JM v SMK & 4 Others,*[93] *the court interpreted* how spouses have the right to make a declaration. The court observed that a wife can assert her rights to jointly owned properties and seek a share of the estate. The court can determine their separate estates, regardless of whether the couple is still married or divorced.

Tanzania's Law of Marriage Act and the relevant rules are silent on the procedure where spouses, former spouses' administrators or executors of the estate of a spouse, or beneficial interest in matrimonial property can defend their rights or interests in their matrimonial property. Section 105(1) of the Law of Marriage Act restricts parties to be joined in a decree of separation as co-respondents; the provision is silent on the right of declaration of interest in matrimonial property.

87 Rule 5(2) and 5(1)(a), Matrimonial Property Rules.
88 Rule 5(3), ibid.
89 Kenya Law of Marriage (Matrimonial Proceedings Rules) 2020 Legal Notice No. 112 of 2020.
90 Rule 6 (1), Matrimonial Property Rules.
91 Rule 6(1) (a), ibid.
92 Rule 6(1) (b), ibid.
93 [2022] eKLR.

The silence of the Law of Marriage Act on the right to declaration of interest in matrimonial property has affected several claimants in Tanzania. This is because the Law of Marriage Act requires spouses to be parties to a divorce to get a right of or interest in a division of matrimonial property. In *Maryam Mbaraka Saleh vs Abood Saleh Abood,*[94] the Court of Appeal dismissed an application by a non-divorcing co-wife because the applicant was not a party to any of the previous proceedings. She had requested the court to review the court decision awarding forty per cent (40%) shares of the matrimonial property to a divorcing wife to consider the interests of the remaining co-wives.

In *Scolastica Spendi vs Ulimbakisya Ambokile Sipendi and Another,*[95] the court awarded a leaving spouse 30% without hearing the rights of other non-divorcing spouses. The divorcing wife was granted 30% because the husband had other wives. In *Masunga Buzzy vs Scholastica Pastory,*[96] the respondent failed to lay evidence that he had built a house with his first wife. The failure to prove led the court to believe that the appellant's second wife had contributed to the acquisition of the property, and it was divided under an approach of 50% to the appellant and respondent, leaving aside the first wife.

The Law of Marriage Act has not addressed the right of non-divorcing wives to sue for ownership, contribution or interest in matrimonial property before the divorce. Under section 2 (1) of the Law of Marriage Act and the Law of Marriage Matrimonial Proceedings Rules,[97] matrimonial proceedings do not include the right to claim an interest in matrimonial real property before divorce. Lack of this provision has caused a jurisdictional gap.

Section 76 of the Law of Marriage Act, section 177 of the Land Act and section 60 of the Village Land Act establish matrimonial courts and land courts. However, from the jurisdiction vested on land courts,

---

[94] Civil Appeal No. 1 of 1992, Unreported.
[95] Matrimonial Cause No. 2 of 2012, [2018] TZHC 72.
[96] PC. Matrimonial Appeal No. 01 of 2019, [2020] TZHC 515.
[97] GN No. 25 of 1971.

sections 13 and 37 of the Land Disputes Courts Act[98] and ordinary courts under section 76 of the Law of Marriage Act, the ordinary courts lack jurisdiction to deal with claims of right to ownership or interest of real property for non-divorcing spouses before, during or at the time of divorce, thereby affecting the right of spouses.

Sections 81(b) 114(1) of the Law of Marriage Act and its rules deal only with the application of the division of assets of spouses who did not claim division of matrimonial property during or after divorce, or where the court did not make an order for division of property. The application is made by chamber summons supported by affidavit; however, it presumes that the parties to divorce gave evidence of property rights or interest in property in the original file, while non-divorcing spouses are not parties to such cases. Their evidence to prove contribution, ownership or interest in such matrimonial property is not taken. Likewise, the nature of the application does not give parties the right to adduce evidence to authenticate the rights, ownership or their extent of contribution towards the acquisition of property, hence affecting the non-divorcing spouses.

6.3 Assessing Contribution, Matrimonial Property and Distribution of Property

Tanzania's Law of Marriage Act has not defined the term matrimonial property. Kenya's Matrimonial Property Act defines matrimonial property to mean any interest in land or lease that is acquired by a spouse during the subsistence of marriage.[99] In Kenya, the right of spouses to matrimonial property is protected under the Constitution.[100] Parties to a marriage are entitled to equal rights during the marriage and at its dissolution.[101] Courts in Kenya have interpreted equal rights not to mean equal share (50:50) of the property acquired during the marriage unless the contribution is ascertained to be equal.

---

[98] Land Disputes Courts Act, [Cap 216 R. E. 2023].
[99] Land Registration Act, [Cap. 300 R.E. 2010], Section 2.
[100] Article 60(1) (a-g), Constitution of Kenya.
[101] Article 45(3), ibid.

The Supreme Court of Kenya provided clear guidance on the equality principle set out in the Constitution in *Joseph Ombogi Ogentoto vs Martha Bosibori Engentoto and 2 Others (Amicus Curiae)*.[102] Interpreting Article 45(3) on the principle, it noted that quality does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that contributed nothing to its acquisition merely because they were or are married. The court noted that, to do so would mean that Article 40(1) and (2) of the Constitution, which protects the property right, would have no meaning, which would not have been the intention of the drafters. The interpretation is equated to the labour theory of value, which requires the spouses to be compensated only to the extent of the contribution made.

Therefore, under Article 45(3), equality during marriage and of dissolution provides that each party is entitled to their fair share of matrimonial property and no more. Thus, a marriage does not automatically result in co-ownership of property by the vesting of property rights between spouses. The provision is not designed to enable the court to pass property rights from one spouse to another by reason of marriage only.[103] Thus, each spouse must prove contribution towards the acquisition of the property, whether direct or indirect.[104] Marriage is not intended to encourage dependency by one spouse rather each party contributes, shares responsibilities and benefits, taking into account gender limitations.[105]

Article 45(3) of the Constitution guides the courts to determine the rights of parties to a marriage concerning the division of matrimonial property.[106] The Supreme Court in PNN v ZWN,[107] stated that the Constitution does not explicitly state that equal rights include a 50-50 division of property. Parliament, in enacting the Matrimonial Property

[102] Petition No. 11 of 2020, January 27 of 2023, Supreme Court of Kenya, at pp. 38.
[103] Ibid.
[104] Ibid, at pp. 38-39.
[105] MEK v GLM [2018] eKLR.
[106] AWM v JGK [2021] eKLR.
[107] [2017] eKLR.per Kiage. JA.

Act of 2013, acknowledged that property is not automatically shared equally. Instead, the Act establishes that the division of matrimonial property between spouses should be based on their respective contributions to its acquisition.

Kenya's Matrimonial Property Act was enacted to give effect to Article 45(3) of the Constitution. Section 7 of the Matrimonial Property Act makes provisions relating to the ownership of matrimonial property. Kenya applies the same principle as Tanzania, where the principle of contribution is stipulated by section 114 (2) (b) of the Tanzania Law of Marriage Act and cemented in various decisions of the Courts of records in Tanzania[108] requiring proof of contribution towards the acquisition of matrimonial property, whether a direct or indirect contribution.

The Law of Marriage Act has not defined the term 'contribution.' The Matrimonial Property Act defines contribution to include monetary and non-monetary contributions, including domestic work and management of the matrimonial home, [109] childcare, [110] companionship,[111] management of family business or property[112] and farm work.[113] Likewise, contributions can be direct or indirect.

The *Joseph Ombogi Ogentoto vs Martha Bosibori Engentoto (supra)at page 47 cited* Lord Justice *Fox in Burns vs Burns*[114] noted that contribution may include paying part of the purchase price of the matrimonial property, contributing regularly to the monthly payments in the acquisition of such property, making a substantial financial contribution to the family expenses to enable the mortgage instalments to be paid,

[108] See for example the cases of Bi Hawa Mohamed vs Ally Seif [1983] T.L.R 32; Yesse Mrisho vs Sania Abdul Civil Appeal No. 147 of 2016 CAT, [2019] TZCA 414; Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo, Civil Appeal No 102 of 2018, [2020] TZCA 31 among other cases.
[109] Section 2(a), Matrimonial Property Act of Kenya
[110] Section 2(b), ibid.
[111] Section 2(c), ibid.
[112] Section 2(d), ibid.
[113] Section 2(e), ibid.
[114] [1984] 1 All ER 244.

contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property, and Caring for children and the family at large as the other spouse works to earn money to pay for the property.

In the case of *Ambayo Joseph Waigo vs Aserua Jackline,*[115] the Court interpreting Article 31(1) (b) of the 1995 Uganda Constitution, which is *pari materia* with Article 45(3) of the Kenya Constitution, noted that the spousal contribution to the matrimonial property can be direct or indirect; monetary or non-monetary, provided it enables the other spouse to either acquire or develop the property in question.[116] *The* Matrimonial Property Act recognises and formalises both the monetary and non-monetary contributions of parties in a marriage.[117]

In assessing the contribution of spouses in the acquisition of matrimonial property, each case must be decided on its own merit, bearing in mind the principle of fairness.[118] Likewise, the Law of Marriage Act recognises the contribution of spouses, but the scope of the concept of contribution is not defined in the statute. The term contribution was defined in the case of *Bi Hawa Mohamed v Ally Seif;* it includes domestic contribution, but domestic contribution was not defined.

In Kenya's Matrimonial Property Act, matrimonial property means the matrimonial home and homes[119], household goods and effects in the

---

[115] Civil Appeal No 100 of 2015, Court of Appeal of Uganda at Kampala (Unreported).
[116] Ibid, at p. 18.
[117] In the case of NWM vs KNM (2014) eKLR, the Court held that, courts must give effect to both monetary and non-monetary contributions that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.
[118] Muthembwa vs Muthembwa (2002) 1 EA 186, cited with approval Court of Appeal in TKM vs SMW [2020] eKLR.
[119] Section 6(1) (a), Matrimonial Property Act of Kenya.

matrimonial home and homes[120] and other immovable and movable property jointly owned and acquired during the subsistence of the Marriage.[121] However, the matrimonial property does not include property held under trust or customary law.[122]

Just like in Tanzania, for a court to divide matrimonial property, the parties must be in a marriage, they must have acquired matrimonial property during their marriage, and the marriage must be dissolved.[123] Ownership of the matrimonial property in Kenya vests in spouses according to the contribution towards its acquisition, and such property shall be divided after divorce.[124] The distribution of matrimonial property does not depend on whose name the property is registered in[125] Top of Form Even if that property is registered in the name of one person, but the other spouse contributed towards its acquisition, then each spouse has an interest in that property.[126]

The Matrimonial Property Act also allows the pre-nuptial agreement to determine property rights, and such agreements form an exception to matrimonial property. [127] These agreements can be set aside on grounds of fraud, coercion, or if it is manifestly unjust.[128] The Act allows parties to any intended marriage to agree and determine their property rights, which is enforceable provided that the agreement is not influenced by

120 Section 6(1) (b), Matrimonial Property Act of Kenya.
121 Section 6(1) (c), ibid.
122 Section 6(2), ibid.
123 P.O.M vs M.N.K (2017) eKLR, Musyoka J. See also the case of T.M.V. vs F.M.C (2018) eKLR, Nyakundi J. opined that: - "...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property."
124 Section 7, Matrimonial Property Act of Kenya.
125 CWN vs BN, Civil Appeal No. 236 of 2009, Nairobi Court of Appeal.
126 Njoroge vs Ngari [1985] KLR 480.
127 Section 6(3), Matrimonial Property Act of Kenya.
128 Section 6(4), ibid.

fraud, coercion or is manifestly unjust.[129] A spouse, just like any person, is bound by a contract made by him or her so long as it was freely made and in the absence of vitiating factors such as fraud, coercion, mistake, or misrepresentation.[130]

6.4 Alternative Dispute Resolution in Matrimonial Litigation Relating to Property Division

In Kenya, the rules governing matrimonial litigation allow for the use of Alternative Dispute Resolution (ADR) in matters related to the division of property. The court hearing a claim may, at any stage of the proceedings, but before making final orders, refer any or all the issues in dispute to mediation. This referral is made by the practice and procedure currently in force for the administration of court-annexed mediation.[131] Where the parties reach a mediated settlement concerning all or any of the issues in dispute, such a settlement shall form part of the record in the proceedings and may be adopted by the court as an order.[132] In cases where the parties fail to reach an agreement on any of the issues referred for amicable settlement under this rule, the court shall proceed to hear and determine the remaining issues in accordance with Rule 23 of the Matrimonial Property Rules.[133]

---

[129] *Federation of Women Lawyers Kenya (FIDA) vs Attorney General & anothe*r [2018] eKLR Mativo J. See also, Muchemi J. in Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) vs Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR, See also the Law of Contract Act, [Cap 345 R.E 2023], Section 14. This also entails a principle of freedom to contract. Alistair James Company (TZ) Limited vs CJ SC Logistics (T) Limited (Civil Case No. 112 of 2022) [2024] TZHC 277 Mwanga J. said the principle of freedom of contract is the doctrine of pacta sunt servanda: "A fundamental principle of law that requires the provisions of agreements concluded properly must be observed. This means that once parties have exercised their freedom to enter into a contract, they have the legal rights and obligations they have agreed to and are entitled to, and if either of the parties has suffered loss as a result of the breach is entitled to the damages." See also section the Law of Contract Act of Tanzania section, 37 and the principle of sanctity of contract which requires the parties to hourner obligations under contract unless excluded by justifiable impossibilities of performance as stated in the case of Robert Scheltens vs Sudesh Kumari Varma & Others (Civil Appeal 203 of 2019) [2022] TZCA 508 where Galeba J stated "Once parties have entered into a contract, they must honour their obligations. Neither this Court nor any other court in Tanzania should allow deliberate breach of the sanctity of contract."

[131] Rule 22(1), Matrimonial Property Rules.

[132] Rule 22(2), ibid.

[133] Rule 22(3), ibid.

Tanzania's Law of Marriage Act is silent on the use of Alternative Dispute Resolution (ADR) for resolving property rights between spouses. While Section 101 empowers the conciliatory board to reconcile parties to a marriage, the provision does not mandate the board to grant orders regarding the division of property between spouses. Moreover, the division of matrimonial property is addressed only after divorce proceedings are concluded. Under the Law of Marriage Act and its Rules, the court does not have the authority to refer parties to mediation under Part C of Order VIII of the Civil Procedure Code during the division of matrimonial property.[134] Mainland Tanzania can take this as a lesson from Kenya.

6.5 Sale and Execution Challenges in Polygamy

Section 114 of the Law of Marriage Act allows courts in polygamous marriages to divide jointly acquired matrimonial property upon divorce. The court can also order the sale and divide the proceeds of the sale between the spouses based on their contributions.[135] The option to sell must consider the interests of the spouses residing in the matrimonial property.[136] Courts have, however, noted that the provision of section 114 is not exhaustive.[137] Thus, the Court is given a broad discretion to devise a formula of division that is just and equitable according to the circumstances. Despite the above judgment, the Court has not filled the gap in the law concerning the rules of division of matrimonial property in polygamy.

---

[134] Cap. 33 [R.E 2013].

[135] Mariamu Suleimani vs Suleiman Ahmed, Civil Appeal 27 of 2010, [2010] TZHC pp. 4-5.

[136] Sixbert Bayi Sanka vs Rose Nehemia Samzugi Civil Appeal 68 of 2022 [2023] TZCA 227, at pp.10-11 the CAT held that, sale should not always be a preference where either of the spouses is ready to buy out the other whereby valuation of the house should be done and an interested and capable spouse may pay the other his or her share. The costs of valuation which should be equally shared by the spouses are normally deducted from the proceeds of sale before division. The parties ought to have been first given the right to exercise this option which we now order to be undertaken. Upon failure to exercise such right, the sale of the house will be inevitable.

[137] Mazoea Selemani vs Esha Amiri PC Matrimonial Appeal No 3 of 2016, [2016] TZHC 2021, Fauz J, at p. 8.

Section 114 does not offer sufficient mechanisms in a polygamous marriage. This is due to the reasons that: The section does not explicitly address how to handle the claims of multiple spouses, each of whom may have distinct interests and contributions over the matrimonial property to be sold. Thus, each divorcing or non-divorcing spouse might claim a share based on their perceived contribution or financial need, leading to disputes that could complicate the division process. The challenges will be how to balance the interests of multiple spouses, considering that some spouses are not interested in divorce, and their contribution towards the property has not been proven.

In polygamous marriages, determining the fair share for each spouse involves complex legal and financial considerations, but can be difficult to achieve, particularly when there are disputes over the value or when the property market fluctuates. Furthermore, meeting the standards of equitably dividing the proceeds from the sale among multiple spouses, each with potentially different claims and needs, adds another layer of complexity.

From the foregoing, it is clear that Mainland Tanzania has not fully complied with Article 7(d) of the Maputo Protocol.[138] The Protocol requires the equitable recognition of women's property rights, particularly addressing the unequal access and enjoyment of such rights during marriage. The reason is that the Law of Marriage Act does take into consideration forms of the contribution made by non-divorcing wives at the time of the acquisition of marital property and consequently at the time of sale.[139] The Law of Marriage Act has also not included the elements of equitable sharing, such as the duration of the marriage, whether the couple had children, the cause of the divorce of marriage, and the responsibility that each spouse bears.[140]

---

[138] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 11 July 2003, CAB/LEG/66.6.

[139] General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property during Separation, Divorce or Annulment of Marriage (Article 7(D)) Part III, (d), at Clause 43.

[140] Clause 44, ibid.

In polygamous marriage, for example duration of marriage is very important since wives may be married at different times, denoting different contributions. This, therefore, calls for reform.

Consequently, selling real property involves legal and practical hurdles, including obtaining the consent of all spouses to the sale, and disagreements can delay or complicate the process. Dividing property and selling real estate can affect the welfare of children and the broader family dynamics. Ensuring that the division does not adversely impact the children or the family structure adds a layer of complexity. These complexities require careful judicial handling to ensure equitable outcomes and address the unique challenges posed by polygamous marriages.

The sale of the property is further complicated by the fact that the interests of non-divorcing spouses may not have been assessed during the divorce proceedings, as they were not parties to the case. This raises concerns about how the proceeds from the sale will be divided and how non-divorcing spouses will benefit if their shares are not considered. Section 114(1) of the Law of Marriage Act aims to address these issues by safeguarding the property rights of spouses in a monogamous marriage during divorce, but ultimately does not provide solutions when it comes to polygamous marriages.

This is because Section 114(1) of the Law of Marriage Act and section 171(1) of the Land Act do not delineate how contributions are to be quantified or how property interests are to be divided in practice. This can lead to disputes over what constitutes fair distribution because some spouses' rights over the matrimonial real property have not been heard or proved. The reason is, they were not parties to the divorce because their claims are not formally recognised or assessed during divorce proceedings. Tanzania can adopt the provisions of sections 17 and 7 of Kenya's Matrimonial Property Act and rules 4 and 5.[141] These provisions allow a spouse to make an application to the court in light of property division during or after the dissolution of marriage. With this provision, all spouses' interests and rights to the matrimonial real property would have been assessed.

[141] Matrimonial Property Rules of Kenya.

Furthermore, Section 114 of the Law of Marriage Act presents a challenge for non-divorcing spouses and decree holders seeking to enforce property rights. This provision only applies when a divorce has been granted or is being considered. As a result, spouses who remain married but have contributed to matrimonial property cannot claim a share under this section, even if their contributions are substantial. This creates a gap in protection, particularly in polygamous marriages where co-wives may not seek divorce but still contribute to the family property.

Under section 54(1) (e) of the Civil Procedure Code,[142] the execution of a decree may be hindered, particularly when it comes to the sale of property that serves as a matrimonial home to other spouses and children.[143] This provision ensures that such property cannot be sold in the execution of a decree, safeguarding the rights of all family members residing there. This protection implies that a divorcing or divorced spouse may face difficulties in claiming their share through the sale of the matrimonial property, as this could negatively impact other spouses and children living in the matrimonial home.

The Law of Marriage Act, the Land Act and the Civil Procedure Code have not addressed the challenge posed by polygamous marriage in the execution of the decree by the sale of the matrimonial home. Selling the property may not be a viable solution for the remaining spouses and children in this situation. This provision implies that the divorcing or divorced wife may not easily get her shares by sale, as it may affect other spouses in the matrimonial home or property. Also, who will be liable to contribute to the divorced wife if the property is not sold? Is it the husband or the other wives? What about the interests of the children? These questions leave a lot to be desired.

---

[142] Civil Procedure Code, Cap. 33 [R.E 2023].

[143] Mwaisondola G. N., The Modern Law of Mortgages in Tanzania: The Role of the Land Act 1999 (Doctoral Dissertation, University of Birmingham 1999) 309, available at https://etheses.bham.ac.uk/id/eprint/132/2/Mwaisondola08PhDB.pdf.

The execution can have challenges since the other spouses are protected and can be allowed to file a caveat in line with Section 59 of the Law of Marriage Act. Likewise, selling the property is challenging since the non-divorcing spouse's interest in such property was not assessed during the division, as they were not parties to the divorce and subsequent division of the said property. Even if the property is sold, how will the non-divorcing wives' benefit, as their shares were not assessed? And how will the proceeds of the sale of the real property be divided? Thus, section 114(1) of the Law of Marriage Act anticipated the property rights of spouses in monogamous marriage at the time of divorce.

7.0 Conclusion and Recommendations

Kenya offers a more advanced legal framework for the division of matrimonial property in polygamous marriages compared to mainland Tanzania. Tanzania's approach, per section 114 of the Law of Marriage Act, remains limited, as it excludes non-divorcing spouses and decree holders in polygamous marriages from claiming a share in matrimonial property.

Key areas for improvement include the division of property in polygamous marriages, procedure to claim interest in matrimonial property, rights of first wives and other wives and addressing the role of pre-and post-nuptial agreements in protecting matrimonial property rights. Additionally, defining key terms such as contribution, joint efforts, and matrimonial property remains significant, among other critical legal considerations.

In light of the gaps identified in Tanzania's Law of Marriage Act regarding the division of matrimonial property in polygamous marriages, it is recommended that Mainland Tanzania should amend and enact relevant provisions drawing lessons from Kenya's matrimonial laws while adapting reforms to its specific legal and cultural context to strengthen its frameworks. Specifically, the author recommends the following: -

(i) Amend the Law of Marriage Act by enacting a comprehensive framework that guides the division of matrimonial property in polygamous marriages. Tanzania can adopt sections 8 and 17 of the Matrimonial Property Act and rules 4, 5, 6 and 7 of the Matrimonial Property Rules.

(ii) Enact a provision in the Law of Marriage Act that expressly recognises the property rights of the first wife in a polygamous marriage. This will ensure that property acquired during the marriage between the first wife and the husband is jointly owned and equally divided among them. Tanzania can learn from section 8 of the Matrimonial Property Act. This would ensure that the first wife's property rights are safeguarded, regardless of subsequent marriages, and prevent potential injustices as seen in the case of *Hidaya Kondo vs Mohamed Shaban Mumbi (supra)*.

(iii) Amend section 114 (2) of the Law of Marriage Act to include a subsection that considers the duration of marriage as a significant factor in determining each spouse's contribution to marital property. Mainland Tanzania can learn from the case of *M. A. A. vs A R (supra)*.

(iv) Amend section 106 of the Law of Marriage Act to include provisions that recognise the enforcement of pre-nuptial agreements in polygamous marriages. Mainland Tanzania can borrow a leaf from section 8(2) of Kenya's Matrimonial Property Act. By incorporating similar provisions, Tanzania can provide greater clarity and security for spouses who wish to define their property rights before marriage.

(v) Courts in Tanzania should accord an appropriate interpretation of section 114(3) of the Law of Marriage Act. That is if a spouse acquires a separate property before or during the marriage, the property does not automatically become matrimonial property. However, if the other spouse contributes to its improvement, they acquire a beneficial interest in the property equal to the value of their contribution. The Law of Marriage Act can be amended to incorporate the reasoning behind section 9 of Kenya's Matrimonial Property Act.

(vi) Amend the Law of Marriage Act to include the provision that allows spouses in polygamous marriage to have a right to sue for a declaration of interest in matrimonial real property before divorce. Mainland Tanzania can adopt the provision of section 17 of the Matrimonial Property Act. This is important in polygamous marriages where each wife may assert property rights, either jointly owned or individually acquired during the marriage. The section provides a mechanism for resolving disputes when there is ambiguity about the ownership of property, which is common in polygamous marriages. This flexibility is significant in polygamous marriages, as spouses may not always seek divorce but may still need to clarify their rights to property. Mainland Tanzania can adopt rules 4, 5, and 7 of the Kenya's Matrimonial Property Rules, which sets out the relevant procedures and specifies the courts with jurisdiction.

(vii) Amend the Law of Marriage Act by adopting the definitions of the terms "contribution" and "matrimonial property" under Sections 2 and 6 of Kenya's Matrimonial Property Act. This will specifically recognise both financial and non-financial contributions, establish what constitutes matrimonial property, and provide a solid legal basis for equitable distribution. Ultimately, it will strengthen the protection of spouses' rights and ensure consistent, fair outcomes, especially in polygamous marriages.

(viii) Amend section 114(2) (a) of the Law of Marriage to be specific on the nature of customs that the court can take into account. Mainland Tanzania can use the provisions of sections 3 and 11 of Kenya's Matrimonial Property Act. The legislature should take the lead in enacting legislation to regulate matrimonial property, which would apply equally to all, regardless of class, religion, or creed.

(ix) Amend the Law of Marriage Act to include that Alternative Dispute Resolution (ADR) be used as a mechanism to settle issues of property division in polygamous marriages. This can be mediation, conciliation or reconciliation, where spouses can file a consent agreement between them in respect of rights and ownership of interest in polygamy. This will assist divorcing and non-divorcing spouses in settling their rights regarding property division. Mainland Tanzania can adopt the provision of Rule 22 of the Matrimonial Property Rules of Kenya.

(x) Amend Section 114 of the Law of Marriage Act to give rights of non-divorcing wives to defend or make an application for a declaration of interest in the matrimonial real property before the court decides the division between the divorcing spouses as provided under section 17 of the Matrimonial Property Act of Kenya.

(xi) Amend section 54(1) (e) of the CPC and section 114(1) of the Law of Marriage Act to remove the contradiction and to allow the party with a decree to execute and provide an appropriate remedy to the remaining spouse.

Case Commentary: Ouster of Court's Jurisdiction in Cooperative Societies' Disputes: *Arusha Soko Kuu SACCOS Ltd et al v. Wilbard Urio et al*

Mathias S. Nkuhi* & Audax P. Rutabanzibwa**

Abstract

Cooperative societies' disputes in Tanzania are settled in accordance with the Cooperative Societies Regulations. The Regulations seek to preserve cooperative identity through non-adversarial mechanisms, namely, negotiation/reconciliation, reference to the registrar, and appeal to the minister whose decision is final. This dispute resolution arrangement raises a fundamental question of ouster of the High Court's jurisdiction in disputes involving cooperative societies. The court's holding in *Arusha Soko Kuu SACCOS Limited et al v. Wilbard Urio et al* (Arusha Soko Kuu) suggests that the court's jurisdiction cannot be ousted in such disputes. This commentary argues that the court in this case failed to consider the basic foundation of resolving cooperative societies as expounded by the law. This is because a model cooperative dispute settlement framework must strike a balance between preserving cooperative identity and ensuring access to equitable justice. Thus, the key elements of resolving such disputes must be premised on preservation of co-operative identity and equitable justice, exhaustion of internal dispute resolution procedures to enable cooperatives avoid confrontation in courts.

Keywords: *Cooperative societies' disputes, ouster of courts' jurisdiction, Tanzania*

1.0 Introduction

Co-operatives are unique social enterprises. Unlike other enterprises, they are autonomous associations of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise. They are established out of members' determination to be organised into self-help, self-responsible, democratic, solidarity, equality, and equity values.

In addition, such societies are guided by ethical values of honesty, openness, social responsibility, and caring for others. The values are enforced through legal frameworks that encompass seven crucial principles. These are voluntary and open membership, democratic control, members' economic participation, autonomy and independence, education, training and information, co-operation among co-operatives and concern for the community.

Co-operatives exist in multiple forms and in diverse sectors. They are in banking, insurance, microfinance, agriculture, as well as in intellectual property and other professional-based services. Settlement of cooperative societies' disputes is an ongoing concern in Tanzania. It is an area that is regulated by cooperative societies legislation.[1]Cooperative societies' disputes are settled in accordance with the Cooperative Societies Regulations, 2015.[2] The Regulations provide for non-adversary mechanisms, namely negotiation/reconciliation, reference to the registrar, and appeal to the minister.[3] Accordingly, the decision of the Minister responsible for cooperative affairs in resolving disputes is final and conclusive.[4]

Despite the mechanisms, multiple legal issues have arisen within a few years, making the area a contentious and ongoing concern. The contentions revolve around the role of the Cooperative Societies Registrar's in resolving conflicts, limited avenues for appeals and side-lining of cooperative societies' self-regulation mechanisms. The court's authority over such disputes, and the recent adoption of Cooperative Societies Dispute Settlement Guidelines 2022,[5] also form part of key concerns on the existing framework. This commentary focuses on the court's authority in cooperative societies' disputes.

---

[*] Department of Law, Moshi Co-operative University, mathias.nkuhi@mocu.ac.tz.
[**] Department of Law, Moshi Co-operative University, ruttta05@gmail.com.
[1] Cooperative Societies Act [No. 6 of 2013] Cap. 233, [R.E. 2023].
[2] Cooperative Societies Regulations, Government Notice No. 272 of 2015.
[3] Regulation 83, ibid.
[4] Regulation 83 (9), ibid.
[5] Providing for cooperative dispute settlement through five levels namely; cooperatives, local government authorities, assistant registrar, appeal to the registrar and other authorities (including courts of law) thereby creating new path to cooperative disputes settlement and which is in conflict with regulation 83 of the Cooperative Societies Regulations, 2015 which provides for three levels of negotiation/ reconciliation; reference to the Registrar and appeal to the Minister.

The controversial issue is whether the adversarial court system may be resorted to in cooperative societies' disputes settlement in Tanzania. So far, courts have diverging opinions on the question. The dominant position is that ordinary courts cannot entertain such disputes. They must be dealt with in accordance with procedures provided under Regulation 83.[6] Kihwelo, J explained the logic behind this position in *Daudi Gerald Kilinda v. Chama cha Msingi Kalemela*. Accordingly, the underlying logic behind the dispute settlement machinery provided by the said co-operative legislation is to encourage harmony and peace within co-operative societies and ultimately allow co-operative businesses to thrive.

The mechanisms are designed with a view to avoiding paralysing co-operative societies in businesses through adversarial and protracted court litigation, which may result in dividing co-operative societies as well as their members. Only exceptions would be where local remedies are exhausted, and judicial review is preferred.[7] Also, a dispute is not a cooperative dispute, which will have to be dealt with in accordance with normal procedures.[8]

The position that courts can entertain cooperative societies' disputes notwithstanding Regulation 83 is the basis of the decision in *Arusha Soko Kuu SACCOS Limited and another v. Wilbard Urio*.[9] The High Court of Tanzania, in our view, disregarded the existing law on cooperative dispute settlement. Notably, the decision embodies *per-incuriam* postulates which, if endorsed, could raise concerns among co-operators, stakeholders and the co-operative movement in general.

---

[6] See: Asha Iddi v. Babati SACCOS Ltd and another Civil Appeal No. 30 of 2019, High Court of Tanzania (Arusha District Registry) at Arusha (unreported); Daudi Gerald Kilinda v. Chama cha Msingi Kalemela Civil Appeal No. 5 of 2019, High Court of Tanzania (Tabora District Registry); Babati SACCOS and Another v. Reginald Sanka [Land Appeal No. 67 of 2019, High Court (Land Division) at Arusha (unreported); and Ladislaus Mashauri Msana v. Mashima SACCOS Limited and another Land Case Appeal No. 16 of 2018, High Court of Tanzania, (Moshi District Registry).

[7] Manager Majengo SACCOS v. Medrad Prosper Nyakulima PC Civil Appeal No. 7 of 2020, High Court of Tanzania (Dodoma District Registry) at Dodoma (unreported).

[8] As per Masara J, in Asha Iddi v. Babati SACCOS and another (supra) note 6.

[9] Civil Appeal No. 6 of 2019, High Court of Tanzania [Arusha District Registry].

The concerns in this commentary are on, *inter-alia,* the incorrectness of the submissions; oversights of the procedural requirements;[10] and the manifested unfamiliarity with the applicable legal mechanisms in the resolution of co-operative societies' disputes. The commentary, thus, seeks to enlighten on these issues which pose, *inter alia,* social, legal and policy questions. If not addressed, these issues may lead to conflicting legal positions in co-operative dispute settlement in the country.

2.0 **Brief Facts of the Case and Issues for Determination**

The case relates to a cooperative society based in Arusha. The first appellant was a Savings and Credit Co-operative Society (SACCOS). The respondent was a member of the first appellant, and the second appellant featured as a debt collector of the first appellant. The first appellant had issued a loan worth 15 million Tanzania Shillings to one of its members (the borrower). The loan was guaranteed by the Respondent. The borrower defaulted on repaying the loan.[11] The first appellant issued a default notice for the unpaid loan.

Sadly, the borrower passed away, and the first appellant seized the respondent's goods and shares[12] to recover the unpaid part of the loan. The respondent sued the appellants at the Resident's Magistrate Court at Arusha (the trial court) to recover what was taken from him. The trial court upheld the claim and ordered a refund as prayed. The first and second appellants appealed to the High Court.

Based on the grounds of appeal, the High Court raised three issues, namely:

(i) whether the trial court was vested with the requisite jurisdiction;

(ii) whether the trial court correctly considered the evidence adduced and the applicable law governing parties to the case; and

---

[10] The same presupposes an unsettled understanding of co-operative enterprises.

[11] The borrower had only made part repayment.

[12] The seizing was compliance to their Constitution (By-Laws). The death of the borrower transferred liability to him as a guarantor.

(i) what would be the parties' appropriate reliefs?

Having considered the issues, the High Court dismissed the appeal on the ground that the trial court had jurisdiction to entertain the matter.

This commentary focuses on how the court addressed the first issue, that is, ordinary courts' jurisdiction in co-operative societies disputes under the relevant Tanzanian law. The analysis is done by way of underlining critical oversights by parties and the Court. Although the question of jurisdiction was apparently not addressed by the trial court, it arose at the appeal stage and became central to the appeal.

3.0 Parties' Submission on Jurisdiction

Counsel for the appellants maintained that the trial court lacked jurisdiction because section 130(1) of the Co-operative Societies Act, read together with Regulation 83(1) of the Co-operative Societies Regulations,[13] requires disputes involving co-operative businesses to be settled amicably through negotiation or reconciliation before it is referred to the Registrar. Counsel referred the court to *Evatha Michael Mosha v. Shalom SACCOS & 2 Others*[14] to support his argument. He relied on sections 94 and 95 of the Co-operative Societies Act on the issues of the courts' jurisdiction on co-operative disputes.[15]

Counsel for the respondent submitted that the matter was referred to the District Co-operative Registrar as well as the Regional Registrar according to the applicable law. He argued that by doing so, the respondent had exhausted local remedies.[16] Thus, it was the appellants who frustrated the process by failing to comply with the orders not to sell and to return the property issued by the District and Regional Registrars.

[13] Supra note 2.
[14] Misc. Appl. No. 109 of 2019 High Court of Tanzania (Arusha District Registry -Unreported).
[15] Section 94 is on cost of enquiry while section 95 is on surcharge.
[16] Available remedies within the co-operative societies' legal framework.

Foremost to our observations is the wrong citation by the appellant's Counsel of the provision of the Co-operative Societies Act. Counsel referred to section 130(1) of the Act, which has nothing to do with co-operative societies' dispute settlement.[17] Presumably, the learned Counsel may have confused the section with regulation 130(1) of the Credit and Savings Co-operative Societies Regulations (Government Notice No. 115 of 2015).

Assuming that was the case, again, the Regulations had, at the time, been repealed by the Microfinance (Savings and Credit Co-operative Societies) Regulations, 2019.[18] Moreover, Counsel referred to the case of *Evatha Michael*, and relied on sections 94(2) and 95(1-4). In our opinion, the provisions were wrongly and erroneously relied upon. They were inapplicable in the circumstances of the case.[19]

Section 94 of the Co-operative Societies Act relates to powers given to the Registrar to recover costs incurred in the course of conducting an inquiry into the business affairs of the co-operative society (pursuant to section 91 of the Act) or to recover costs incurred for conducting an inspection of societies (pursuant to section 93 of the Act). The section gives power to the Registrar to recover both types of costs through the magistrates' courts in cases where persons who were supposed to pay decline to heed his demand.

On the other hand, section 95 gives power to the Registrar to recover the amount of money surcharged to the co-operative leaders or employees discovered to have misappropriated co-operative funds after conducting an inquiry or inspection. The section provides that such surcharge amounts may be recovered by the Registrar through the magistrates' courts, in case the person so charged refuses to heed the Registrar's surcharge demand notice.[20]

---

[17] The right provision is section 141(2).

[18] Government Notice No. 675 of 13th September 2019; the Regulations were made following the enactment of the Microfinance Act No. 10 of 2018 [Cap 407 of the Revised Laws].

[19] Section 94(2) and 95 (4), inter alia, give mandate to the Registrar to initiate proceedings in the magistrates' courts (District Court or a Court of Resident Magistrate) to recover cost of enquiry and surcharge.

[20] Section 95 (3) (b), Cooperative Societies Act, Cap. 233.

The provisions referred to above have nothing to do with co-operative societies' dispute settlement machinery. Reference to them was misleading, and the impression, which was created, and which we believe to be wrong, was that it is the Registrar who has the discretion to take disputes to the Courts.[21] There was no submission as to what constitutes a cooperative dispute. However, even with its address, there would not be a probability of including the Registrar's inquiry or inspection under the subject sections.

The submissions were neither contradicted by the Respondent's Counsel nor were they noticed by the Court. They thus remain to be '*per-incuriam* submissions. Further, the Co-operative Societies Act and Regulations made thereunder neither refer to "District Co-operative Registrars" nor "Regional Registrars." It was wrong, therefore, to refer and rely on the two as if they were part of the existing machinery for resolving cooperative societies' disputes.

The mandate to entertain disputes from co-operative societies, after failure of amicable settlement, is given to the Registrar.[22] In discharging this mandate, the Registrar is assisted by the Deputy Registrar in charge of regulatory functions.[23] The law, however, recognises Assistant Registrars who are to carry out duties as may be assigned to them by the Deputy Registrar or the Registrar[24].

It may, therefore, not be proper to assume that all co-operative officers in a district or region are vested with the functions of entertaining co-operative disputes. This was the assumption that the Court made in the case at hand. There must be proof to that effect, and the respondent ought to have submitted proof of the "District/Regional Registrar" mandate on entertaining such disputes.

[21] The impression is substantiated by the Court's serious consideration of the use of the word "May" under the sections.
[22] As per regulation 83(2) of Co-operative Regulations, 2015; furthermore, the Registrar's authority is provided for under section 10 of the Act.
[23] As per section 11(3) read together with section 8(2) (a).
[24] As per section 12(2).

Furthermore, contrary to what the respondent's Counsel averred, it is submitted that there was misdirection on the exhaustion of local remedies. Assuming that there were failed reconciliation/negotiation attempts and subsequently reference to the Registrar, there is nothing to suggest that the dispute was referred to the final authority - the Minister responsible for co-operative matters.

The law imposes a mandatory requirement that disputes concerning co-operative business be first settled amicably through negotiation and reconciliation.[25] Where such a settlement fails, the dispute shall be referred to the Registrar within 30 days from the date of its failure to settle. According to the law, reference to the Registrar must be made through Form No. 13 and the Registrar is supposed to settle the dispute that has been referred to him through arbitration.[26] There is a right to appeal by a party aggrieved by the decision of the Registrar.

The law provides for the right of appeal to the Minister responsible for co-operatives.[27] Referring to the facts of the case, the respondent's counsel did not offer any submission on the futility of the whole process; that is, the respondent's appeal to the Minister responsible for co-operatives. An appeal to the Minister would have signified exhaustion of the so-called local remedies and, consequently, the remedies stood unexhausted as per the dictates of the law when the respondent decided to take the matter to the trial court.

Thus, the respondent's Counsel submission on exhaustion of local remedies ought to have addressed the respondent's proof of compliance with amicable negotiation or reconciliation; reference of dispute to the Registrar; and appeal to the Minister as per the dictates of the law.

In response to the arguments by the appellant's Counsel, regarding Registrar's power to take matters to the magistrates' court, the respondent's Counsel was of the view that section 94(2) is not

---

[25] Co-operative Societies Regulations, 2015, Regulation 83 (1).
[26] Regulation 83 (2), ibid.
[27] Regulation 83(9), ibid.

mandatory for the dispute of that nature to be referred to the Court by the Registrar. He maintained that the provision uses the word "may" and not "shall."[28]

As earlier observed, we reiterate that this entire argument was irrelevant and the section was wrongly relied upon. Our firm view is that Counsel for the respondent failed to discharge his duty in assisting the Court by spotting the wrong sections relied on by the appellant's advocate. We are forced to think, in the circumstances, that both Counsel were not conversant with the legal prerequisites under the Tanzanian co-operative societies' legislation and generally the machinery for settlement of such disputes.

4.0 **Court's Decision and Reasoning**

After considering submissions by parties, the Court held that the trial court was vested with jurisdiction to entertain the dispute. Accordingly, the basis for the holding was that courts have a constitutional mandate under Article 107A of the Constitution of the United Republic of Tanzania.[29] Under the provision, courts are conferred with the final authority in the dispensation of justice in the United Republic of Tanzania.

Thus, the Judge convinced that the trial court had jurisdiction to entertain the case because the respondent had exhausted all available avenues in the settlement of the cooperative dispute.[30] The Court referred to the decision of the High Court in *James F Gwagilo v Attorney General*[31] where Mwalusanya J (as he then was) held that statutory clauses ousting courts' jurisdiction are ineffective to exclude the High Court in discharging its judicial review and supervisory power.

---

[28] Section 94(2). Cooperative Societies Act, Cap.233.

[29] The Article reads: "107A.-(1) Mamlaka ya utoaji haki katika Jamhuri ya Muungano itakuwa mikononi mwa Idara ya Mahakama na Idara ya Mahakama ya Zanzibar, na kwa hiyo hakuna chombo cha Serikali wala cha Bunge au Baraza la Wawakilishi la Zanzibar kitakachokuwa na kauli ya mwisho katika utoaji haki." The English version of the provision is: "107A.-(1) The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania".

[30] The fact that he had referred the dispute to the Registrar and there was 'disregarding' of the Registrars decision by the Appellants creating a no option for the Respondent.

[31] [1994] TLR 73 HC.

Our conviction on the decision and the reason thereof, on the contrary, is that it was made without taking into consideration the underlying logic behind the existing cooperative dispute settlement machinery, the completeness of the machinery as well as the role of courts in the process. It is indeed correct that courts' power cannot be ousted as per Article 107A. The only departure is on the question of when courts are supposed to get involved.

Article 107A, *inter alia,* bars other dispute settlement machineries from being final authorities in the dispensation of justice. The Article, in our opinion, does not empower courts to disregard other forums lawfully set up to dispense justice. Importantly, the Article suggests that other authorities can entertain disputes at their inception or initial stages, and courts will be the final authorities when disputes are not solved, and internal mechanisms are exhausted. In the cooperative disputes' settlement machinery, the Minister responsible is the highest authority.[32]

We are of the view that the holding by the Court that the trial court has powers to deal with the matter (not necessarily the High Court alone) must be looked at cautiously. Logically, it will not be proper to subject the Minister's decision to a subordinate court even under the auspices of Article 107A. Moreover, the declaration that the respondent had exhausted local remedies had neglected the critical steps that parties to cooperative disputes must adhere to. There was no evidence of reference to a dispute to the Registrar (neither to the so referred to as District and Regional Registrars).[33] Besides, there were neither parties' submissions nor Court findings on the involvement of the Minister responsible for co-operative matters.

In essence, the Minister's involvement signifies the exhaustion of internal avenues within the co-operative dispute settlement machinery.

32 Regulation 83, Cooperative Societies Regulations 2015.
33 Supra note 22.

Thus, it is incorrect to rely on the move by a party to justify exhaustion of the internal mechanisms.[34] The decision, therefore, that the trial court had jurisdiction because the respondent had exhausted local remedies, is, in our opinion, a *per incuriam* decision.

5.0 **Policy, Legal and Social Implications**

The decision in *Arusha Soko Kuu,* being a decision of a superior court, has various implications in the legal system of Tanzania, particularly on the settlement of co-operative disputes. Under the common law system, which is also applicable in Tanzania, a decision of a superior court is binding on lower courts under the doctrine of *stare decisis.* There are apparent anomalies pointed out in this commentary which led the Court to the wrong direction and ultimately the decision. It is correct to say that a Judge plays an impartial role in settling disputes that are brought before the court.

However, even with the little assistance from counsel, the court is obliged to ensure that the correct legal position is ascertained and that the appropriate decision is arrived at.[35] The issue of courts' jurisdiction in co-operative society disputes is very fundamental, which requires serious determination by our courts of records. The decision in the present case leaves more questions than answers. The decision has notable flaws. From the legal point of view, and as pointed out earlier, the decision was based on wrongly cited provisions and a wrong assumption that internal remedies had been exhausted.

The decision prompts legal principles which conflict with those under the conventional framework for settlement of co-operative disputes. There are social, political, legal, and/or policy ramifications from the decision itself.

---

[34] The Court observed:
"…case [of Evatha Michael] presupposes that the court's jurisdiction is ousted if the internal mechanism of dispute settlement is not exhausted….in the case before me, as well submitted by the respondent, there was a move to reach such settlement by negotiation as opposed to the above case of Evatha Michael… [Emphasis ours by Italicising and bolding].
Moreover, the assertion that 'there was a move to reach such settlement' cannot be equated to exhaustion of local remedies. Even if one looks at the said 'move' from the degree or stage it had reached, the above cited law is clear that local remedies are exhausted with the decision of the Minister responsible for co-operatives, the appeal which the respondent did not make.

[35] There were several wrongly cited provisions of the co-operative society legislation by counsel for both parties and which were later, mistakenly, endorsed by the court resulting to this decision.

The ramifications revolve around the co-operative dispute settlement machinery as well as the relationship between the machinery and ordinary courts of law. The decision puts the courts of law and the co-operative system at loggerheads.

Courts, bound by this decision, will claim to have jurisdiction from the initial stages of the proceedings; that is, even under the unfit circumstances. The danger posed by the decision is the likely floodgate of co-operative disputes to ordinary courts before exhaustion of the existing co-operative dispute settlement machinery. In such a situation, the chances of the existing machinery for settlement of co-operative disputes being ignored are high.

Consequently, it is more likely that the existing machinery may become redundant, affecting the key actors, including the Registrar and Minister responsible for co-operative matters. Ignoring the machinery and its likely redundancy is likely to come with the social costs of loss of the co-operative identity and consequently the co-operative entity.

In addition, holding that mere attempts to resolve the dispute are sufficient to justify taking the matter to the court defeats the underlying cooperative philosophy of preservation of co-operative identity through amicable procedures. This is important taking into consideration the fact that the existing machinery for co-operative dispute settlement is designed to encourage peace and harmony amongst co-operators.

Further, the holding by the Court that even the trial court can entertain a cooperative dispute (relying on Article 107A) was too general. It failed to consider the demarcation between co-operative and non-cooperative disputes. The former must adhere to the existing machinery under the Co-operative Societies Act, 2013, while the latter are subject to other municipal laws such as land, criminal, labour and business laws.

On the other hand, the holding that any court can entertain a cooperative dispute creates a conflict between the subordinate courts and the High Court when exercising supervisory and judicial review powers over administrative bodies, including that of a Minister under the co-operative societies' settlement machinery.

The cooperative societies' legislation does not define cooperative disputes, and courts' decisions are somewhat divergent on what cooperative disputes are, as well as what is to happen when matters involving cooperative societies are submitted before it. However, there is a common understanding that a co-operative dispute is one that concerns the business of a co-operative society.[36]

Thus, there is a need, in the long run, to clarify the definition and scope of a co-operative business to enable courts to assess themselves as to whether they are clothed with relevant jurisdiction. The decision poses another important legal consideration regarding the need to have a clear policy on the status of the societies' constitutions (by-laws). Registration of co-operative societies is dependent on the existence and content of their by-laws.[37]

Significantly, matters contained in the by-laws are primarily determined by the members. For credit co-operative societies, their by-laws are required to include, *inter alia,* provisions relating to loan issuance and security for assurance of repayment of the said loans.[38] By-laws are legally binding on the registered society and its members as if they contain a covenant by each member to observe them.[39]

---

[36] See note 6 (supra), some courts' opinions converge with the position that a court has no jurisdiction over disputes concerning business of co-operative societies once it is found out that the dispute which is brought before them concern co-operative businesses. These courts assert that in the latter situation court's responsibility is to direct the disputants to the proper dispute settlement machinery. Other court opinions suggest that courts have jurisdiction to entertain disputes from co-operative societies, but they should do so after ascertaining that disputants' exhaustion of local remedies under co-operative law.

[37] It is the document that signifies existence of a co-operative society as a legal entity; it is required on registering the co-operative society. See section 30 of the Co-operative Societies Act, 2013 and Regulation 12 of Co-operative Regulation 2015.

[38] Section 52(3).

[39] Section 54(1).

Strangely, from the present case, the Court looked at the appellants' refusal to heed the so-called District and Regional Registrars' directives[40] as a hindrance to exhausting local remedies. Essentially, the appellant, being a duly registered co-operative society, was exercising that which is directed by its by-laws. The by-laws were approved by the Registrar, who, in our view, is estopped from denying their contents, requirements and their legal binding nature. Respecting societies' by-laws is thus a critical area that requires policy and legal consideration to allow co-operatives to operate smoothly.

6.0 **Conclusion**

The ruling in *Arusha Soko Kuu is* significant to the ongoing concerns regarding the Tanzania's framework for settlement of co-operative societies' disputes. The case has manifested critical issues relating to understanding and application of the co-operative philosophy, underlying principles and values, as well as co-operative societies' dispute settlement machinery. The holding is premised on flawed and unpacked submissions. It poses a significant threat to the preservation of societies' identity through amicable machinery currently in existence.

For purposes of attaining the aims of preservation of co-operative identity and equitable justice, exhaustion of internal dispute resolution procedures will continue to be necessary to ensure that co-operatives do not become centres of confrontation in courts of law at the expense of tranquillity in co-operative businesses.

However, if the aims of equitable justice are not attained even after exhaustion of internal procedures, courts of reference should have jurisdiction over co-operative business disputes. Thus, legal practitioners need to be well versed with the requisites of the co-operative legal machinery on dispute settlement to ensure that the anticipated balance is attained in cases where the disputes find their way to ordinary courts of law.

---

[40] Appellant's confiscation of the Respondent's properties as a means to force him to repay the defaulted loan as a guarantor was in conformity with their by-laws and loan agreement. Unfortunately for them, they were ordered by the so called "District and Regional Registrars" to return the said properties. The authors' think that the orders made were legally wrong for they were in conformity with the society by-laws which are legally and dully registered.

Law Reform Commission of Tanzania
University of Dodoma
Mkalama Road
Academic Building No. 1
P.O Box 1718,
Dodoma
Telephone: +255 734356685-6
Email: lrct@lrct.go.tz
Website: www.lrct.go.tz