

AN ANALYSIS OF MATRIMONIAL PROPERTY DILEMMA:

A CASE STUDY OF UGANDA.

BY

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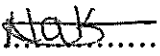
**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF
THE DEGREE OF BACHELOR OF LAWS OF
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DECLARATION

I hereby declare that this is my own work to the best of my knowledge and belief. It contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institution of higher learning except where due acknowledgement has been made in the text.

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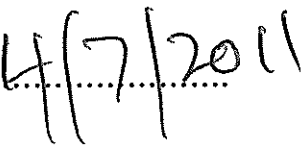
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APPROVAL

"I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Law of Kampala International University".

Name of Supervisor: Mr. Muhamud Sewaya

Signature:.....

Date

DEDICATION

I am indebted to my family for the unreserved support and encouragement during the entire programme of Bachelor of Laws at Kampala International University.

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I gratefully acknowledge the support given to me by my parents, Mr Kimbowa John Baptist Evans, Mrs. Nandawula Sarah, Mrs. Namazzi Betty, and my Sister Namiyingo Justine' during the entire period of study and particularly during the writing of this research.

I would like to express my thanks to my supervisor, Mr. Muhamud Sewaya for his advice and unreserved guidance in the writing of this research.

Last but not least, I must thank my friends Namiiro Florence, Muheebwa Priscilla, Twijukye Kenneth and Bakundane Esther at Kampala International University for tirelessly motivating me during the research and making corrections where necessary Nakitende Teddy and Nabawanuka Edith for helping me with typing and Namutebi Geminah who under took the task of proof reading my work.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 Background to the Study

Several conflicts arise between spouses. The bulk of problems are experienced by women, more so on divorce or death among others of the spouse and particularly on the issue concerning matrimonial property. Also disputes may arise concerning matrimonial property between spouses, co-wives, between wives and husbands relatives upon the death of a husband or wife

Evidence of disputes over matrimonial property shows that disputes are more common in all tribes especially among the Buganda among other tribes especially in relation to land issues. It appears that because of the stigma attached to those who report conflicts, majority of property related disputes are resolved by the parties involved. In most cases disputes are not referred to third parties for mediation because of fear of publicity. Most people prefer to deal with the disputes behind closed doors. However there is substantial evidence that in most cases such matters are never resolved but rather shelved away never to be revisited. Women are reluctant to disclose property related wrangles for as long as they are still in the marriage, women often fear seeking intervention because of the time and expense involved in suing their husbands yet at the end of it all the results may not be their favour.

Similarly there is fear among men emanating from the feeling that they will be stigmatized or ridiculed if they reported their wives to an external authority. Men and women conceded that it is mainly the women who experience the above problems because they are the disadvantaged.

Although in a few cases women are the aggressors, in the majority of cases, women are usually the aggrieved parties.

The type of property which gives rise to disputes varies from home to home especially in commercial houses, land, money and the division of matrimonial property between co-wives. Also husband- wife joint ownership of matrimonial property (joint estates) is also a major source of conflict between spouses, especially on divorce. Spouses at times fail to come to an agreement on how to manage and or develop or how to share proceeds from jointly owned Property.

To some extent house hold chattels are a source of conflict especially in the event of divorce or separation. Disposing of matrimonial property such as cash crops by wives without seeking permission from their husbands and for no good reason also causes conflicts.

1.1 Definitions

1.1.1 Property

Property is anything that you can own exclusively with the protection of the law¹. Therefore, ownership need not of course be by an individual only, but it can be by any of several kinds of groups who are right to own property the law recognizes. Property is the generic term for all that a person has dominion over. It belongs to a person exclusively of others and can be the subject of bargain and sale. It is indicative and descriptive of every possible interest which a party can have. Property can be divided into real and personal.

¹ *You and the law reader digest by William and Salter.*

It includes gifts by will, choses in action shares, shares in a company, good will, trademarks, rights under contract, chattels, goods, money valuable securities and others.

Black's law dictionary², gives the definition of property, that property is the right to possess, use and enjoy a determinate thing.

Section 1 (j) of the Sale of Goods Act³ defines property and it states that property means the general property in goods and not merely a special property. In **Re Keene**⁴, It was held that the notion "Property" includes intangible as well as tangible assets.

1.1.2 Matrimonial property

The question of matrimonial property raises various situations on a number of points. There is property that may be acquired by the spouses jointly and for joint use. It may be property owned separately by the spouses. It may also include property acquired by one spouse and the other has no interest in it.

Further it may include property in which title is vested in one party but the other carried out improvements on that property.

It is these various dimensions that have given rise to cases concerning how such property may be shared particularly when the two parties want to live apart.

Women like any other person can freely own property such as land and can own other property in their own right regardless of their marital status. Several issues have arisen with regard to property vested in one party but another one carries out some improvements on it either by cash payment or by work done on that party.

² *Eight edition Bryan A. Garner.*

³ *Cap 82.*

⁴ *(1922) 2 Ch 475.*

The issue is if such improvements are effective, do they give any interest to the party undertaking them.

In a number of cases, the principle is that interest may be acquired by the party carrying out the improvements if such improvements are substantial in nature.

In Pettit Vs Pettit⁵, the wife bought the matrimonial home and registered it in her names as a result of doing work on that home by the husband, he claimed that he had improved the property's value by over \$ 1,000, most of the work done by the husband consisted of redecorating the banglow in question making the garden, a wall and some work outside the house.

No agreement as to his rights was made. The two subsequently separated and the issue was whether or not the husband had acquired some interest in this property. It was held that he had acquired nothing.

1.1.3 Spouses

The term spouse generally refers to a partner in a marriage. For instance husband referring to a male, wife referring to a female⁶. However, in some usages, a partner in a civil union, domestic partnership or common law marriage. Spouse is selected; depend on a society's view of the

⁵ (1969) 2ALLER 385.

⁶ [Http://www.iflr.com/Article/21117396/spouses](http://www.iflr.com/Article/21117396/spouses).

family. Its role. For example in Northern Uganda, some families marry their young daughters; they give to their own children⁷.

According to **Black's Law dictionary**⁸ gives the definition of spouses as one's husband or wife by lawful marriage, a married person.

1.1.4 House hold property

It is possible for one spouse to sell goods to the other and property will pass to the buyer even if the goods are to remain in the house. This is because in the **Law of Sale of Goods Act**⁹, property passes independently of delivery. However the household property in Uganda, men controls most of the house hold incomes and resources.

A husband may appropriate even money earned by a woman or he may control the spending of money¹⁰. Difficulty arises, however with regard to gifts made between spouses. This is because spouses rarely make agreements for those gifts, if an agreement for these gifts is made; property there in will pass without difficulty. Since the passage of property to the donee will be inferred from the execution of the agreement with regards to gifts without a accompanying contracts /agreements between spouses, two difficulties arise.

Normally, the spouses will use the property together. Spouses frequently use that other property such that an intention to make a gift cannot be readily inferred from the permission to use the chattel in question. In this light, the burden of proof lies by the spouse alleging a gift from

⁷ <http://www.unicef.irc.org/publications/pdf/ibid>.

⁸ *Digest fe pdf*.

⁹ *Cap 82*.

¹⁰ *Obbo, (1989) Matovu (1995); WLEA, (1997) page 20.*

another. It's higher than that of a stranger it's quite difficult to prove delivery with regard to gifts which are for the exclusive use of the donee like giving your husband the pair of shoes among others. However, difficulties arise with regard to goods which have been already used by both parties in the house and will continue to be used even when they are given away as gifts for example furniture in the house. In **Lock v Health**¹¹, the husband was held to have given all his furniture to the wife by a symbolic delivery of a chair. Generally courts are slow to infer the delivery of a chattel from one spouse to another. This is because of danger that spouses might fraudulently allege a prior gift of the goods to the other in order to keep such goods out of the hands of a creditor.

Accordingly, courts require proof of an existing transaction involving such gifts from one spouse to the other and also effective delivery.

In **Re Cole**¹², the husband completely furnished a new house before the wife set foot on it, when she connived in the home, the husband put his hands over her eyes, took her into the first room and uncovered her eyes and said look and she went then into the other rooms and handled other various items at the end of this, the husband said, it's all yours, the furniture nevertheless remained insured in the husband's name. The husband then became bankrupt. The issue was whether or not the trustee in bankrupt was entitled to the goods in question or the wife had failed to establish an effective delivery and consequently the gift to her was never perfected.

¹¹ (1892) viii TLR 195.

¹² (1953) 3 ALLER 433.

1.1.5 Inheritance

According to **Black's Law Dictionary**¹³, inheritance refers to property received from an ancestor under the laws of intestacy. In case of the matrimonial home, it should not be distributed. The widow/widows/ widower are entitled to stay there until they die, remarry or voluntarily leave. The minor children who are below eighteen years.

If male and female are also entitled to stay in the principal matrimonial home until they attain majority age. And if the Administrator of the estate of the deceased previously unknown, such property whereby nobody claims a right to occupy it is disposed of like other property belonging to the deceased. Where there is more than one legally recognized widow, they all share the percentage due equally, the children of the deceased share a certain percentage of the whole estate irrespective of their sex and whether born within or outside marriage.

The customary heir takes a small percentage of the deceased's estate plus any other share to which he or she might be entitled as a child of the deceased or a dependent.

In this case, the Administrator must act accordingly to the law otherwise he or she will be removed by the court upon sufficient evidence being brought before it of mismanagement. He or she can also be ordered to compensate the estate.

Nobody has authority to deal with the property of obtaining letters of Administration from court. Where a wife has been separated from her husband as a member of the household for six months or more and he dies intestate, she will not be automatically entitled to share the deceased's property. She has to apply to court before his death or within six months from the husband's death to be able to share the property. She has to show that she was separated from the deceased

¹³ *Supra.*

for reasonable cause and the contents of a separation agreement must conform to the provisions of written law and should not be inconsistent to the 1995 constitution of Uganda as amended under Articles 31 and 33¹⁴.

1.2 Statement of the Problem

Matrimonial property is jointly owned to overcome procedural problems but this has not by its totally eliminated such problems that arise when there are dispute within the spouses in matters concerning their matrimonial property. It appears that the absence of marital law property regimes and the resultant fear of men either interfering with the management or actually taking over women's property, prompts women to conceal property. Much as women are ready to share their husband's property, they are in no way willing to have their shared at the dissolution of marriage.

However, to a lesser extent, men too, conceal property especially when they are planning to marry other women¹⁵.

1.3 Objectives of the study

The general objective of the study is to investigate the effectiveness of the law on matrimonial property.

The specific objectives of the study are:

- a) To identify the role played by each of the spouse in case of substantial contribution.
- b) To identify the legal effect of matrimonial property.
- c) To establish the importance of owning separate property.

¹⁴ WAMY (1995).

¹⁵ Percy Ntuhaise ver, I.D matovu, *Muslim Women in Marriage and Household Resource Management in Uganda*, pg 27.

d) To identify the steps that can be taken to improve and effectively manage the issue of matrimonial property.

1.4 Research Questions

The following questions have guided the research findings:-

- a) Does our law recognize the concept of separate property?
- b) In case of divorce or separation, how do the spouses go over the issue of property?
- c) What about in a situation where a woman does not work?
- d) What legal measures have been put in place to deal with property?
- f) How effective have these measures been?
- e) What measures need to be established to effectively manage the issue of matrimonial property?

1.5 Significance of the study

This study will highlight the problem of matrimonial property in Uganda. It is also aimed at concealing any loopholes created by the existing laws of the land and trying to come up with recommendations which can ensure that the existing laws do fully address the function for which they were established to address.

1. 6 Methodology

This study used both quantitative and qualitative methods of data collection as these were found to be the most appropriate because of the need to gather enough information on the subject. These methods allowed the collection of data from the areas analyzed in this study. Data was also collected from a detailed library research concerning the subject. There was also field

information obtained and more supplements from the Internet, various research papers, booklets and journals.

1.7 Literature Review

Several international laws and conventions directly or indirectly grant spouses the right to own and control resources. These include Declaration of the Conventions of Elimination of all forms of Discrimination Against women, the international Covenant on Economic, Social and cultural Rights the International Convention on civil and political Rights and the Universal Declaration on Human Rights.

In addition to International Law and Conventions the frame work for founding spouses rights in issues concerning property in Uganda as a country was established by the British and comprises of diverse ethnical groups and different religious include Islam and Christianity. English Law was imported into Uganda as part of the imposition of colonial administration in Uganda. The Uganda Order in Council 1902, provided for the application of English common law doctrines of equity and natural justice. These laws were to apply in so far as the circumstance of the colony permitted. The Governor of the colony also had powers to pass ordinances for the governance of the Ugandan colony. Between 1904 and 1906 marriage laws were promulgated. These laws took into account the religious and cultural diversity of Uganda and provided for pluralism in the area of personal status laws¹⁶.

¹⁶ Percy night Tuhaise Vero, I.D Matovu, *Muslim Women in Marriage and Household Resource Management in Uganda*, pg 32.

Pluralism, in term of state recognized laws in the area of personal status laws has survived up to the present. These laws include, the Marriage Act¹⁷ and the marriage of Africans Act¹⁸. The above two Acts recognize and apply to monogamous marriages celebrated under them.

The Constitution of the Republic of Uganda¹⁹ presents news and fundamental changes which point out the issue of property among others. Article 26(2) of the 1995 Constitution provides that “Every person has a right to own property either individually or in association with others”. **Article 31 (1)** accords spouses equal rights in marriage and upon its dissolution.

Article 31 (2)²⁰ provides that parliament shall make appropriate laws for the protection of the rights of widows and widower to inherit the property of their deceased spouses and to enjoy parental rights over their children.

This article of the Constitution tackles abut of property issues especially the issue concerning inheritance of property. The **Land Act of 1998**²¹ has to a point addressed the issue of property concerning the rights of the spouse in a matrimonial home. In this way women as daughters and wives are empowered to sufficiently assert their rights at individual and family levels to the property in a home. Under common law, the husband was under the duty to provide matrimonial home for his wife and an upper hand in determining the location for that home.

Section 39 of the Land Act²² prohibits the sale, transfer, mortgage among others of land where the family resides or where it derives its livelihood without the consent of the spouse. It safeguards the matrimonial home irrespective of the registered owner parties should ideally agree before marriage where the matrimonial home should be. If they fail to agree, court need to look

¹⁷ Cap 211.

¹⁸ Cap 212.

¹⁹ 1995.

²⁰ *The Constitution of the Republic of Uganda 1995as amended.*

²¹ Cap 227.

²² 1998.

at the factors such as who is the bread winner of the family. Reasons to why the parties have refused to join each other. A rational decision should be made depending on the circumstances of the case. Courts are unwilling to terminate the choice of matrimonial home unless otherwise.

The Succession Act²³ also talks about the issue of property to a deceased person's immovable and movable property. **Section 4 of the Succession Act Cap 162** provides that succession to the immovable property in Uganda of a person deceased is regulated by the law of Uganda, wherever that person may have had his or her domicile at the time of his or her death. .

Succession to the movable property of person deceased is regulated by the law of the country in which that person had his or her domicile at the time of his or her death.

In **Farasia Rwabaganda v Donato Bahemurwabusha²⁴** Butagira J, held in terms of section 30 of the **Succession Act Cap 162** no spouse of an intestate shall take any interest in the estate of an intestate if at the death of the intestate that spouse was separated from the interstate as a member of the same house hold. Since it was found as a fact that the deceased's first wife had separated from and ceased to belong to the same house hold as the deceased since 1965 up to the time of the deceased death she would therefore take no interest in the estate of the deceased. Women like any other person can freely own property in their own right regardless of their marital status. In **Uganda v Jennina Kyanda²⁵** the high court of Uganda recognized that a woman regardless of her marital status can own property in her own right.

²³ Cap 162.

²⁴ (1978) HC 244.

²⁵ (1977) HCB 111.

Most complainants in property related wrangles are women. More so when such women are less aware of their legal and religious rights than men.

The category of spouse that is least aware of their legal right is the category that nevertheless utilizes the law to remedy their situation highlights a contradiction that signifies the depravity women face in property relations in marriage. It is a challenge on how one should measure equality as between the sexes. Further more, the Law reform commission recommends that there should be equality in the distribution scheme on intestacy as between the sexes.

The law of Succession provides for the manner of inheriting property, the mode of distributing properties of the deceased persons and how other related matters should be dealt with.

It is however worth nothing that many people are ignorant about the law of succession and the importance of making wills. Customs and cultural practices which are very oppressive are applied in many cases by greedy and unscrupulous relatives. Even where wills exist, the law which governs the execution of wills is not followed.

The 1995 constitution of Uganda as amended provides for the protection of the rights of widows and widowers to inherit the property of their deceased spouses. It provides that laws, cultures, customs or traditions which are against the dignity, welfare or interest of women are illegal. It also gives children special protection such that they are not deprived of economic benefit by reason of certain beliefs.

In Uganda the law provides for two types of succession namely.

Testate succession and Interstate succession.

Testate succession occurs when a person dies leaving will.

Interstate Succession refers to the inheritance of an estate of a person who has died without making a Will. It also occurs when a will is invalid or when the Testator remarries after writing the first Will.

A Will is a document made during a person's lifetime in which he/she directs or states how his/her property and other affairs should be dealt with after his/her death. It is the last wish of the deceased stating what his/her wishes to be done after his/her death.

A person who has made a Will is called a Testator

A Will may provide for how the minor children should be looked after (guardianship) and the elderly. This creates harmony within the family, The Testator chooses who should distribute the property (Executor if male and Executrix if female) as he/she knows who is most suitable to carry out his/her last wishes, The property is left to whoever the Testator wishes should benefit including those who would not be considered if there was no Will, The paternity of the children particularly those born outside marriage will not be disputed as the testator would have listed his children clearly, The Executor is able to collect the debts due to the deceased from debtors and pay creditors, The Testator spells out other wishes such as where to be buried.

Any person who is 21 years and above can make a Will. The Testator must act voluntarily on his or her own free will without being influenced or forced by any one. He/she must also fully understand what he/she is doing at that material time for instance must be of sound mind. A person who is very sick, mentally unbalanced or senile is deemed to be of unsound mind and thus incapable of making a will.

In Uganda, women and men have formal equal rights and opportunities in the field of employment under the constitution of the Republic of Uganda, 1995 as amended. There is no formal discrimination in the right of either men or women to education and employment.

In Uganda, most income generating activities are labor based and yet men own most productive resources such as land. Women provide labor without having the benefit of managing or controlling the proceeds there from. Women are also viewed as a source of accumulation of wealth and are sometimes referred to as property. The definition of maintenance is couched in terms of a cash economy that tends to favor men and the unpaid indirect and direct contribution of a woman in marriage is under looked. More over the obligations of love and caring which most women provide is not taken into account²⁶.

Conclusion, the current review attempted to examine literature on matrimonial property in Uganda. The review shows that there is hardly any systematic attempt to analyze the spouses property rights in marriage.

1.8 Chapterisation

The study will cover the concept of matrimonial property in Uganda. Chapter one will include the introduction, background to the study, statement of the problem, objectives of the study, research questions, significance of the study , chapterlisation ,methodology and literature review. Chapter two will feature the statutory measures put in place to deal with matrimonial property, Chapter three will feature non-statutory measures dealing with matrimonial property, Chapter four will feature the effect of the measures put in place to deal with matrimonial property. Lastly Chapter five will consider the general recommendations and conclusion.

²⁶ *M/S Aryanyijuka Annet Winfred, At women's Law center on the Law of Succession in Uganda, 2008.*

CHAPTER TWO

2.0 ANALYSIS OF MEASURES TO DEAL WITH MATRIMONIAL PROPERTY

2.1 Introduction

Two questions arise in whom are the legal and equitable interests in the property vested and what rights short of ownership may one spouse have in the property of the other? So long as they are living amicably together, these questions rarely have to be answered but they become vital if the marriage breaks down.

This adds considerably to the difficulty for the parties rarely contemplating the collapse of the marriage when they acquire property and their respective rights in it are never discussed, let alone defined. Hence the courts are faced with the problem of having to infer an intention which the spouses never formulated all and they have over the year developed appropriate remedies and the legislature has intervened to make them more effective .There are various ways of solving disputes open to them.

2.2 Common law remedies

2.2.1 Common law Rule

The democratic principle is that the property rights are protected by both statutory provisions and by the precedents of common law. The Judiciary thus strives to strike a balance between safe guarding cases involving claims over matrimonial property' on one hand and restraining unfair and wrong full acts which one of the spouse can exploit to the others advantage thus oppressing the other.

Thus the law attempts to combat the injustice that may arise by providing exceptions to the aggrieved party. However disputes as to property can arise when there is as yet no question of proceedings concerning the marriage itself and not infrequently arise after the death of one or other of the spouse. where it is complained that one of the parties is acting or purporting to act *ultra vires* and the matter is one which the members cannot ratify, one of the parties can go to court to get a better solution. In some cases doctrine of equitable estoppel may apply if the other party encourages the other to expand, he or she is estopped from denying proprietor interests arising from the contribution of the expenditure made. As long as he or she made substantial contribution to the property and was encouraged to do so, proprietary interest is acquired by the party.

In Gissing v Gissing²⁷, lord Denning observed that the court should not look at direct contributions only but also some services that contribute indirectly to the improvement of the family. Lord Denning further made an important observation which may be relevant to realities in developing countries especially Uganda where women generally don't earn salaries and are incapable of making direct contributions to improvements in matrimonial homes, their services! Contributions must be recognized and awarded. An aggrieved party however may institute one of the following actions.

a) Personal action.

A personal action is one brought by somebody who has been wronged and wishes to recover on his or her behalf. An aggrieved party can bring a personal action for breach of personal rights.

²⁷ (ALLER) 780 HL.

In *AJail v Ajail*²⁸, the plaintiff successfully obtained an injunction restraining the defendant from releasing the secrets which had come to his knowledge during the subsistence of marriage. Court granted an injunction though they had already divorced.

In *Gathward v Knee*²⁹, the deceased who was a Battalion soldier brought an undated letter addressed to the plaintiff in England. The letter contained such expressions as, if you have a letter to say that I'm killed, then the lot is for you" there was a further expression, which said "if I am killed ,the lot is for you as I shall make a will in favour"

The writer died and no other document in the nature of a will was ever received or discovered and the father of the deceased took out the grant of letters of administration as the deceased was unmarried.

The plaintiff on the other hand propounded the letter as a will and applied for revocation of the grant of letters of administration granted to the deceased's father.

It was held that the letter constituted a testamentary document capable of taking effect as a soldier will. The letter was privileged will and therefore valid.

b) Representative Action.

The Civil Procedure Rules, under Order I Rule 1 provides that:

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where following those persons brought separate suits, any common question of law or fact would arise.

²⁸ (1879) *ALLER* 123.

²⁹ (1920) *ALLER* 23.

A representative action is permitted where aggrieved person brings an action on behalf of both himself and other persons to enforce their collective personal rights. The relief sought will therefore be beneficial to all these persons represented by the plaintiff. Any judgment obtained in respect of such action binds all persons so represented. The importance of this procedure is to prevent duplicity of actions in respect of the same issues. **Article 50 (2) of the 1995 Constitution of the Republic of Uganda** provides that any person or organization may bring an action against the violation of another person or groups of human rights. This has been applied in a number of cases.

In **Uganda Association of Women Lawyers v Attorney General**³⁰, the women lawyers brought an action against the attorney general on grounds of divorce on behalf of all the women. In divorce proceedings, a husband proves one ground whereas a wife proves many grounds. This causes hardship to women in cases of divorce. Section 4 (1) of the Divorce Act Cap 249 provides that a husband may apply by petition to the court for the dissolution of his marriage on the ground that since the solemnization of the marriage his wife has been guilty of adultery. section 4 (2) provides that a wife may apply by petition to the court for the dissolution of her marriage on the ground that since the solemnization of marriage, her husband has changed his profession of Christianity for the profession of some religion and gone through a form of marriage with another woman or has been guilty of incestuous adultery, bigamy with adultery, marriage with another woman with adultery, rape, sodomy or bestiality, adultery coupled with cruelty or adultery coupled with desertion, without reasonable excuse, for two years or upwards.

³⁰ *Constitutional Petition No.2 of 2003.*

c) Derivative action

For a derivative action to be allowed, the wrong complained of must involve a fraud on one of the spouses resulting into the exploitation of property. The derivative action is subject, however, to the doctrine of clean hands since it cannot be used to do an injustice.

2.3 Statutory measures

The protection of spouses in matters concerning their matrimonial property provided by common law has been extended by the statutory enactment which has either added to or altered the remedies, which has either added to altered the remedies. Where common law remedies are reported to, one seeking them has to however meet their specific requirements for instance, where one of the spouses brings a derivative action, but given the difficulties associated with bringing such an action it becomes-impracticable to do so. Statutory remedies often provide for alternative grounds of action and are often simpler and faster to obtain. Statutory measures available to protect an aggrieved party include action for damages in tort, statutory remedy for issues between one of the spouses and a stranger, statutory remedy for property acquired by the spouses, statutory remedy for transactions between husband and wife.

Section 6 provides for consent to mortgage of matrimonial home and a penalty if not complied with. Where a matrimonial home is the subject of an application for a mortgage, a mortgagee shall satisfy himself or herself that the consent of a spouse referred to in section 5 is an informed and genuine consent and that duty is deemed to have been complied with if a) the mortgagee has I) explained to the spouse or spouses of an applicant for a mortgage in the presence of an independent person, the terms and conditions of the mortgage which is being applied for or

ii) In writing advised the applicant for a mortgage that he or she should ensure that his or her spouse or spouses receive independent advice on the terms and conditions of the mortgage which is being applied for and

b) The spouse or spouses as the case may be provide a signed and witnessed document to the effect that they have received independent advice on the mortgage which is being applied for and have understood and asserted to the terms and conditions of the mortgage or that they have not withstanding the advice from the mortgagee, waived their right to take independent advice.

3) A mortgagee may take such other steps in addition to the steps sets out in this section as he or she considers necessary and desirable to satisfy himself or herself that the assent of the spouse or spouses is informed and genuine.

4) Where a person holds out to be providing independent advice as provided for under this section (1) (a) (ii) such a person shall be liable on conviction to a fine not exceeding one hundred twenty currency points or to imprisonment not exceeding sixty months or both.

2.3.1 Action for damages in tort

Either spouse may now protect his or her interests in property by suing the other in tort. For example in trespass or conversion However, under section 25 of th9 Divorce Act, upon a decree of judicial separation being granted to the petitioner's wife, she would be entitled to permanent alimony for herself and children.

2.3.2 Statutory remedy of proceedings for an injunction

Either spouse may obtain an injunction to prevent the other from committing a continuing or threatened wrong against the plaintiff's property and property of which the claimant is a bare

trustee and in which he or she has no beneficial interest at all. The court may make an order with respect to property including immovable property situated abroad but will do so if the order is likely to be ineffective because a foreign court would disregard it and the court has no means of enforcing it against the defendant in personam. The court has also jurisdiction to determine questions of title and possession. In order that it may do this, there must be in existence specific property or a specific fund with respect to which the order might be made and that if the property or fund had ceased to exist, there is no power to make what would be in effect an order for damages for trespass, conversion or debt.

In Lee V Lee³¹, court ordered the spouse to give up possession of a house, deliver up chattels, to transfer shares and to pay over a specific fund and it even forbid him to dispossess the other spouse and to deal with the property in any way inconsistent with the others rights. Plaintiff successfully obtained an injunction restraining the defendant from releasing the secrets which had come to his knowledge during the subsistence of the marriage. Court granted an injunction though they had already divorced.

On the breakdown of a marriage, one of the spouses will normally petition for divorce, nullity or judicial separation. However, if trustees for sale refuse to sell the trust property, any person interested can apply to court for an order directing him or her to give effect to the trust, where upon the court may make such order as it thinks fit. This power may be used to force the sale of the parties' home because if both have a beneficial interest in it, either as joint tenants or as tenants in common, this will automatically create a trust for sale.

2.3.3 Statutory remedy for issues between one of the spouses and a stranger.

³¹ (1952) 2 QB 489.

The question to be considered here is how far rights in property created or affected by marriage can be enforced by one of the spouses against a third person.

The latter may claim in one of a number of capacities for example as a purchaser for value from the other spouse, as the other's, creditor or trustee in bankruptcy or as a beneficiary entitled to a deceased spouses' estate.

It is essential to decide first what rights the claiming spouse has against the other spouse and then how far these rights are enforceable against the third person.

This will depend upon the application of general principles of the law property and in particular the nature of the latter's title.

If he is a purchaser of a legal estate or interest for value, he will not be bound by her equitable interests if he purchased in good faith and without notice of them.

2.3.4 Statutory remedy for property acquired by the spouses

Presumptively, marriage will not affect the ownership of property vested in either of the spouses at the time. This will also be true of property which is used by them jointly in the matrimonial home. For example furniture, among others in the absence of an express gift of a joint interest in law.

The income of either spouse whether from earnings or from investment will *prima facie* remain his or her own property. But where the spouses pool their incomes and place them into a common, it seems that they both acquire a joint interest, in the whole fund. This occurred in

Jones v Maynard³², in 1941 the husband who was about to go abroad and authorized his wife to draw on his bank account which was there after treated as a joint account. Into this account were paid dividends on both the husband's and the wife's investments, the husband's pay and allowances and rent from the matrimonial home which was their joint and which had been let during the war. The husband's contributions were greater than the wife's, the spouses had never agreed on what their rights in this fund were to be but they regarded it as their joint savings to be invested from time to time. The husband withdrew money on a number of occasions and invested it in his own name and finally after the spouses had separated in 1946, he closed the account altogether. The marriage was later dissolved and the plaintiff sued her former husband for a half share in the account as it stood on the day it was closed and in the investments which he had previously purchased out of it. Vaisey J held that the claim must succeed.

He said, "in my judgment when there is joint account between husband and wife, a common pool into which they put all their resources, it is not consistent with that conception that the account should thereafter be picked apart and divided up proportionately to the respective contributions of husband and wife, the husband being credited with the whole of his earnings and the wife with the whole of her dividends. I do not believe that when once the joint pool has been formed, it ought to be and can be dissected in any such manner. In my view a husband's earnings or salary when the spouses have a common purse and pool their resources, are earnings made on behalf of both and the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid in by the husband or the wife is quite inconsistent with the original fundamental idea of a joint purse or common pool.

³² (1951) CH 572.

What then constitutes a common purse? It would seem on principle to be essential that there must be a fund intended for the use of both spouses from which either may withdraw money and this will normally take the form of a joint bank account. On the other hand, if the husband is the sole contributor, the presumption of advancement will operate so as *prima facie* to give her an interest but this will be rebutted if for example it can be shown that the power to draw on the account was given for the husband's convenience by enabling the wife to draw cheques for the payment of housekeeping expenses. Even though the beneficial interest in a joint account is initially vested in one spouse alone, his or her intention may change and it may be converted into a joint interest⁴⁸. The courts will probably tend to find a joint beneficial interest today much more readily than they did in the past.

If either spouse withdraws money from the common purse, property bought with it will *prima facie* belong solely to that spouse if it is for his or her personal use for example clothes but to both jointly if it is for their joint use for example a car, investments purchased by means of the common purse will similarly belong to the purchaser and will similarly belong to the purchaser unless it is clear that they are intended to represent the original fund.

In Re Bishop³³, large sums had been withdrawn by both spouses to purchase investments in their separate names. In many cases blocks of shares were bought and half put in one name and the other half put in the other, other money was spent in taking up shares offered to the husband by virtue of rights which he possessed as an existing share holder in the companies concerned. In these circumstances, Stamp J had no difficulty in holding that the presumption could not be rebutted and that the spouse in whose name the shares had been purchased was entitled to the whole beneficial interest in them.

³³ (1965) Ch 450.

2.3.5 Statutory remedy for transactions between husband and wife

With the exceptions in the case of chattels, gifts between husband and wife are subject to the general law, in particular, it should be noted that their relationship does not as such give rise to a presumption that either has exercised undue influence over the other. This is somewhat surprising when one bears in mind the special treatment that equity accorded to married women in the past and fact that spouses rarely take independent legal advice unless they are already at arm's length. A presumption can arise, however, if the circumstances show that one of them is particularly dependent on the other. This occurred in **Simpson v Simpson**³⁴ where the husband's mental capacity had been reduced by a cerebral tumour and the effect of the transfer (which was out of character) was to defeat bequests to his children by a former marriage. It is also probably fair to say that courts will look with particular care at any transaction entered into at the time of the breakdown of the marriage when both spouses are likely to be in an emotional state. If its effects is to give one of them a considerable financial advantage with no counter balancing advantage to the other, it will be set aside if the transferor is relatively poor and ignorant of the effects of property transactions in general and of the transaction in question in particular and has neither received independent advice not been urged to seek it. In order to perfect a gift of a chattel there must be an intention on the part of the donor to pass property to the donee and in addition either a deed executed by the former or a delivery of the chattel to the latter. Gifts by deed will be rare between spouses but, when they do occur will again present no difficulties since the intention can be inferred from the execution of the deed. But a spouse who alleges that the other has affected a gift by delivery has to surmount two obstacles. First, since spouses frequently use each other's property an intention to make a gift cannot readily be inferred from

³⁴ (1992) 1 *fir* 601.

permission to use the chattel in question and consequently the burden of proof upon a spouse alleging a gift will probably be higher than upon a stranger.

Secondly, it may be impossible in many cases to prove for example clothes or jewellery, delivery will normally take place at the time the gift is made by a physical handling over and taking but if the goods in question have already been used by both spouses in the home and will continue to be used in this way for example articles of furniture, there is not likely to be any apparent change of possession. There may indeed be an effective symbolic delivery of one chattel as representing the whole but spouses are hardly likely to carry out such an artificial act, the significance of which will not occur to them. Where the possession of goods could be in one of two people (as will happen in the case of furniture used by both spouses in the matrimonial home), it is presumed to be in the owner, so that if ownership is changed by a deed of gift, the buyer or donee will be presumed to have taken possession as soon as the transaction is complete, but this presumption cannot apply in the case of a gift by delivery since the delivery must be proved before a change in ownership can be established.

2.4 Conclusion

In a conclusion, it is evident from the above discussion that various attempts have been made to afford the protection of one of the spouses against oppression. Such protection as seen above is not limited to litigation only but extends to other measures too.

It is evident from the above discussion that protection of one of the spouses against oppression. And since no one knows what the wishes of the deceased were, the relatives and clan leaders have a right to distribute the property as they so wish. Will making is thus encouraged to avoid such occurrences. Such protection as seen above is not limited to litigation only but extends to other measures too.

CHAPTER THREE

3.0 NON - STATUTORY MEASURES DEALING WITH MATRIMONIAL PROPERTY

3.1 Introduction

The gender strategy adopted by the Ministry of Gender, Labour and Social Development seeks to achieve an equality empowering both men and women. It is however, recognized that as a corollary of this, there must be some protection of the matrimonial property of the spouses. Most spouse's rights against the matrimonial property are lacking in some aspects, according to the 2001 report on gender sensitization for magistrates and state Attorneys published by the Ministry of Gender, labour and social Development on the economic status of men, men enjoy greater access to lucrative careers and control of financial resources as well as credit loans, land and property ownership.

In case of divorce and most especially when the divorce is caused by the wife's adultery, her property can be claimed by the husband and children. However **section 9 of the Divorce Act**, it is essential not only that the respondent should be guilty but that the petitioner should be innocent and justly aggrieved by the others wickedness. In case if the man is claiming for custody of the children, he is entitled to the custody of the children because under the traditional custom especially among the Baganda tribe, the children belong to the man.

However in **Teopista Kayongo vs Richard Ssekiziyivu**³⁵, Nyamchoncho J, Held that as concerns custody of children of tender years, such children should normally stay with the mother unless she is not a fit and proper person.

³⁵ (1972) ULR 122.

In case of inheritance and when a man dies without making a will, the property can be distributed according to the traditional customs.

In Re Sulemani Serwanga Salongo³⁶, Kiwanuka CJ held in the Kiganda customs, the person named in a will as Omusika was the person entitled in the English law which was applied here to be known as executor. However, **Section 17 of the Succession Act**³⁷, provides that A will may be revoked or altered by the maker of it at any time when he is competent to dispose off his property by will.

Thus in the **Estate of Southerden**³⁸, in that case the testator made a will leaving all his property to his wife in the event of her surviving him. He also appointed her as his executor. However, upon their return to England, the testator destroyed his will by burning it.

The testator mistakenly believed that his wife would receive all his property under intestacy rules. Upon the death of the testator, the plaintiff as executor sought to propound the will but the defendant (testator's father) opposed the grant of probate claiming that the testator died intestate as the act of burning the will amounted to destruction of the will. Court held that the testator had again and again throughout his married life stated that upon his death all his property to pass to his wife. He had not made a will since he knew the property would go to her any way. Although the will was physical destroyed, the intention in destroying the will was not to despise the wife but and therefore the contents of the destroyed will could be admitted to probate.

³⁶ (1978) HCB 240.

³⁷ Cap 162.

³⁸ (1925) 1 ALLER 415.

3.2 Bank Accounts

From the premise that women and men can own property separately, it is also possible for husband and wife to own separate accounts and it's also possible for them to own joint accounts. With regard to joint accounts, where the spouses pull their incomes and place them into a common fund, the law appears to be that both acquire a joint interest there in.

However, several issues may arise with regard to the share of joint interest particularly considering the fact that they may each make different deposits and different withdrawals.

In Jones v Maynard³⁹ the husband authorized his wife to draw on his bank account which was thereafter treated as a joint account. Further into this account was deposited the dividends from both the wife's and husband's investments. Generally the husband's contribution into this account was greater than that of his wife. The two had agreed on what their rights on this fund were to be, but they generally regarded this fund as their joint savings to be invested from time to time. From time to time, the husband withdrew money and invested it in his own name subsequently, the two separated and the husband closed the account.

The marriage was dissolved and the wife sued for half share in the account. Court held that regardless of these differences in contributions and withdrawals, the two are equally entitled. Where both spouses contribute to this fund, the intention to create a joint account will be imputed to the parties in the absence of any other agreement. But where the fund is delivered from the income of one spouse alone, the presumption will not arise as general rule but it's a question of fact whether the account is to remain his or her exclusive property or whether there's intention to establish a common fund. For investments purchased from the joint fund, property you buy from the joint account is your property generally if either spouse withdraws money from a joint account. Property bought with that money *prima facie* belongs to that spouse and not to

³⁹ *Ibid.*

both jointly. This presumption however may be rebutted for instance with regard to investments which may be held to represent the original fund. But with regard to property meant for personal use, this presumption may not be rebutted.

In Re Bishop⁴⁰, large sums of money were drawn by spouses to purchase investments in their separate names. In many cases share were bought and half put in one name and another half put in the other. It was held that the presumption could not be rebutted that property belonged to each of the spouses and that the spouse in whose name the shares had been purchased was entitled to the beneficial interest there in.

However, this approach may concessionary yield some injustice because making savings out of housekeeping allowances may involve some skills for example search for markets, some sacrifices, bargaining capacity among others.

In **Green Wood v Martins Bank**⁴¹, the plaintiff had an account with the defendants bank The wife of the plaintiff had over a period of time forged her husband's name. On the wife's request, the husband had refrained in from notifying the bank about the frauds. When the husband threatened to notify the bank, the wife committed suicide. The husband brought an action for the amount paid by them on a forged signature. The claim was rejected because the plaintiff had breached his duty of information the bank of forgeries. It was held that deliberate abstention from speaking in those circumstances amounted to representation that the forged cheques where in fact in order and assuring that the fact followed by the bank, they were all element for an estoppel.

⁴⁰ Ibid.

⁴¹ (1932) 1 KB 371.

Although Green wood's case talks of the guilt of breach of duty, this does not mean that the parties owe each other a duty of care in tort. This was made clear by the Privy Council's decision in **Tai Hing Cotton Mill Ltd v Liu Chong Bank Ltd and ors**⁴², their lordship said that this duty is a contractual duty and does not extend to tort. They were of the view that it has never been the law that a person who had the choice of suing in contract or tort can fail in contract yet nevertheless succeed in tort.

That one cannot rely on the law of tort to provide him a proper protection than that for which expressly or impliedly he has contracted with the bank.

However, the learned author of Puget's law of banking contests this view. He asserts that there could be situations in which the principle does not preclude the imposition of a duty of care in tort between parties who stand in contractual relationship.

In **Sunderland v Barclays Bank Ltd**⁴³, the bank dishonored the plaintiff's cheque because she had insufficient funds, she complained to the husband and the bank in the course of the conversation told the husband that she was making cheques to book makers. She sued for breach of duty of secrecy. It was held that the disclosure was in the interest of the bank.

3.3 Property Agreements

Many disputes arise between spouses from misunderstandings that can be substantially reduced or avoided altogether by agreeing and recording beforehand all the principal terms relating to their relationship interest.

⁴² (1986) AC 80.

⁴³ (1938) 5 LDB 163.

The document that achieves this purpose is called the property agreements. Under the old law for instance, it was advisable in many cases for spouses to enter into a property agreement during the relationship, setting out who would get what.

Before a couple makes any agreement for the division of their property should they break up, each party must receive independent legal advice, otherwise the agreement is not valid.

In **Gissing v Gissing**⁴⁴ the matrimonial home was bought and put in the name of the husband, the wife paid for furniture and household expenses. The issue was whether or not the wife was entitled to beneficial interest in the matrimonial home. It was held that there was no common intention that the wife would have any such interest therein. In addition to that, there was no expressed agreement to that effect.

However difficulties can occur when classifying property as either relationship or separate property especially when it was inherited by one spouse or partner and has since been intermingled with relationship property or it was acquired in contemplation of a marriage, relationship after a couple separated or it concerns insurance policies or superannuation funds.

The property agreement is a private and invariably confidential document whose contents are known only to the parties concerned. It is not required to be filed in any public registry.

Parties should ideally agree before marriage where the matrimonial home should be if they fail to agree, court needs to look at some factors such as who is the bread winner of the family, reasons why the parties have refused to join each other among others. A rational decision should be made depending on the circumstances of the case. Courts are unwilling to terminate the choice of

⁴⁴ *Ibid.*

matrimonial home unless otherwise. However, the courts have discretion whether to order the sale of property where a spouse and children in occupation.

The majority of reported cases indicate a tendency to regard the interest of the creditors as prevailing over those of the spouse and children of the bankrupt in all but in most exceptional circumstances. The matrimonial home of the insolvent is not exempt under **section 4 1(1) of the Bankruptcy Act**⁴⁵. The provisions do not sufficiently provide for the livelihood and survival of the bankrupt and his family. This section pronounces retribution more than rehabilitation of the insolvent and the persons more likely to suffer as a result of this are members of the insolvent family more than the insolvent.

When husband and wife own the matrimonial home jointly and one of them becomes bankrupt, the question as to the right of the trustee in bankruptcy to have the house sold in order to take half of the proceeds into the estate arises.

In **Re Turner**⁴⁶, the husband was made a bankrupt and the house was jointly owned with the wife, it was held that although the matter was one for the discretion of the court.

The key advantage of a property agreement is that the spouses can practically make provisions for any conceivable eventuality in their relationship and thereby address in advance most of the issue which lead to disputes, litigation and even the end of their marriage. Examples of such matters include but are not limited to, property remains separately

3.2 Separate property remains separately

In general, separate property for instance all property remains the property of the person who owns it kind it is not divided. It includes property that the parties owned before the marriage on

⁴⁵ Cap 67, Laws of Uganda.

⁴⁶ (1975) 1 ALLER 5.

when the relationship began and that they kept separate during it. Any gifts and inheritances that the parties received during the marriage or relationship and that they kept separate.

Separate property also includes all, property acquired out of separate property and the proceeds of selling any separate property. If an increase in the value of one's party is separate property or any income or gains derived from the property is caused wholly or partly by the actions of the other party, the increase or the income or gains is treated as relationship property and is divided according to each party's contributions to the increase. This applies whether the other party's actions caused the increase directly or indirectly. The general principles of Islamic law makes no distribution between various kinds of properties for the purposes of succession whether the property is real or personal , ancestral or self acquired corpus or usufruct, movable or immovable is immaterial the rules of succession are one and the same.

Also in Islamic teaching, a Muslim woman retains her property and any wages or earnings acquired or gained by her belong to her. She is entitled to sue in her own name in respect of contract entered into by her.

Articles 26(2) of the Constitution of the Republic of Uganda 1995 provide that, every person has a right to do own property either individually or in association with others.”

The Quran gives a woman absolute right to own, sell, gift or manage her property. It includes even the property acquired by her as Mahr. Her husband cannot take it back.

Quran 4. 32 states.

Unto men a fortune from that which they have earned and unto woman a fortune from which they have earned but ask Allah of his bounty. Lo: Allah is ever knower of all things.

3.2.2 Agreements to divide relationship property

If the parties have entered into a valid property agreement, the relationship property will be divided according to the terms of that agreement. However, the agreement must be made according to strict requirements including each party receiving independent legal advice otherwise the agreement is invalid.

If the parties cannot agree on how divide the property, they can apply to the family court or

High Court to deal with the question under the provisions of the Act.

In **Kaithoum Abdul Wahid Nordin Bin Othman**⁴⁷, the plaintiff wife was divorced by her husband, the defendant. During the marriage they had been given a piece of land on which they both worked together. Later the husband married a second wife and after that seldom returned to the house. The land was acquired by the government servants housing corporation and compensation was paid on condition that it should be divided equally between the husband and wife. The wife claimed her half share and the sharia high court gave judgment in her favour. Holding that the land was jointly acquired and the compensation should be divided equally between them.

In **Zainuddin v Anita**⁴⁸, the divorced wife claimed a share of the matrimonial home as jointly acquired property. The learned chief Khadi found that the house was built during the period of marriage and he ordered the husband to pay half of the property to the divorced wife. On appeal, the board of appeal held that the learned chief Khadi had based his judgment not on evidence but on his own opinion. The Board of Appeal therefore gave the husband the opportunity to adduce

⁴⁷ (1990) 9 JR 178.

⁴⁸ (1980) 4 JR 73.

evidence that the property was jointly acquired property. After having heard the evidence, the Board of Appeal held that the evidence could not be accepted as proving the case and they decided that the matter be dealt with according to the Islamic law. The Board held that where the parties have contributed by their joint efforts to the acquisition of the property but there is dispute as to the contribution of either of them then if there is sufficient evidence as to the contribution of the claimant, the value of that would be given to him or her if the evidence is insufficient as regards the contributions of either of them then if there is sufficient evidence as to the contribution of the claimant, the value of that contribution of the claimant, the value of that contribution would be given to him or her if the evidence is insufficient as regards the contributions of either of them , they should be asked to take the oath, if they both take the oath, then the property will be equally divided between them. If one of the parties takes the oath, the property could go to him or her. If any of the parties had died, if they claim the share, if according to the custom, either of them contributes more than the other then the division should follow the custom. In this case both parties to take the oath and the board of appeal ordered the property to be equally divided between them. However, issues concerning distribution are mostly influenced by custom.

3.2.3 Marriage of short duration (less than three years) in the case of a marriage of less than three years, the family home or particular family chattel if it was owned wholly or substantially by one spouse at the date of the marriage or the family home or a particular family chattel if it came to one spouse after the marriage began by succession, by survivorship as the beneficiary under a trust or by gift from a third person or the family home and all the family chattels if the contribution of one spouse to the marriage is clearly disproportionately to the marriage is clearly

disproportionately greater than that of the other, in the cases, each spouses share in the property in question is determined according to the contribution that each spouse made to the marriage.

In the case of matrimonial property other than the family home and chattels, each spouse is entitled to share equally in the property unless his or her contribution to the marriage had clearly been greater than that of the other spouse in which case the shares are determined according to each spouse's contribution to the marriage.

3.2.4 Necessaries of life

Under common law, it was the duty of the husband to provide necessaries of life to the wife as far as marriage was subsisting; this duty was for the continuing enjoyment of consortium with her, if the wife committed adultery, this duty would be over unless he had forgiven her.

In case the husband failed to provide maintenance for his wife, she could exercise her right of maintenance through agency of necessity or pledging the husband's credit. This arose where the husband had failed to provide necessaries of life to the wife. She would get credit from the trader and get goods on credit which would be liable for such a debt?

In Nanyuki Trading stores v Mrs Peterson,⁴⁹ once goods supplied, must be necessaries of life which are determined by using two principles. Husband's station of life (status of the husband) by looking at the husband's standard of living, the husband must have failed to maintain his wife it does not matter that the account was operated in the wife's name (credit) and the husband need not have practically stopped the trader from supplying goods to the wife. The duty to maintain the family should be on both parties, these contributions should be in terms of monetary contributions and non monetary contributions. For instance domestic work done by the wife.

⁴⁹ (1942) 1 ALLER 234.

In *Edita v Nakayingi v Merekazadeki*⁵⁰ the wife contributed to the building and maintenance of the matrimonial home for twelve years. She did some cultivation and bought the roofing of the house. After some disagreements, the husband terminated the marriage, he also sought to evict the wife from the home but she refused to vacate. It was held that, it is the duty of the husband to provide the wife with the home and if he wanted to evict her he must find her another or alternative accommodation.

Court found that since it is the husband who terminated the marriage, in the eyes of equity, he could not chase the wife from the house to which she had substantially contributed.

3.2.5 Issues concerning a will

The matrimonial home cannot be given out in a will. It is automatically taken over by the surviving spouse(s) if the testator was married. The minor children of below the age of 21 years are also entitled to live there. It is thus an offence for anybody to evict the Widow/widower or children from the matrimonial home.

The matrimonial home includes all the house hold properties, which too should not be tampered with.

The testator is at liberty to give his or her property to other persons or his or her choice as beneficiaries. These include charitable organizations and legal entities like companies which are legally recognized as persons. Property may also be left to a person known as a trustee not for his or her property directly to his or her young children or persons with disabilities who are unable to manage the property well or by themselves.

⁵⁰ (1978) HCB 107.

In Banks v Good Fellow⁵¹, the testator had had delusions since 1841 that he was being molested by a man who was long dead and that evil spirits were pursuing him. He had been confined to asylum on several occasions made a will and died in 1865 still afflicted by the delusions. The court held that the will was valid because the delusions could not have had any effect on the disposition of property made by the testator or those whom he should consider when making those dispositions.

The court noted that the testator might lack the necessary mental ability to make a will there by rendering it ineffective .However) in order to decide if any particular matter deprives the testator mental capacity the test can be summarized as requiring three essentials namely, sound mind, sound memory, sound understanding in Uganda, these property agreements may be applicable by enlightening the masses on their importance. Once entered into, such agreements are enforced by the law just like any other normal contracts.

3.4 Conclusion

Parties should agree on everything concerning their matrimonial property and if they fail to agree among themselves, they should seek redress to the courts of law and, the assessment of the different contributions made to the marriage, financial contributions do not rate any more highly than contributions of other kinds, such as caring for children or performing domestic tasks among others.

⁵¹ (1870) 2 AC 114.

CHAPTER FOUR

4.0 EFFECT OF THE MEASURES PUT IN PLACE TO DEAL WITH MATRIMONIAL PROPERTY

4.1 Introduction

The common law remedies and statutory remedies mentioned in the earlier chapters have been effective in protecting the rights of the aggrieved party to a certain degree. This chapter will analyze to what extent they have succeeded in offering protection to such aggrieved parties.

4.2 The effect of Matrimonial Property

Problems usually arise in applying the principle that an aggrieved party can always sue when what he or she complains of could not be validly effected or ratified by an ordinary resolution, because it prevents the other spouses action simply because the spouses could have rectified the wrong complained by one of the spouses between themselves, when the spouses have in fact not had an opportunity to decide whether or not to do so. However, this has been resolved by the courts stating the relevant action until the parties have been given the opportunity to decide on the matter complained of.

In **Gakwavu v Mariana Gasengayire**,⁵² **Ssekandi J**, held that there is no provision in the Divorce Act Cap 249, laws of Uganda as to what ought to be done with matrimonial property after the parties have judicially separated. All there is, are provisions for property a wife may acquire after the separation under section 16 and 17 of the Act. In section 17 it is provided that

⁵² (1977) HCB 322.

upon a decree of judicial separation being made, the wife shall be considered as an unmarried woman for the purpose of contracts, wrong and injuries.

Under section 22 of the **Divorce Act**⁵³, laws of Uganda, a husband can recover damages from any person who commits adultery with his wife but the reverse is not true. The only relevant provisions in the **Divorce Act** with regard to consequential orders following a decree of judicial separation are sections 24 and 25 which provide for alimony in any suit under the Act when a suit is pending.

A maintenance order may be made after the decree and the court may order the husband to secure the sum awarded to the wife. The effect of sections 24 and 25 of the **Divorce Act** is that the court may order a husband to pay alimony to his wife while the suit is pending;

On termination of the suit, the court may investigate the financial position of the parties and their conduct and then make such an order with regard to maintenance of the wife as is reasonable. The alimony should not exceed net income. The sum awarded to the wife as maintenance may be secured upon any of the husband's property but the security referred to does not include actual transfer of the husband's property to the wife. Such security can be in the form of a caveat on land, a floating charge on commercial goods or a mortgage.

However in *Abdallah Saidai v Mwanamkuu*,⁵⁴ Yusuf Samatta , Ag J. held that a divorcee is entitled to share of property and assets acquired through their joint efforts during the subsistence of the marriage.

⁵³ *Above*.

⁵⁴ (1978)LRT n.43 page 220.

Before granting an order for division of matrimonial assets, the court should first determine the current market value of the assets and the degree of the contribution made towards the acquisition of the assets.

Parties in legal marriage are protected from disclosure of information which came to their knowledge as result of their marital cohabitation.

In *Ajail v Ajail*⁵⁵ the plaintiff successfully obtained an injunction restraining the defendant from releasing the secrets which had come to his knowledge during the subsistence of marriage. Court granted the injunction though they had already divorced.

Section 120 of the Evidence Act⁵⁶ provides that the wife or husband of the accused person shall not be a compellable witness for the prosecution without the consent of the accused person.

Many people do not wish to leave the distribution of their property to be done upon their death. Instead they prefer to distribute all that they own in their life time. This distribution is not inheritance. It is simply a gift. Therefore, one should make an equal distribution among his children with sons and daughters receiving equal shares.

4.2.1 Problems of common law protection

It is very difficult to distinguish between a wrong done to one of the spouses and a wrong done to both. The use of the representative form, to bring a derivative action is very confusing because even personal actions to enforce the aggrieved party's rights may be brought in the same form. More over, an act can be between the spouses or among the family members of one of the spouses after the death of the other in matters concerning the sharing or distribution of matrimonial property.

⁵⁵ (1969) HCB 413.

⁵⁶ Cap 6.

A derivative action is normally brought in a representative form, with one of the spouse being named as the defendant. It is not easy to discern whether one of the spouses is a wrongdoer or the victim or possibly both.

The case law on this common law remedy is contradictory and inconsistent, since it seems to limit the rights of the aggrieved party. The issue however arises as to which matters can be rectified and which cannot.)

An example is the case of **Nanyuki Trading Stores v Mrs. Peterson**⁵⁷ once goods supplied must be necessities of life which are determined by using two principles. By looking at the husband's standards of living, the husband must have failed to maintain his wife.

It does not matter that the account was operated in the wife's name (credit) and the husband had practically stopped the trader from supplying goods to the wife.

The duty to maintain the family should be on both parties. These contributions and non monetary contributions. The proposal was that each spouse should be presumed to have authority to pledge the other's credit, to borrow money on behalf of other spouse. Convert- the other's spouse's movable property into money and use it for the benefit of himself or herself or children done in accordance with the spouses' means and way of life.

There is also a problem of the bankrupts' home/matrimonial home. The most valuable asset belonging to a bankrupt is the home which he or she occupies. The issue of policy and principle associated with the treatment of matrimonial home in the case of bankruptcy of either spouse has given rise to protracted controversy since they involve attempts to reconcile two mutually exclusive interests.

⁵⁷ *Ibid.*

One side is the claim of the unpaid creditors recoup some of their losses from the principal available assets, set against this is the general concern that the hardship and dignity of homeless should not be imposed upon persons who are, in the main innocent victims of the bankrupt's financial failures. Two alternative situations need to be considered, namely Where the bankrupt is a sole owner of the matrimonial home and where the bankrupt and his flier present or former spouse are joint owners of the home.

The courts have discretion whether to order the sale of property where a spouse and children in occupation. However, the majority of reported cases indicate a tendency to regard the interest of the creditors as prevailing over those of the spouse and children of the bankrupt in all but in most exceptional circumstances. In **National Provincial Bank Ltd v Ainsworth**⁵⁸, in this case was well set before 1986 that execution of the trust for sale resulting from joint ownership of the matrimonial home could be ordered by the court in response to application by the trustee in bankruptcy.

Under **section 41(1) of the Bankruptcy Act**⁵⁹, the matrimonial home of the insolvent is not exempt. The provisions do not sufficiently provide for the livelihood and survival of the bankruptcy and his family. This section pronounce retribution more than rehabilitation of the insolvent and the persons more likely to suffer as a result of this are members of the insolvent family more than the insolvent.

When a husband and wife own the matrimonial home jointly and one of them becomes bankrupt, the question as to the right of the trustee in bankruptcy to have the house sold in order to take half of the proceeds into the estate arises.

⁵⁸ (1965)AC 1175.

⁵⁹ Cap 67.

In Re Turner⁶⁰ where the husband was made a bankrupt and the house was jointly owned with the wife, it was held that although the matter was one for the discretion of the court, in this case the trustee's claim under statute greater than that of the wife's and an order for sale was made but suspended for two months so that the wife could try to find a solution which could avoid the need for a sale.

However, acquisitions of proprietary interests by a spouse for example in a matrimonial home where he or she furnished less than full consideration and the so has been benefited by the other spouse who later becomes bankrupt, have been attached by the latter's trustee in bankruptcy.

In Re, Windle⁶¹ . it was held that although the expression, purchaser for valuable consideration, did not import a purchaser in the strict sense of a purchaser under contract of purchase and sale, it does postulate a person who, in a commercial sense, provided a quid pro quo.

In Kivuitu v Kivuitu,⁶² this case, the wife had made a substantial indirect contribution to the family income and assets by using her income to pay house hold expenses, to prepare food and clothing for the children, organizing their schooling and generally enhancing the welfare of the family . After they had divorced, the wife filed a suit against the husband for share of the property. It was held that although the wife had made measurable financial contributions to the family income and to the property that was too narrow as a basis on which to determine the parties' respective share in the matrimonial home.

In this case, the judge had therefore erred in apportioning the parties' shares as to one quarter and three quarters respectively and they were entitled to the property in equal shares.

⁶⁰ (1975)1 ALLER.

⁶¹ (1975)3 ALLER 987.

⁶² (1990-1994)EA 276.

Instead of the sale ordered by the high court, since the husband was still living there with the children of both his marriages, there would be substituted an order that the property would be independently valued and that the husband would pay to the wife a sum equal to half the valuation.

Similarly in **Chakupewa v Mpenzi and Anor**⁶³, the appellant and John (second respondent) were a married couple. They built two houses through their joint effort. They rented one of their houses to Mpenzi (first respondent). Later, John sold the house to Mpenzi while the appellant was away. Aggrieved by the sale, the Appellant filed a suit against John and Mpenzi seeking a declaration that the contract of sale was invalid arguing that the suit property was a matrimonial home and her consent was required before any sale could be had. Evidence led showed that the appellant and John were not living in the suit property and that the same had earlier on been rented to a commercial enterprise. There was also evidence showing that the property was registered solely in the name of John though the appellant claimed to have made a general contribution.

The trial court found that the suit property was not a matrimonial home and that the sale there of was not tainted with illegality. It was held that the trial court had sufficient material before it upon which it could find that the suit premises were a commercial building.

The suit property was a matrimonial asset which had been acquired through the joint efforts of the appellant and her husband. Although the suit property was registered in the name of the husband, the appellant had beneficial interest and in law, the purchaser got only what the husband owned, he could not have purchased the appellant's beneficial interest without her consent. The husband did not pass the whole title and the sale was therefore invalid. There is also

⁶³ (1999)1 EA 32.

a situation where one of the spouses may apply for an injunction to court and this can be at the discretion of the court whether to grant an injunction or not and this will depend on what presented to court by the aggrieved party and another.

In **Kinyanjui v Kinyanjui** ⁶⁴, the wife took out an originating summons asking for declarations to the effect that she was co-owner to the extent of one half or such other extent as the court shall determine of all her husband's immovable property. She had been shown the door out of the matrimonial home in the posh area of Karen Langata and forced to live at Dagoretti market. She was also deprived of the use of Mercedes Benz saloon car which she used to drive simultaneously with the originating summons. She filed an application for interlocutory injunction seeking an order that the husband be restrained from denying her access to and use of her Mercedes Benz Limousine.

It was held that the wife had established a prima-facie case with a probability of success at the trial to the effect that she was a co- owner of the matrimonial home and the motor vehicle and was entitled to access and use them. For a person used to life in a posh residential area and to V “the amenity of locomotion by Mercedes Benz saloon her present consignment to Dagoretti was a psychological torture and as such as an injury that could not be compensated for by an award of damages. The injunction would therefore be granted and the wife was at liberty to return to her matrimonial home and to take possession of and use her Mercedes Benz.

⁶⁴ (1995-1998) EA 146.

In Mutinda, v Mutinda⁶⁵ the issue in this case was whether the wife may be deemed to have made non monetary contributions to acquisition of matrimonial property. In this case the appellant's customary marriage to the respondent had been dissolved pursuant to divorce proceedings initiated at the lower court. The court however found that the appellant was required to prove her contribution to acquisition of the matrimonial property and that she had failed to discharge this burden and could only enjoy rights of the user but not of ownership.

However, a wife can contribute to the acquisition of matrimonial property either through direct financial contributions or through non monetary contributions. When property is acquired during the course of coverture and is registered in the joint names of both the spouses, the court in normal circumstances must take it that such property being a family asset, is required in equal shares.

In Kamore v Kamore,⁶⁶ in this case the wife filed a suit against her husband claiming for a share in the property acquisition during coverture. The two properties were in the possession of the husband. The other two properties had been in the name and sole possession of the husband, although one of them had since been sold. The wife claimed beneficial interest to half shares in the four properties.

The trial judge made orders that the four properties be sold and the wife receive a half share of the net proceeds from the sale on the ground that she was entitled thereto.

In Gathaiya v Gathaiya⁶⁷, the issue in this case was whether court has power to transfer title from one spouses to another. In this case, the high court ordered for the division of the suit

⁶⁵ (1995-1998) 1 EA 224.

⁶⁶ (2000) 1 EA 80.

⁶⁷ (2003) 1 EA 80.



property in equal shares between the respondent and the appellant since the suit properties were owned jointly by the two parties in such proportion as the court thought fit.

4.3 The effect of action for damages in tort

This remedy has been effective in that the threat of filing a suit to court often is successful in achieving in achieving recess for an aggrieved party. The effect of an action for damages in tort being made is that the disputing parties would subsequently ask for the court to rescind it with a view to their reaching settlement, for instance in the case of **Chakupewa v Mpenzi and another**⁶⁸ . The remedy of an action for damages in tort is available irrespective of the e of wrong doing. This has been effective in protecting the aggrieved party who has been barred from bringing actions instances where one of the spouses feels aggrieved but fail to prove any wrong doing which is required while bringing certain actions or relying upon certain laws, for purpose of this remedy , the wrong complained of need not affect a party as a party . In **Kivuitu v Kivuitu**⁶⁹ the appellant's rights as a wife were affected by the divorce issues as a wife, yet the court held that the wife was entitled to get a share from husband's property thus entitled to a remedy.

In **Muthembwa v Muthembwa**⁷⁰, It was held that a declaration be made that all the immovable and movable property required during matrimonial though registered in the appellant's husband's name was jointly owned be shared equally between the spouses and that the husband be restrained from alienating , encumbering or otherwise disposing of the property.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ (2002)1 EA 186.

4.3.1 Problems of action for damages in tort

The remedy inherent in **Kivuti's case**⁷¹ is drastic especially when considered from the perspective of the party who is desirous of the marriage continuing in existence and is unsatisfactory redress for the petitioner. This is because the result is that the marriage is ended, there by ceasing to exist and the petitioner or aggrieved party is entitled to a share among the property acquired by the spouses during the subsistence of the marriage.

The end of the marriage or divorce, separation among others, order can be obtained easily in the courts of law and the order shall not be refused unless the court is of the opinion that some other remedy is available and the petitioner is acting unreasonable in seeking to have the marriage end and divide the matrimonial property instead of pursuing that other remedy be followed up. This makes the threat of proceedings the easy way out

4.4 Effect of Remedy of proceedings for an injunction

Applying for an injunction has allowed an aggrieved party among the spouses to petition to the Court if the affairs of the marriage concerning the matrimonial property between the spouses are being conducted in manner oppressive to other party including him or herself. It has an advantage over the concept of sharing matrimonial property in case of a divorce among others because it is less draconian and more flexible in that it has enabled court to impose whatever solution it considers appropriate.

⁷¹ *Above.*

4.4.2 Negative Effects

The case of **Edita Nakiyingi v Merekizadeki**'s case⁷², greatly favours the status of a woman in issues concerning ownership and control of matrimonial property. The decision contrasts sharply with the English common law position, which originally conferred possession of all real property owned by a wife at marriage to her husband. The husband was entitled to the rent from the land and to any profit made from operating the estate during the joint life of the spouses. As time passed, the English courts devised means to forbid a husband transferring real property without the consent of his wife but he still retained the right to manage it and to receive the money which it produced. Regarding the wife's personal property, the husband's power over it was complete since he had the right to spend it as he saw fit. This has made it hard for an aggrieved party to bring an action against the other who is a wrongdoer. Another problem is that it is not clear about the category of persons who may present a petition in court. The remedies available do not specify whether persons who may bring the petition include representatives, trustee's aggrieved party among others. Spouses lack the traditional and social power to influence the administration of customs as well as religion. The generality of statutory law and the gender specific nature of custom and religion (Sharia) circumvent the spouses needs. Dispute resolution structures are seen to play a great role in the administration of justice where problems arise

However, they are found to be inadequate to contain the peculiar gender biases and prejudices that exclude the aggrieved party's needs and rights in case of disputes concerning matrimonial property. While the formal structures are inaccessible, expensive and bureaucratic, the informal ones, particularly the religious and customary ones rely on gender biased norms and values. In the process, the spouses' needs and rights are either not addressed or suppressed. This would

⁷² Above.

necessitate institutional and substantive reforms multi- disciplinary to cover all socio -cultural as well as legal perspectives. Also the petitioner must show that he or she is being oppressed in order to take a suit in court. This limits the occasions on which the court has been required to consider whether the affairs of the spouses are being conducted in a manner oppressive to the other party.

It is also difficult to determine when the conduct pleaded by the petitioner was oppressive.

Lord Keith in Elder v Elder and Watson,⁷³ though that oppressive conduct involved an element of lack of probability and fair dealing, while lord Cooper in the same case suggested that it was conduct which amounted to a visible departure from the standards of fair dealing and a violation of the conditions of fair play.

4.5 Effect of Statutory remedy for issues between one of the spouses and a stranger

The enforceability of rights against the third person has successfully acted as a check on the issues between the spouses concerning their matrimonial property and the affairs during and after their marriage. It has helped to ensure that the issues between one of the spouses and a stranger are being dealt with lawfully and not fraudulently or in a manner oppressive to the other party.

This remedy has also ensured that an aggrieved party has been given all the information with respect to the affairs of their matrimonial property which both spouses might reasonably expect. This is useful for it's a well known fact that knowledge is power. With such information, the party can detect that he /she is being treated fairly or not or whether the affairs between one of the spouses and a stranger are in a proper manner.

⁷³ (1952) S.C 49.

4 .6 Effect of statutory remedy for property acquired by the spouses

This remedy has been very effective in protecting the aggrieved party in issues concerning the spouses' matrimonial property and where it has been difficult to institute proceedings against the other party. When the proceedings have been commenced, the courts have been used to help the aggrieved party in matters concerning his or her rights in a matrimonial home. Spouses are examined as to their conduct in their families, their matrimonial property among others and if they are found liable for any misapplication concerning their property they are compelled to repay or share the matrimonial property equally. They may sometimes be compelled as the court thinks fit.

4 .7 Effect of statutory remedy for transactions between husband and wife.

This remedy has helped to provide additional support to the spouses concerning the transactions they usually carry out between themselves. This may include gifts by deeds among other transactions.

Gifts by deed will be rare between spouses but when they do occur, will again present no difficulties since the intention can be inferred from the execution of the deed. But a spouse who alleges that the other has affected a gift by delivery has to surmount two obstacles. First, since spouses frequently use each others property, intention to make a gift cannot readily be inferred from permission to use the chattel in question and consequently the burden of proof is upon a spouse alleging a gift will probably be higher than upon a stranger Secondly , it may be impossible in many cases to prove for example clothes or jewelry, delivery will normally take place at the time the gift is made by a physical handing over and taking ,but if the goods in

question have already been used by both spouses in the home and will continue to be used in this way for example articles of furniture, there is not likely to be any apparent change of possession.

4.8 Conclusion

Though the spouses' rights and needs are lacking in some aspects, the above measures have to a greater extent protected them from outright oppression in issues concerning matrimonial property between themselves. However, the various loopholes in the above mentioned measures should be sealed in order to provide full protection to the aggrieved party among the disputes arising from the problems brought about by the matrimonial property during and after marriage.

CHAPTER FIVE

GENERAL CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The multi-disciplinary nature of the research clearly has brought out the findings that a combination of factors is at play in jeopardizing matrimonial property relations among the spouses. These include economic, social and political factors. Among the spouses, women are highlighted not to own and have limited ownership of important resources in a home especially land a basic factors at play that inhibit women among the spouses from owning important resources in a home. Owning important resources in a home need to be addressed within the perspective of the aggrieved party concerning matrimonial property in the particular circumstances. In doing this, it must be borne in mind that none of the spouses is a homogenous group. Each of the spouses has a role to play determining their status or even influencing their responses or coping strategies to given situations.

5.1 The Constitutional Frame work

The Constitution of the Republic of Uganda 1995 as amended was promulgated on 8th October 1995, the Constitution presents new and fundamental changes which are significant to property. The Constitution has provided for the establishment of an equal opportunities commission and has guaranteed that women shall be accorded full and equal dignity of the person with men. Within this constitutional empowerment property legislation should be enacted or activated. The Constitution also advances the possibility of encouraging popular tribunals and the revival of

tradition mediation agencies⁷⁴. **The Civil Procedure Rules**⁷⁵, have already embraced the system of alternative disputes resolution as opposed to court proceedings. This implies that an alternative route to access the formal courts must be found either in the court system itself, outside it or parallel to it. This is necessary if the judicial system is to cope with the problem of property related disputes.

The judicial process itself is stated to involve the laws, norms, values and aspirations of the people. This gives ample room for both law and reform and judicial changes that can accept multiple conceptions of law and adjudicating process. The nature of property disputes in Uganda appears to require this versatile combination besides extending the mandate to the local council courts to cover property related disputes there is need to rediscover traditional mediation agents such as the clans court or committees and integrate them into the adjudication process.

5.2 Balance of power relations

Power relations in a home are highlighted to be a great influencing force on property relations among spouses. Men are highlighted to dominate ownership and management of resources in homes by virtue of their being the bread winners, the financial providers and the purchasers of almost everything in a home. Though the law indeed challenges this status quo by providing for gender equality, it will have little or no effect among spouses if the power relations are not gender balanced. Thus in suggesting remedies, power relations among spouses should be focused, in addition to other phenomena like law and religion. In this regard, the balance in resource management among spouses can only be remedied by reviewing all the socio economic realities that have marginalized women as well as the form of labour they avail. This will go

⁷⁴ *Of the Constitution as amended.*

⁷⁵ *Cap 71, Laws of Uganda.*

along way in improving the purchase power of women and consequently increasing their capacity to own and control resources in a home.

5.3 Prima facie case in Derivative Action

It is argued that reform should be made concerning the requirement of showing a prima facie case by the plaintiff in a derivative suit. Court do not usually allow a full scale trial to proceed, thus without hearing evidence they are in no position to know whether there is a serious risk that the aggrieved party may not come to an informed decision of whether to litigate or not.

It is also asserted that rules should also be laid down allowing the aggrieved party among the spouses to bring action and make joint decisions in resource management in their homes including decisions to sell or purchase resources and even to utilize the proceeds. This should be done with mutual understanding and respect, rather than mutual suspicions and quarrelling. This can help them formulate any precise allegations against the wrongdoers. This is because in derivative suits, court insists on the discovery of documents and correspondence necessary for the conduct of the proceedings. This would also reduce on disputes that arise among the spouse related to matrimonial property wrangles.

The derivative action should not be allowed as a remedy of last resort. An aggrieved party is always refused to use it where there is another alternative action available for any of the parties among the aggrieved spouse. This should be changed to allow the aggrieved spouse to institute a derivative action whenever need arises.

5.4 Legal awareness campaigns

Spouses minimal ownership and control of resource concerning their matrimonial property is partly attributed to their lack of awareness of laws governing matrimonial property in marriage. This situation calls for an intensive legal education, programme to enable society especially the

aggrieved party in marriage to advocate for his or her rights and to make their needs known. A campaign on legal awareness should be commissioned country wide.

On the issue of separate ownership of property, a wife should have her own separate property. This criminalizes situations of such property being mixed up with the husbands especially when the later passes away in succession matters, the estate of a deceased man should be exclusively for the widow and her children. The relatives should not get shares out of such an estate as they jeopardize the property rights of widows and children. The awareness campaign should be handled by the family courts so that the spouses know their rights and issues concerning their matrimonial property.

Lack of knowledge of statutory law which governs property rights in marriage and at its dissolution by divorce or death.

Even there are many key informants who are quite knowledgeable about the existing law governing matrimonial property and are totally ignorant about statutory law. This shows how alien statutory law is to people at the grass roots. In Uganda's legislation, as in most legislations of this world, it is the man's norm that applies in most areas of social life. Thus for the most part, the opinions, needs and experiences of men are reflected in laws and religious principles.

There is also need to educate the spouses on how to make wills. Also judges, lawyers as key players in the distribution of deceased property should pay special attention in handling issues on inheritance and distribution of property as it appears to be a complex area.

The law for the establishment of courts should be enacted for proper administration and effective handling of matrimonial property in Uganda. Also, in order to avoid problems, one should have one's financial matters in order. There must be clear definition of property with regard to all aspects especially household goods, general advice on making a will, have the marriages

registered according to the Ugandan law, the estate of the deceased should be wound up speedily and the heirs must be given their shares, one must be very careful about debts among others

5.5 Legal Reforms

Much as the law has been recommended in making gender balanced provisions on equality, there is still a lot of room for improvement especially in the areas of property relations between spouses. There is need for the laws on domestic relations to spell out property interests of spouses on marriage, during marriage and after marriage. This would minimize the disputes, wrangles or even violence that characterizes marriage situations centering on proprietary interests of spouses and ex-spouses.

The law should also go further to re-define the concept of matrimonial property and what

Concerning Muslims, the Khadi, Imams and the state have major role to play in order to safeguard the Muslim marriages in Uganda. Muslim couples should be educated on the key principles of sharing matrimonial property in case of a dispute among the spouses.

In order to effectively manage the Muslim marriage in Uganda, **Article 129 (1) (d) of the Constitution of the Republic of Uganda 1995 as amended** which caters for the establishment of the Quadi courts should be put into effect. The Quadi courts should have exclusive jurisdiction over cases within their powers. There is a need to have proper and regular system of reporting of Quadi court cases, to be a source of reference for the judges, legal practitioners and the public at large.

In Uganda's legal system, various laws have been highlighted to discriminate against women, notably the laws on marriage, divorce and succession. For instance the Divorce Act, sets out separate discriminatory grounds for divorce. While a husband must prove one ground, a wife has to prove seven grounds. Also the secular laws on marriage and divorce are silent on property

relations on marriage some case decisions like that in **Nakiyingi v Merekizadeki**⁷⁶, and **Uganda v Jennina**⁷⁷ have come out with bold case decisions concerning married women's rights to own property separately from their husbands. In **Nakiyingi's case**⁷⁸, a wife who had tilled the land and contributed iron sheets to the construction of the matrimonial home was held by the court of Appeal to be having proprietary interest in the property. The court applied equity to reach such decision. In **Uganda v Jennina Kyanda**⁷⁹, a wife-who was convicted of contempt of court under section 101(1) she re- took possession of land, which court had previously ordered in favour of her husband. The issue at stake was whether a spouse is capable of committing an offence in respect of such property bearing in mind the principle of unity of spouses on revision of the case, the High Court held among other things that a woman in Uganda is capable in law to hold and own her own separate property from her husband. In respect of such separate property, the wife is not debarred from instituting proceedings against her husband and vice versa. This Judicial position is strengthened by the 1995 Constitution of the Republic of Uganda which provides for equality during marriage and at its dissolution.

5.6 Reducing on the unfair rules on matrimonial property

There is need to set up courts to interpret and implement matrimonial property rules among spouses.

It is argued that corruption has been a major hindrance to the realization of the aggrieved party's rights among the spouses in that many lawyers have turned the problems of spouses into business matters, they continually receive bribes in order to turn a deaf ear to their fellow errant lawyers ,

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Above.*

⁷⁹ *Above.*

some even swindle the spouses money. It is thus proposed that strict measures such as instant dismissal of any corrupt lawyers be introduced to curb corruption so that the problems of spouses are dealt with properly. This should be in conjunction with the courts to help in interpreting and implementing matrimonial property rules among the spouses. Every spouse should be taught on the issue of his or her rights in the family.

And this should be done in sending the spouses about issues concerning their matrimonial property.

5.7 Conclusion.

The position of matrimonial property relations among spouses in Uganda has been analyzed. The operative systems of laws comprise statutory laws, customary laws, customs and practices, religion (Sharia) and the institutional framework. The analysis of the findings highlights that the laws, customs, religion and their implementation structures advances the interests of men and repress the rights of women to property before marriage, during and after marriage. The scenario is favorably endorsed by the patriarchal set up within which our society operates.

The spouses' knowledge and access to statutory laws is relieved to be largely wanting.

However *Nakiyingi's*⁸⁰ case greatly favours the status of a woman in issues concerning ownership and control of matrimonial property. The decision contrasts sharply with the English common law position which originally conferred possession of all real property owned by a wife at marriage to her husband. The husband was entitled to the rent from the land and to any profits made from operating the estate during the joint life of the spouses. As time passed the English courts devised means to forbid a husband transferring real property without the consent of his wife, but he still retained the right to manage it and to receive the money which it produced.

⁸⁰ *Ibid.*

Regarding the wife's personal property, the husband's power over it was complete since he had the right to spend it as he saw fit.

Spouses lack the traditional and social power to influence the administration of custom as well as religion. The generality of statutory law and the gender specific nature of custom and religion (Shari) circumvent the spouses needs.

Dispute resolution structures are seen to play a great role in the administration of justice where problems arise. However, they are found to be inadequate to contain the peculiar gender biases and prejudices that exclude the aggrieved party's needs and rights in case of disputes concerning matrimonial property. While the formal structures are inaccessible, expensive and bureaucratic, the informal ones,' particularly the religious and customary ones rely on gender biased norms and values. In the process, the spouses' needs and rights are either not addressed or suppressed. This would necessitate institutional and sustentative reforms that are multidisciplinary to cover all socio cultural as well as legal perspectives. The courts work need also be organized so as to provide the best possible facilities for conciliation, professionally trained staff need be available to assist both the court and the parties.

The term conciliation is used in the sense of assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation by reaching agreements or giving consents or reducing the area of conflict upon custody, support access to the education of the children, financial provision, the disposition of the matrimonial home, lawyers fees and every other matter arising from the breakdown which calls for a decision on future arrangements.

Conciliation procedures should be conducted through the court and this will help to civilize the consequences of breakdown than to achieve a full reconciliation between the parties. The court

should be equipped with its own specialized family court welfare service. Also the circumstances of the spouses should be examined at a family court conference, organized and conducted by the court welfare service.

To some extent this research would be concerned with financial matters but its chief purpose would be to encourage the parties to a marriage which has remained broken to consider their matrimonial future. The resources of the court would be deployed in order to ensure that people have all the legal, social and financial information and assistance necessary to make rational choices. The research will seek to place poor and ill informed people in as good a position to make reasoned judgment as are those who can afford to pay for the professional advice of solicitors, bank managers and accountants. In essence, it is believed that if the spouses are properly advised would favour divorce rather than the preservation of the empty legal shell of a broken marriage. The court also has to organize its procedures, sittings and administrative services and arrangements with a view to gain the confidence and maximizing the convenience of the parties who appear before it. Among the spouses, property in most homes is owned by the husbands. Husbands control property while women utilize and manage it and there are only a few or certain instances when spouses make joint decisions on issues concerning the matrimonial property. There are many factors that contribute to the concealment of property by both husbands and wives. The most important of these are mistrust, unpredictable future and religious beliefs.

Spouses who conceal property from each other do not trust their spouses. And those who conceal property do it possibly due to mistrust of their partners. Wives suspect that their husbands have extra marital relationships with other women so they fear that they might be sent away from the matrimonial house any time. Thus if both spouses are aware of the existing law most especially those laws that suit them, they will be able solve the problems that arise as a result of

concealment of property. This is a key to solve property related wrangles during and after marriage.

Early classical liberal philosophers, notably Hobes , Locke , Rosseau⁸¹ all attach question marks onto women's status as persons , both in terms of moral philosophy and law.

At times spouses prefer having their property related problems settled outside court. This is clearly understandable. This is because elders are approachable and accessible as no bureaucracies stand between them and the respondents. This implies therefore that elders play a role in resolving property problems among spouses. However, if not properly solved, this would directly affect the status of spouses in property control, use, management and ownership in a home. Education campaign should be complementary in that all knowledgeable persons particularly lawyers and experts should handle it. The focus on education or sensitization programmes should be to change people's attitudes on their property rights and to advocate for gender equality.

The limits set in the distribution of the estate must be observed and the property must be delivered to the respective heirs. There is no place for favour or hatred for any bonafide heir to make any of them suffers injustice or undue favour. Therefore, any person who has special love for any relative or potential heir, is free to do so through the process of gift where the beneficiary will take the possession of the property during his or her lifetime. For effective protection of the spouses in issues concerning the matrimonial property it is submitted that the above recommendations should be put into consideration.

⁸¹ Omony John Paul, *Key issues in Jurisprudence page 1 and 2, 1st edition.*

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