

**SHARING OF PROPERTIES UNDER CUSTOMARY MARRIAGES IN UGANDA: AN  
EXAMINATION OF THE LAW.**

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**A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL  
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**MARCH 2018**

### DECLARATION

I AMITO NANCY IMMACULATE declare that this dissertation entitled “ **SHARING OF PROPERTIES UNDER CUSTOMARY MARRIAGES IN UGANDA: AN EXAMINATION OF THE LAW**” is entirely my own effort and has never been submitted to any institution for any academic-award whatsoever.

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## APPROVAL

This dissertation, “ **SHARING OF PROPERTIES UNDER CUSTOMARY MARRIAGES IN UGANDA: AN EXAMINATION OF THE LAW**” has been under my supervision and is due for submission to the Faculty of Law of Kampala International University.

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Signature: Date: 24/03/2013

## DEDICATION

This dissertation is dedicated to my family, special thanks to you mummy for your selfless care and attention in our hours of daily need. You really worked so hard for me and sister Sarah. Thank you mummy and uncle Alfred for your mercy heart of caring and love, for your struggle and hard work has really made me who I am. I am really profoundly grateful.

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## LIST OF STATUTES

Constitution of Republic of Uganda 1995.

Customary Marriage (Registration) Act Cap 248.

Universal Declaration of Human Rights 1948

African Charter on Human Right 1981

Land Act cap 227

The Uganda Human Rights Commission Act Cap 24.

Penal Code Act

Case Law

Judicature Act.



## LIST OF CASES

Moonlight Sengooba V A.G Nc Suit No. 894/1973

Gumede V. President of the Republic of south Africa 2009 (3) BCLR 243 (CC)

Law and Advocacy for women in Uganda V Attorney general of Uganda constitutional petitions No S. 13 /05/805/06.

Mifumi (U) LTD & ORGS V Attorney General and Kenneth and Kenneth Kakuru Supreme Court Constitutional Appeal No: 02 of 2014.

Julius Rwabinumi V Hopo Batti Mbisomwe Civil Appeal No. 10 of 2009.

Uganda Association of Women Lawyers and Others V Attorney General Constitutional Petition No. 2 of 2003.

Muwanga V Kintu, High Court Divorce No. 135 of 1997.

Kivuitu V Kivuitu (1990) E.A 270.

## ABSTRACT

The study aimed at examining the law of sharing of properties under Customary Marriages in Uganda. The Objectives of the study were; to review the existing legal framework in protection and distribution of property, to analyze the effectiveness of the institutional framework governing property sharing in customary marriages and to examine the effects of the law of sharing of properties under customary marriages in Uganda.

The recommended a by analyzing this study on the topic of Sharing Property in A Customary Marriage. I have come up with the following conclusions, observations and recommendations that should be addressed by all stakeholders from Uganda and other nongovernment organizations at both national and international levels. This is in the bid to promote equity and peace in the sharing of property in a customary marriage.

The study concluded by revealing a large destruction and damage to property in customary marriages when not explicitly divided among the members of the family. This research is therefore intended to shade light on the law and bring awareness to the community.

## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

#### **1.0 Introduction**

This research project considers the examination of the law on sharing properties in customary marriages in Uganda. This legal protection has come to cover the prevention of unfair division of property, the protection against loss or decay of property, the safeguarding of cultural heritage, the protection and promotion of conditions to ensure the legal and fair division of property and heritage as well as the protection of access to property in a customary marriage. This means that the sharing of properties under customary marriages today has become an important subject-matter in a network of policy fields, which makes it necessary to understand the most important objectives of these legal instruments, to discuss how they interrelate and how they may support each other. This research therefore is to provide an account of the major developments in the law of sharing properties under customary marriages in Uganda. This account is intended to present a general outline of the network of relations between the major interests that are involved in these developments, not only in the sharing of property, but also in the protection of the rights to access, enjoy and share the benefits of sharing property under customary marriage. The research project will be guided by three sub-questions concerning the protection of the interests of the national state in relation to the international community, the protection of the rights of individual right holders, and the protection of the position of communities in relation to their property. This will lead to the concluding chapter, which will provide a comprehensive assessment of the major tendencies in the law of sharing properties under customary marriage in Uganda.

At common law, property was generally owned by only the husband. Today, the law generally allows husbands and wives to own property. Property in marriage may have different dimensions. There is property that may be acquired by spouses jointly and for joint use and other property may be acquired separately.

It may be property acquired separately but used jointly. Further, it may also include property in which the title is vested in one party but the other carries out improvements on the property. It's

these various dimensions of property that have given rise to various issues particularly on how such property may be shared when the two parties want to separate on in case of divorce.

Today the legal position that women cannot own property in their own right has changed. They can acquire property irrespective of their marital status: Every person has the right to own property either individually or in association with others.<sup>1</sup>

The court held that the English Married Women's Property Act (MWPA) (1882) which allows women to own property in their own right was applicable in Uganda. Historically the MWPA (1882) was of universal application. It provided that any woman marrying after 1882 should be entitled to retain all property rights owned by her at the time of the marriage as her separate property. That whenever she was married any property acquired by a married woman after 1882 should be held by her in the same way.<sup>2</sup>

Customary law means the customs that have developed over the years in different communities in Uganda. Customary law is not usually written down. One key feature of customary law is its dynamic nature, it changes over time as people change their ways of doing things.<sup>3</sup>

A customary marriage can be monogamous or polygamous meaning that a male older than 18 years of age can marry more than one wife. A customary law can only be concluded in accordance with customary law. Customary law is defined as the customs and usages traditionally observed among the indigenous African people of Uganda which forms part of the culture of those people.

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<sup>1</sup> Article 26 of the Constitution of Uganda 1995

<sup>2</sup> Moonlight Sengooba V A.G NC Suit No. 894/ 1973

<sup>3</sup> Dianne Hubbard, Marital Property in Civil and Customary Marriages , Gender Research and Advocacy Project, 2005

## 1.1 Background of the Study

Customary Marriage means a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community or any marriage celebrated in accordance to the Act.<sup>4</sup>

Customary law means the customs that have developed over the years in different communities in Uganda. Customary law is not usually written down. One key feature of customary law is its dynamic nature, it changes over time as people change their ways of doing things.<sup>5</sup>

A Customary law can only exist if a specific legal practice exists and that *opinio juris* deems it to be a law.

Every person has a right to own property individually or collectively with other people.<sup>6</sup> Uganda Constitution is heralded as one of the most gender neutral with regard to property rights in sub Saharan Africa including land rights both in content and language. It accords both men and women the same status and rights. In addition to the guarantee of property rights “without bias to gender or marital status,” the Ugandan Constitution also decrees equal land rights for men and women during marriage and at its dissolution, with a clause on the use of affirmative action in favor of marginalized groups based on gender or other reason created by history, tradition or custom for the purpose of redressing existing imbalances.

Property rights in Uganda are usually discussed in the context of land with little written about women’s rights and access to other reforms of physical and financial assets such as agricultural equipment, livestock and savings and credit. The Land Act also recognizes ownership of property by women and outlaws any decisions against women.<sup>7</sup>

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<sup>4</sup> Section 1(b) Customary Marriage (Registration) Act Cap 248

<sup>5</sup> Marital Property in Civil and Customary Marriages , Gender Research and Advocacy Project, 2005

<sup>6</sup> Article 26 Constitution of Uganda 1995

<sup>7</sup> Sections 4,37and 39 Land Act Cap 227

Customary marriage is typically guided by traditional norms and practices of a community and ungoverned by national legal statutes on marriage. Customary marriage in Africa broadly provides a framework for attaining wider objectives, beyond the interests of two parties getting married. These interests include the continuation of the lineage group, the establishment of alliances and the provisions of domestic services by a wide. Individual interests are viewed within the wider interests of the community. As a consequence the customary marriage is considered more a social rather than legal institution.

Customary marriages are legally recognized by the Customary Marriage (Registration) Act Cap 248 whose stipulation is for customary marriages to be registered by the government, however the lack of registration of a customary marriage does not invalidate it.<sup>8</sup> The Act does not specifically address the rights and responsibilities of each party to the marriage and is silent on the law and procedures concerning the dissolution of customary marriages.

People acquire assets through a number of different means. Assets may be inherited, received as gifts or transfers, purchased or distributed by the state. Preliminary evidence suggests that men and women obtain assets through different channels. Inheritance is both way that individuals acquire assets and that wealth is transmitted across generations. In addition to financial assets the physical assets that could be important are dwellings, land, livestock, businesses, agricultural equipment and consumer durables.<sup>9</sup>

## **1.2 STATEMENT OF THE PROBLEM**

The dissertation will highlight, discuss and entire the place and the efficiency of the law and challenges facing the area of Sharing of Properties under Customary Marriages in Uganda with respect to the law.

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<sup>8</sup> Section 6 Customary Marriage (Registration) Act Cap 248

<sup>9</sup> Birabwa-Nsubuga, Christine. "Women Under Customary Marriage in Uganda : A Critical Look at their Property Rights at Dissolution." Research Partnership 2/2006, The Danish Institute for Human Rights (2007).

All customary marriages where there is one husband and one wife whether entered into prior or after the coming into operation of the Act are in community of property ( Gumede V President of the Republic of South Africa 2009 (3) BCLR 243 (CC). This means that they share all the debts. If the parties would like their marriage to be out of community of property they will have to enter into an ante-nuptial contract prior to getting married. If they want to change after they are already married they will have to apply to the High Court.

The sharing of property in customary marriages is governed by various customary laws. This therefore leads to varying degrees of methods and conditions when sharing the property and in the process several problems arise towards access to the property. Customary law often poses a problem and hinders the enforcement of laws that positively and equally consider the rights of the spouses. There is a social resistance and the various ways in which males in the family reposses the property. The conflict between positive law and customary. The conflict between positive law and customary law is indeed difficult commitment. Furthermopre, the fact that made spouses are considered the heads of families pramales the exclusion of women from arrest to economic resources.<sup>10</sup>

### **1.3 OBJECTIVES OF THE STUDY**

#### **GENERAL OBJECTIVE**

1. To examine the Law of sharing of properties under Customary Marriages in Uganda.

#### **SPECIFIC OBJECTIVES**

1. To review the existing legal framework and its effects in protection and distribution of property.
2. To analyze the effectiveness of the institutional framework governing property sharing in customary marriages.
3. To establish recommendations and observations as a result of the study on sharing of property in a customary marriage.
4. To ascertain the rights of the parties to a customary marriage.

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<sup>10</sup> Tavoids Wamen's equal rights to land in the Eastern Africa sub religion by Akini Nzioki

5. To establish the where the girl child and boy child enjoy some rights with regard to property inheritance in a customary marriage.

#### **1.4 RESEARCH QUESTION**

The question sought to be answered by this paper will be “Is the mode of sharing of properties in customary marriages in Uganda that is currently granted by the law sufficient in the respect of the heritage of the concerned.

#### **1.5 METHODOLOGY OF THE RESEARCH**

In view of collecting reliable and representative information on the topic; the work will thus heavily rely on qualitative research which will be conducted in an interpretative manner.

The researcher will use Action research whose primary intention is to solve the specific, immediate and concrete problem of women’s rights in sharing of properties under customary marriages in Uganda.

The concern here is not whether the research results are generalized because the major goal is to seek solution to the problem of sharing property in customary marriages.

Action research is found useful because it provides answers to problems that cannot wait for theoretical solutions.<sup>11</sup>

The written sources of data such as text books, newspapers, magazines, journals, papers and other publications will be referred to, the law national law of Uganda and international statutes ratified by Uganda.

#### **1.6 SCOPE OF THE STUDY**

The research will examine the law of sharing property in a customary marriage as governed by the various laws of Uganda. The research will further provide a legal basis for protection of cultural rights of various groups of people which obligation also exists in customary law governing sharing property in customary marriage. In the endeavor to adequately respond to the above query, the researcher will understand what customary law is and comprehend its area and scope of operation.

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<sup>11</sup> Towards women equal rights to land the Eastern African subregion by Akinyio Nziok.



There are numerous aspects governed by customary law however this dissertation will focus on sharing of property in a customary marriage.

### **1.7 HYPOTHESIS**

The hypothesis of the study considers the legal basis for human law application and moral context by concentrating on the motivations of law in Uganda on the sharing of property in customary marriages.

### **1.8 SIGNIFICANCE OF THE STUDY**

This study is intended to justify and build upon prior research done by schools, jurists, international organs and promoters of law. The study seeks to analyze the legal status of the law in sharing and protection of property in a customary marriage. Proposals will be made in relation to how the legal regimes can provide further protection in the distribution of property in a customary marriage.

### **1.9 CHAPTERIZATION**

The first chapter of the research in summation includes the general coverage of sharing property in a customary marriage including the introduction, background and a literature review of what has been written about the topic. It also includes the objective of the study, the scope of the study and statement of the problem.

The second chapter sums up the legal and institutional framework governing sharing property in a customary marriage. This chapter of the research paper paints a clear picture and illustrates the role of both international, domestic law and institutions like the government. The various initiatives they take to protect the property in the state in the event of conflict. This is because unlike other properties, cultural property has the dimension of emotional attachment of the community. Its destruction or spoilage inflames the social body in a far more serious way than it apparently appears to be. Whereby the reasons for noncompliance and violations are traceable to inherent non legal factors and not to the infirmities of customary marriage Law as such.

Chapter three sums up and concludes the effects and potential risks as a result of not protecting property in a customary marriage. The chapter goes ahead to illustrate the identification of

potential risk as a result of non-protection of cultural objects in conflict. The possible means of preventing the possible risk resulting from non-protection of property is also included in this chapter. However last but not least the third chapter concludes the possible means of preventing the possible risk resulting from non-protection of property in a customary marriage.

### 1.10 LITERATURE REVIEW

Customary Marriage means a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community or any marriage celebrated in accordance to the Act.<sup>12</sup>

Customary law is a form of a traditional, commonly accepted rule or practice that has the power of law and is usually found within a particular ethnic group or location. It doesn't have a formal status but is still recognized in court. The majority of customary laws represent certain community regulations that have been accepted for generations and thus became an inseparable part of the culture of its members. A customary law can only exist if two requirements are met that is a specific legal practice exists and the *opinio juris* deems it to be a law.<sup>13</sup>

According to Uganda's Constitution and Land Act, both women and men have equal rights to own land and property, either as individuals or jointly with other people. When people get married, they do not lose these rights. However, because couples tend to share property, what belongs to the husband, what belongs to the wife, and what belongs to both can become confusing. In many cultures in Uganda, most or all property belongs to men, even if their wife has it before marriage or is the person to buy it or pay for it. It is important for women and men to know that they can own property before, during and after the marriage is dissolved.<sup>14</sup>

A customary law has power not because some influential person or company enforces it but because one of the collective mindset of the population. Thus while most traditional laws have to be forced onto the common people the former works the other way around. The people dictate what is legal and not the court. Both types of laws exist in parallel to each other. However there has been a noticeable trend regarding formal recognition of customary law. One of the most

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<sup>12</sup> Section 1(b) Customary Marriage (Registration) Act Cap 248

<sup>13</sup> Francis Ladipo//<https://naij.com/1127334-what-customary-law-marriage-nigeria.html#1127334>

<sup>14</sup> Article 31 Constitution of Uganda 1995

prominent examples of customary law is the Ugandan marriage practice, which is the main subject of this research.

Customary law means the customs that have developed over the years in different communities in the country. Customary law is not usually written down. One key feature of customary law is its dynamic nature. It changes over time as people change their ways doing things.<sup>15</sup> In a marriage “in community of property” all the assets and liabilities of the husband and wife constitute one joint estate. This includes assets possessed at the time of marriage and those acquired during the marriage. Each spouse owns an undivided half share of the joint estate. Liabilities incurred by either spouse are paid out of a joint estate. The enforcement mechanisms intended to back up these rules are weak, meaning that a failure to comply will usually result in an appropriate adjustment to the division of the joint estate only at the time when the marriage comes to an end through divorce or death.

The property that is given to a person as a beneficiary of a Will will not form part of matrimonial assets. Property that a spouse acquired by way of custom and such custom requires that they hold that property personally is not also subject to division. Property that a spouse acquired by way of custom and such custom requires that hold property personally is not also subject to division. Property that is sentimental value to the spouse concerned and acquired in any manner by a spouse is also not subject to division. The English dictionary defines sentimental value as the personal value of an object, derived from the personal memories associated with it. The major challenge so far is that the law has not defined sentimental value.

Culture has been defined as that complex that one acquires as a consequence of being a member of a particular society. It may be material as is reflects in its ways of dressing, works of art, greeting and feeding habits. It may also be immaterial involving ways of behavior and values among others.<sup>16</sup>

Despite the pivotal roles women play in society for example those in customary marriages, they are disempowered by cultural dictates. Culture constrains the women's ef

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<sup>15</sup> Dianne Hubbard, Marital Property in Civil and Customary Marriages, Gender Research and Advocacy Project, 2005

<sup>16</sup> Alice P Tuyizere Gender and Development, The Role Of Religion and Culture.

forts towards development in a customary marriage. It has been stated that societies world over are patriarchal in nature. A belief in the superiority of men over women undermines women development for example in property sharing in marriages. This is because women are considered inferior, authority lies in the hands of the so called superiors and have placed themselves in influential positions; these men sabotage women's efforts to rise above their circumstances, so as to maintain the status quo. Most men tend to be assertive in their homes because they are the income earners and disregard their wives contribution even if the wife is also in gainful employment. Because culture has socialized women to be submissive and less assertive, they are susceptible to men's wishes enslaves women to still believe that they cannot inherit or own property in a customary marriage.<sup>17</sup>

Property and land rights are absolutely essential to economic survival. Historically, both statutory and customary law governs sharing of property. The legal system upholds patrilineal ideologies and provides that a wife may claim 15 percent of the husband's estate when he dies. Whereas when a woman dies her husband becomes automatically the owner of everything she possessed. This bias in inheritance was recently addressed in a constitutional court case filed by a women's activist organization.<sup>18</sup> The High Court declared that the provisions of the Succession Act and the Penal Code discriminated against women's inheritance on grounds of sex which is contrary to the fundamental principles and human rights enshrined in Uganda's constitution, and thus struck them off the statute books and ordered Parliament to draft new laws.

It's 10 years since the 1995 Constitution was promulgated. Parliament has in the last 10 years failed to fulfill its duty and mandate, therefore, the Constitutional Court has the responsibility to remedy constitutional violations incurred as a result of outdated laws and parliament's inertia. Challenges women's rights and creates awareness about social injustices.

Social injustices are evident right from the household level where for example, the work that women do on behalf of the family is not rewarded because decision making is usually done by men who control the resources and benefits. It is an established fact that women in Uganda are

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<sup>17</sup> Alice P Tuyizare Gender and Development , The Role Of Religion and Culture.

<sup>18</sup> Constitutional Petition No.13/5 and 15/06 between Law and Advocacy for Women in Uganda Versus Attorney General of Uganda judgment delivered on 5<sup>th</sup> April 2007.

responsible for producing 80% of food and they provide approximately 70% of the total agricultural labourforce. It's also a fact that agriculture is the cornerstone of the economy and yet women's significant role in agriculture is not recognized. Despite women's disproportionate contribution to the agricultural labour force, only 7% of women own land in Uganda. This disparity in ownership perpetuated by laws such as the succession Act results in increased poverty for women and limits their ability to care for children. The poverty of Women and children not only constitutes a gender-based discrimination in violation of the Constitution and international law, it also strains the government's resources and hinders the development of the Ugandan economy.

The Succession Act violates international laws guaranteeing the human for all irrespective of gender and obligating the government to take affirmative steps to ensure their enjoyment.

### **Uganda's International Obligations**

The Uganda government has ratified several treaties that express its commitment to human rights and its willingness to adhere to international human rights standards. These treaties include the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW); The International Convention on Civil and Political Rights (ICCPR); The International Convention on the Economic, Social and Cultural Rights (ICESCR); and The Human and People's Rights (African Charter);

International law places obligations upon states to carry undertakings it has accepted by pacta sunt servanda-agreements between states are binding. The relationship between the rights guaranteed by the Constitution and the rights found in international law is further outlined by Article 45 of the Constitution, which states that, "The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter, shall not be regarded as excluding others not specifically mentioned."

In the international treaties it has ratified, Uganda has committed not only to avoid future discrimination against women, but also to provide a remedy for termination of that already exists. As party to CEDAW, Uganda has agreed to eliminate discrimination against women through a variety of approaches. The Constitutional Court plays an integral role in the process.

under CEDAW Art. 2 (c ), which requires Uganda, ..... to ensure through competent national tribunals and other public institutions the effective protection of women against any acts of discrimination". Similarly, ICCPR Article 2 (3) requires parties to ensure that any person claiming such a remedy (against human rights abuse) shall have their rights thereto determined by competent judicial, administrative or legislative authorities...." The Universal Declaration on Human Rights, to which Uganda is signatory, is also useful for interpretative purposes.

In addition to this, Uganda has signed but not ratified, the Protocol to the African Charter on Human and People's Rights on the Rights of women in Africa. Under the Vienna Convention on the Law on treaties, Uganda may not undermine the objects and purposes of a treaty it has signed, even if it has not yet been ratified<sup>19</sup>.

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<sup>19</sup> Report on intestate succession by law and advocacy for women in Uganda.

## CHAPTER TWO

### THE LEGAL FRAMEWORK GOVERNING THE SHARING OF PROPERTY IN A CUSTOMARY MARRIAGE.

#### 2.1 INTRODUCTION

Marriage is an institution that can have a significant impact on men's and women's property rights. Family law in Uganda covers who can get married, the types of marriage that are legal, what makes a marriage legal, marriage rights and responsibilities, as well as marriage breakdown (either by separation or divorce). In practice, customary rules and norms about marriage are applied to family law alongside statutory requirements. Regardless of differences in the written laws and in customary and religious rules, the Constitution provides the standard upon which all marriages are based to be fair to both men and women. It is important to note that the family laws are currently under review because some are unfair or discriminatory to men and women and the law has to change to reflect the equality embodied in the Constitution.<sup>20</sup> If and when the family laws are unfair or unclear, the Constitution is applied as the standard for both men and women in marriage. Even though property will be discussed in the context of marriage, it is important to remember that men and women have property rights outside marriage including when they are single, separated or divorced. Marriage is when a man and a woman decide to stay together for life of their own free will under any of the existing legally recognized forms of marriage in Uganda. Deciding to marry is not the same as living together or having children together. Unless a man and woman go through the procedures necessary for a church marriage, civil marriage, customary marriage or Islamic marriage, the law does not consider them to be married. This is even if they live together or have children together. This is important because the law gives certain rights and obligations to people who are legally married like rights to inheritance, property and family maintenance.

Cohabitation (where man and woman live together without going through any of the legally recognized marriages) is not legally recognized as a form of marriage in Uganda. Consequently, cohabitating couples do not have the same property rights and legal protections as men and

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<sup>20</sup> Article 26 Constitution of Uganda 1995

women who are married. For example, unless the land where they stay is registered in her name (either alone or jointly with her partner), a cohabiting woman has no legal protection to stop the man she is cohabiting with from selling, renting out, or giving away the land where the couple stays or farms, whereas a married woman would be protected in that her partner could not take any of these actions without her written consent. In Uganda for a customary marriage to be legally binding it has to be a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community or any marriage celebrated in accordance to the Act.<sup>21</sup>

When a customary marriage is celebrated, the couple must register the marriage at sub-county headquarters within six months of the wedding, and they must bring two witnesses from the wedding. To be valid, a marriage certificate must be signed by each spouse in front of two witnesses and be issued by a person who is legally authorized to perform marriages. Each spouse must be at least 18 years old.<sup>22</sup>

Depending on the religion or custom of the spouses, there may also be other proof that a couple is married. For example, among some communities in Buganda letters from parents state the identity of the child to be married, the clan and that the child is permitted to marry. Across Uganda it is common for the husband's family to give the bride's family a bride price of money, animals or other goods. However, only the marriage certificate is legally recognized as proof of the marriage. A marriage certificate shows that the marriage is legally recognized. This means that the spouses have certain rights and responsibilities according to the law.

A marriage certificate helps parents protect their children's right to inherit their property if they divorce or if either of the parents dies. A marriage certificate can make it easier to protect widows' and widowers' rights to inherit property of their spouse. Having a marriage certificate can make it easier to obtain other documents like Letters of Administration or Certificates of No Objection. Registering marriages makes it clear about the person required to give consent if one spouse wants to sell family land. If one spouse wants to leave the marriage and take with him/her

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<sup>21</sup> Section 1(b) Customary Marriage (Registration) Act Cap 248

<sup>22</sup> Customary Marriage (Registration) Act Cap 248



all the property, the other spouse can produce the marriage certificate to show that s/he also has a claim to the property.<sup>23</sup>

Current marriage laws in Uganda do not clearly spell out the property rights of married men and women. Rather, this information comes from Common Law (the law passed on to Uganda by the British). However this research will shine light on the various institutional and legal frameworks that has over the years been put in place to govern the sharing of property in a customary marriage. The property rights of a woman separated under customary law are determined by the customs of the particular tribe or community to which the husband or wife belong as long as the customs treat women and men equally in agreement with the Constitution. The property rights of a woman divorced under customary law are determined by the customs of the particular tribe or community to which the husband or wife belong as long as the customs treat women and men equally in agreement with the Constitution.

## **2.2 INTERNATIONAL LEGAL FRAMEWORK**

### **2.2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948**

The declaration provides that everyone is entitled to all the rights and freedoms set forth in it and this is without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>24</sup> There this provides for the ground that in the event of property sharing in a customary marriage there equity ought to be followed.

The declaration further guides the act of property sharing in a customary marriage. It therefore states that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>25</sup> The declaration then

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<sup>23</sup> Customary Marriage (Registration) Act Cap 248

<sup>24</sup> Article 2 Universal Declaration Of Human Rights 1948

<sup>25</sup> Article 7 Universal Declaration Of Human Rights 1948

provides for remedies in case a person is deprived of property as a result of custom and cultural norms. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>26</sup>

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>27</sup>

A fundamental Article in the Declaration provides that everyone has the right to own property alone as well as in association with others. That no one shall be arbitrarily deprived of his property. This is a law that is paramount in the discussion concerning the sharing of property in a customary marriage.<sup>28</sup>

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>29</sup> Therefore in the event that there is a subsisting customary marriage then the parties ought to abide by the set rules.

### **2.2.2 AFRICA CHARTER ON HUMAN RIGHTS 1981**

The Charter was presented by the members of the African Union as are currently known. Uganda is a party to this law and has also ratified the treaty. The Charter states that the State parties shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.<sup>30</sup>

The Charter further states that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind

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<sup>26</sup> Article 8 Universal Declaration Of Human Rights 1948

<sup>27</sup> Article 16 Universal Declaration Of Human Rights 1948

<sup>28</sup> Article 17 Universal Declaration Of Human Rights 1948

<sup>29</sup> Article 25 Universal Declaration Of Human Rights 1948

<sup>30</sup> Article 1 African Charter on Human Rights 1981

such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. This is therefore useful in the law that governs the sharing of property in a customary marriage in that the rights of a person ought not to be disregarded at any point of the distribution.<sup>31</sup>

The Charter provides for every individual being considered equal under the law as well as being treated with equality as well. This is hence a guiding factor when it comes to the law guiding sharing of property in a customary marriage where the parties' rights have to be adhered to at the point of distribution.<sup>32</sup>

The right to property shall be guaranteed, which is paramount to the research paper in the sharing of property that ought to be equitable to all parties concerned. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.<sup>33</sup>

The Charter further provides for the family as the natural unit and basis of society. The family shall be protected by the State which shall take care of its physical health and moral being. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>34</sup> This therefore provides a direct role of the state in the protection of individuals' rights when sharing property in a customary marriage. All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.<sup>35</sup>

The Charter provides that all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. Therefore in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.<sup>36</sup>

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<sup>31</sup> Article 2 African Charter on Human Rights 1981

<sup>32</sup> Article 3 African Charter on Human Rights 1981

<sup>33</sup> Article 4 African Charter on Human Rights 1981

<sup>34</sup> Article 18 African Charter on Human Rights 1981

<sup>35</sup> Article 19 African Charter on Human Rights 1981

<sup>36</sup> Article 21 African Charter on Human Rights 1981

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The States shall have the duty, individually or collectively, to ensure the exercise of the right to development. Hence in a community, an individual's rights in regard to property sharing ought to be paramount and considered highly in society.<sup>37</sup>

## **2.3 DOMESTIC LEGISLATION**

### **2.3.1 THE CONSTITUTION OF UGANDA 1995**

The Constitution is the ultimate guide for property rights in marriage. The following provisions of the Constitution apply to the property rights of both men and women regardless of the type of marriage, as long as that marriage is one that is legally recognized in Uganda. Therefore in that case the sharing of property in a customary marriage is regulated by the following Articles of the Constitution.

The Constitution is the supreme of law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that law or custom shall, to the extent of the inconsistency, be void.<sup>38</sup>

All people that is to say men and women are equal before the law in every area of life and shall be protected equally by the law.<sup>39</sup> This therefore gives the men and women that are customarily married an equal opportunity in a marriage as regards property sharing.

Women have the same right as men to have property that they can keep alone or share with other people and no one should take away their property for no good reason.<sup>40</sup> Women have equal

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<sup>37</sup> Article 22 African Charter on Human Rights 1981

<sup>38</sup> Article 2 of the Constitution of Uganda 1995

<sup>39</sup> Article 21 of the Constitution of Uganda 1995

<sup>40</sup> Article 26 of the Constitution of Uganda 1995

rights as men in getting married, during marriage, and if and when they decide to end the marriage. These rights include the right to property.<sup>41</sup>

The Constitution bans any laws, customs, cultures and traditions that treat women unfairly or deny women the same opportunities as men.<sup>42</sup> Therefore in property sharing in a customary marriage, both the men and the women are treated equally. When a marriage ends or couples separate, the properties that they have must be divided. Women and men may bring their own property into a marriage. They may also acquire or improve property together while they are husband and wife. It is important to understand women's and men's property rights in divorce and separation. It is common for women to lose property in divorce even if it was their personal property or they contributed to it because many cultures and traditions say that only men can own property, or they limit the properties that women can have. Therefore the need for equity in property sharing in a customary marriage must be widely spread in the community so as to bring awareness to the people.

### **2.3.2 THE LAND ACT CAP 227**

There are some articles of the Land Act Cap 227 that specifically protect the property rights of married people. The Land Act is specific to the protection of land as an asset in a marriage. The issue of land conflicts is wide spread as a result of cultural beliefs that usually cause women specifically to be denied the ownership of land.<sup>43</sup>

The other important legal aspect in relation to matrimonial property is the guarantee in the Land Act of the security of occupancy of every spouse on family land. This means that the spouse has a right to have access and to live on family land. That both husbands and wives have the right to use and live on family land. Family land is defined as land where the family home is situated, land that helps sustain the family (such as land for crops or animals or land from which the family earns an income), or land that according to the family's norms, custom or tradition is called family land.<sup>44</sup>

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<sup>41</sup> Article 31 of the Constitution of Uganda 1995

<sup>42</sup> Article 32 of the Constitution of Uganda 1995

<sup>43</sup> Land Act Cap 227

<sup>44</sup> Section 38 Land Act Cap 227 with amendments.

The Land Act as amended restricts transfer of family land without spousal consent. That both spouses husbands and wives must seek the approval of the other spouse before carrying out any transaction on family land. Such transactions include sale, exchange, mortgage or lease. This therefore protects the property from being fraudulently taken away from the family.<sup>45</sup> The Court held that in the absence of written spousal consent to mortgaging the property, the mortgage created over it was void.<sup>46</sup>

#### **2.4.3 CUSTOMARY MARRIAGE (REGISTRATION) ACT CAP 248**

This is a marriage conducted according to the customs of the community/tribe to which the parties belong. Among some tribes, a man can marry more than one wife as long as he meets the customary requirements of marriage. The conditions that parties have to meet include the following. That both the man and woman must be eighteen (18) years or older, both parties must have freely agreed (given their consent) to marry one another and this is because by the law forced marriages are not allowed in Uganda. The marrying a close blood relative is forbidden among most tribes and communities in Uganda. The man should be single or already married customarily married as the customary marriage is potentially polygamous. The woman must be single. The man must fulfill the customary requirements for each individual woman he marries. In most customary practices, the giving of bride wealth by the man is important in establishing the legality of the marriage. What is given as bride wealth, however, varies among customs and families.<sup>47</sup>

Most customs require that a traditional ceremony be performed to make the marriage official. The traditional ceremony is witnessed by family members from both the man's and the woman's sides. The marriage must be registered at the sub-county headquarters within six months of the traditional ceremony. The sub-county headquarters will issue a Certificate of Customary Marriage to show that the marriage is legal. Two people who were present at the marriage

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<sup>45</sup>Section 39 Land Act Cap 227 with amendments.

<sup>46</sup> Alice Okiror and Anor V Global Capital Save 2004 and Anor

<sup>47</sup> Customary Marriage (Registration) Act Cap 248

ceremony must witness the registration of the customary marriage. It is an offense against the law not to register a customary marriage.<sup>48</sup>

The man and woman have a right to own property, either jointly or individually.

Each has the responsibility to take care of his/her property and manage it correctly. Property obtained after marriage is considered jointly owned unless the wife or husband states otherwise or unless it is recorded as individual property. The man and woman have a responsibility to look after one another. Each spouse has the right to be looked after by the other. The man and woman have a right and responsibility to protect each other from harm, including not being violent toward each other. Both the man and woman have a right and responsibility to nurture and maintain their children. Children born within the marriage are presumed to be the children of the marriage, and the husband is presumed to be the father, unless the contrary is proven or stated. The man and woman have a right and responsibility to meet each other's sexual (intimate) needs.

#### **2.4.5 THE UGANDA HUMAN RIGHTS COMMISSION ACT. CAP 24**

The commission shall have the following functions to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right.<sup>49</sup>

This Act therefore provides a channel and platform through which a person who has had their right to own property or individually with others violated to report the violation to the Commission.<sup>50</sup>

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<sup>48</sup> Customary Marriage (Registration) Act Cap 248

<sup>49</sup> Section 7(1)(a) Uganda Human Rights Commission Act Cap 24

<sup>50</sup> Article 26 Constitution of Uganda 1995

## **2.4 CASE LAW**

### **2.4.1 LAW AND ADVOCACY FOR WOMEN IN UGANDA V ATTORNEY GENERAL OF UGANDA CONSTITUTIONAL PETITIONS NOS. 13 /05 /& 05 /06**

The petitioner, an association that advocates for women rights in Uganda, filed two separate petitions that were later consolidated. The petitions were brought under Article 137 (3) of the Constitution and The Constitutional Court ( Petitions and References) Rules, 2005 ( S.I. No. 91 / 05) challenging the Constitutionality of some sections of the Penal Code Act and 2n (i) and (ii), 14, 15, 23, 26, 29, 43, 44, of the Succession Act. The petitioner alleged that the above impugned provisions are contrary to Articles 20, 21, 24, 26, 31, 33, and 44 of the Constitution. The petitions sought the following declarations and orders namely:

1. The section 154 of the Penal Code Act and the relevant provisions of the succession Act enumerated above violate Articles 20, 21, (1), 21 (2), 21 (3), 24, 31 (1), 33(6) and 44( a) of the Constitution of Uganda, 1995 and infringe fundamental human rights enshrined in International Conventions that Uganda is signatory to.

The Court put into consideration that the Constitution is the supreme of law of Uganda and shall have binding force on all authorities and persons throughout Uganda. That if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that law or custom shall, to the extent of the inconsistency, be void.

The Court therefore held that Section 154 of the Penal Code Act is inconsistent with article 20 (1) (2) (3) 24, 31 (1), 33 (6) of the Constitution and it is null and void. That Section 2 (n) (i) and (ii), 14, 15, 26, 27, 29, 43, 44 of the Succession Act and Rules 1, 7, 8, and 9 of the Second Schedule of the same Act are inconsistent with and contravene Articles 21 (1) (2) (3) 31, 33(6) of the Constitution and they are null and void. Therefore there should be equity when sharing property in a customary marriage.



#### **2.4.2 MIFUMI (U) LTD & ORS V ATTORNEY GENERAL AND KENNETH KAKURU SUPREME COURT CONSTITUTIONAL APPEAL NO: 02 OF 2014**

MIFUMI (U) Ltd and 12 others petitioned the Constitutional Court asking the court to declare the marriage custom and practice of demanding bride price, and its refund in case the marriage breaks down, unconstitutional. By a majority of 4 to 1 the Constitutional Court dismissed the petition, hence the appeal.

MIFUMI (U) Ltd, a Non-Governmental Organization and a women's rights agency operating in eastern Uganda, and 12 people petitioned the Constitutional Court under Articles 2(1) (2), 137(3) and 93(a) and (d) of the Constitution of Uganda and rule 3 of the Constitutional Court (Petitions and references) Rules (S.1. 91/2005) challenging the constitutionality of the custom of paying bride price as a precondition to contracting a valid customary marriage. They also challenged the constitutionality of demanding refund of bride price as an essential pre-requisite for the valid dissolution of a customary marriage.

It was the appellants' contention that the custom of bride price which is practiced by several ethnic groups in Uganda offends Article 31(3) of the Constitution. That Article provides that marriage shall be entered into with the free consent of a man and a woman intending to marry. The appellants' claim was that the demand of bride price by a third party interferes with the free consent guaranteed by the Constitution.

It was also their contention that the payment of bride price by men leads them to treat their wives as mere possessions. This, they claimed, perpetuates inequality between men and women which is prohibited by Article 21(1), and (2) of the Constitution. The petitioners further contended that the demand for bride price by parents of a young woman to be married portrays her as an article in a market for sale, and amounts to degrading treatment which is prohibited by Article 24 of the Constitution. They thus prayed the Constitutional Court to declare the custom and practice of demanding and paying, and also of demanding refund of bride price at the dissolution of customary marriage, unconstitutional.

The appellants prayed that the court finds that the custom of paying bride price is judicially noticed and is commonly practiced in Uganda by all cultures. They also prayed for declarations that the custom and practice of demanding and paying bride price as a necessary condition for a valid customary marriage is unconstitutional, and equally that the custom of demanding for refund of bride price as a condition for the valid dissolution of customary marriage is unconstitutional.

The term "bride price" is used to denote the property which is given by the groom's parents to the bride's parents in customary marriage.

Many writers on African customary marriage and some judgments have avoided using the term "bride price" because of its inappropriateness. For example, Justice Kavuma in his judgment preferred to call it "bride wealth." Others have used terms such as "dowry", "marriage payment", "marriage consideration" and Uganda Law Reform Commission in its *"Study Report on Marriage and Divorce in Uganda"*, Publication No. 2, 2000 used the term "Marriage gifts".

Most ethnic groups in Uganda, apart from the Baganda ethnic group, practice the custom of refund of bride price at the dissolution of customary marriage. Refund of bride price has been covered in several books and journals written on marriage in Uganda. See, for example, *"Marriage and Divorce in Uganda"* by H.E Morris, the Uganda Journal, Sept. 1960, *"The Chiga of Western Uganda"* by May Mandelbaum (MA, Ph.d (Columbia), 1957, and *"The Lango a Nilotic Tribe of Uganda"* by J.H. Driberg, 1954, among others. There is also case law which has taken cognizance of the custom, See, for example Nemezio Aiiya vs Sabina Onziya Ayiia, Divorce cause No. 8 of 1973 and Muhinduka vs. Kabere, Civil Suit No. 1 of 1971.

In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2<sup>nd</sup> respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term "bride price" is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded.

Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. I respectfully do not agree with the suggestion proposed by the 2<sup>nd</sup> respondent that when the marriage breaks down, a woman's contribution should be subjected to valuation, taking into account the length of the marriage, the number of children the woman has produced in the marriage, e.t.c., on the basis of which the refund should be determined. If a man is not subjected to valuation for the refund of bridal gifts ("emihingiro" in Runyankole) when the marriage breaks down, it is not right or just that a woman should be subjected to valuation. She is not property that she should be valued. It is my view that refund of bride price violates Article 31(1) which provides that "men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution".

Furthermore, if marriage is a union between a man and a woman, it is not right that for customary marriage to be legally recognized dissolution should depend on a third party satisfying the condition of refunding bride price failure of which the marriage remains undissolved.

It is my firm view that the custom of refund of bride price, when the marriage between a man and a woman breaks down, falls in the category that is provided under Article 32(2) of the Constitution which states:

"Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any marginalized group to which clause (1) relates or which undermine their status, are prohibited by this Constitution".

The Supreme Court therefore, declared that the custom and practice of demand for refund of bride price after the breakdown of a customary marriage is unconstitutional as it violates Articles 31(1)(b) and 31(1). It should accordingly be prohibited under Article 32(2) of the Constitution.

#### **2.4.3 JULIUS RWABINUMI V HOPE BAHIMBISOMWE CIVIL APPEAL NO.10 OF 2009**

Twinomujuni JA held that at the time the bridegroom and bride become husband and wife, all the property they own become joint matrimonial property and on separation they should be equally divided and shared to the extent possible and practicable.

However on appeal to the Supreme Court, Kisakye JSC observed that; the learned Justice of Appeal not only wrongly articulated the law as to what constitutes matrimonial property' but also how and when individually held property of a person acquired before or during marriage becomes matrimonial property. The court held that a spouse can own individual property as per Article 26 of the Constitution of Uganda 1995. Further it was held that Article 31(1)(b) guarantees equality in treatment of either the wife or the husband at divorce, it does not require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce. It was concluded that the question whether individual property became joint matrimonial property and whether it should be divided equally on divorce depends on the facts of each individual case.

When a spouse makes a substantial contribution to the property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non monetary. In *Muwanga V Kintu*, High Court Divorce Appeal No.135 of 1997,(Unreported) , Bbosa J adopted a wider view of non monetary indirect contributions by following the approach of Court of Appeal of Kenya in *Kivuitu V Kivuitu*,[1990-1994] E.A 270, in the case, Omolo JA found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children's clothing organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the property.

The property a couple chooses to call a home will be considered joint matrimonial property. This together with the property either of the spouses contributes to what matrimonial property is. Summarily, Bbosa J in *Muwanga V Kintu* supra held that the property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.

The question of whether property should be divided equally on divorce depends on the individual circumstances of the case. In *Gissing V Gissing*, the House of Lords held that it is not in every case that the parties hold in equal shares. In *Mayambala V Mayambala*, the High Court Divorce Cause No. 3 of 1998, the wife's interest in the matrimonial home was established at a 70% share. The Supreme Court in *Rwabinumi's* case summed it up and held that whether such property should be divided either in equal shares or otherwise depends on the facts of each case.

#### 2.4.4 CONCLUSION

The law relating to sharing matrimonial property in a customary marriage is hinged on the concept of marriage. This law only and strictly applies to married and or formerly married persons. In *Case V Ruguru* <sup>51</sup> Court held that since the defendant was not legally married to the plaintiff, she could not base a claim of occupancy on the ground that she was the plaintiff's wife.

In the pre colonial era, marriage and property were basically governed by customary law. This law depended on the customs of the different societies in Uganda. During this time women could not own property as the property was basically owned by the men. A woman could hardly claim a thing on divorce. This is because a woman was considered as a source of labour and divorce meant loss of labour. <sup>52</sup>

During the colonial era, courts interpreted customary law in terms favourable to women. The courts protected the rights of women in relation to matrimonial property and ownership of land. The protection of these rights was embedded in two legal principles; the house property complex organized assets around autonomous female headed houses. Men retained a few parcels of land but distributed the bulk of their assets to women for food production. This was premised on the idea of social order through food production. Under the idealized house property complex, land passed from mother to son. When a woman died or divorced, the husband held land in trust. <sup>53</sup>

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<sup>51</sup> (1970)E.A 55

<sup>52</sup> Okumu Wengi, *Weeding the Millet Field; Women's Grassroots Justice in Uganda*.

<sup>53</sup> Lynn Khadiagala, *Journal of African Law; Negotiating Law and Custom; Judicial Doctrine and Womens's Property Rights in Uganda*, 2002, School of Oriental and African Studies, UK.

During the period between 1960-1995, the law in relation to matrimonial property to a different position. The courts favoured a more patriarchal vision of family and by the 1990s, entrenched in judicial doctrine was a legal presumption that property belongs to the male household. Matrimonial property law was governed by the Matrimonial Causes Act which had its roots in the Common law of England . AT Common law the wife almost owned nothing and her freehold property was controlled by the husband while her leasehold property belonged absolutely to her husband . If the husband died before the wife, she resumed the right to all her freeholds but when she predeceased him, her estates descended to her heir subject to the husband's right , as a tenant by the courtesy of England to an estate for his life in all her freeholds in possession.<sup>54</sup>

During the marriage , the wife took no interest in her husband's real property. If she survived him, she became entitled by virtue of her dower to an estate for life in a third in all her husband's freeholds of which he had been seized in possession at any time during marriage, provided that she could have borne a child capable of inheriting, whether such a child was ever born or not. All personality in possession belonging to the wife at the time of marriage or acquired by her during the time of marriage or acquired by her during marriage, vested absolutely in the husband who had the power to dispose of them<sup>55</sup>

There was a radical change in the law relating to matrimonial property in Uganda after the promulgation of the 1995 Constitution. This era is referred to as the post 1995 era. The Constitution introduced a new principle of law in relation to matrimonial property; the equality in marriage principle . This principle is encapsulated in the Constitution and is to the effect that men and women are entitled to equal rights in marriage, during marriage and its dissolution. <sup>56</sup> As a result several provisions of the Divorce Act which were not in conformity with the Constitution were declared null and void.<sup>57</sup>

Therefore, there have been attempts to modify the law relating to matrimonial property in Uganda however these attempts remain futile.

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<sup>54</sup> Nigel Lowe and Gillian Douglas, Bromley's Family Law ,10<sup>th</sup> Edition, Oxford University Press 2007.

<sup>55</sup> Ibid

<sup>56</sup> Article 31 1995 Constitution of Uganda 1995

<sup>57</sup> Uganda Association of Women Lawyers and Others V Attorney General Constitutional Petition No.2 of 2003.

## **CHAPTER THREE**

### **THE EFFECTS OF SHARING PROPERTY IN A CUSTOARY MARRIAGE.**

#### **3.0 INTRODUCTION**

When a marriage ends or couples separate, the properties that they have must be divided. Women and men may bring their own property into a marriage. They may also acquire or improve property together while they are husband and wife. It is important to understand women's property rights in divorce and separation. It is common for women to lose property in divorce even if it was their personal property or they contributed to it because many cultures and traditions say that only men can own property, or they limit the properties that women can have. There is no uniform procedure for divorce under customary marriage. Instead, the procedure is determined by the customs of the particular tribe or community to which the husband or wife belongs.

A customary marriage can also be terminated by court of law following the procedure used for church and civil marriages. The procedures for ending a customary marriage should follow the constitutional standards of equality between men and women. The Constitution gives women and men the same rights when they decide to end the marriage; and it bans any customs, cultures, and traditions that treat women unfairly. A customary separation or divorce is usually brought before a clan or family court where evidence is presented. The clan or family court decides whether to grant the separation or divorce, as well as the terms and conditions to be followed by both the husband and the wife. The property rights of a woman separated under customary law are determined by the customs of the particular tribe or community to which the husband or wife belong as long as the customs treat women and men equally in agreement with the Constitution. Deciding to marry is not the same as living together or having children together. Unless a man and woman go through the procedures necessary for a church marriage, civil marriage, customary marriage or Islamic marriage, the law does not consider them to be married. This is even if they live together or have children together. This is important because the law gives certain rights and obligations to people who are legally married like rights to inheritance, property and family maintenance.

### 3.1 THE BENEFITS OF SHARING PROPERTY IN A CUSTOMARY MARRIAGE.

A benefit connotes a reward which is a result of carrying out an activity. The benefits that result from sharing property in a customary marriage are numerous.

The spouses will be happier and lead a happy relationship as they will be less depressed and anxious. This is because they enjoy security of occupancy of their property which is guaranteed by the law.

The spouses are entitled to legal ownership of their property and in case of any dispute' the can refer the matter to the courts of law. This is because the ceremony involves the families of both the husband and the wife.

The preservation of culture as marriage ceremonies are conducted as a blueprint that has been used over the years. Sometimes, there are variations though that have found their way into the practice but the main frame remains. The marriage ceremonies help to preserve the culture of the people.

The transmission of culture whereby the marriage ceremonies include activities like the consultation of families, presentation of the woman to the grooms family and therefore bars tension when it comes to the sharing of property in the family.

There is promotion of honour and respect in the family as all the property and inheritance is catered for and adequately allocated to among the members of the family in existence.

The law relating to sharing matrimonial property in a customary marriage is hinged on the concept of marriage . This law only and strictly applies to married and or formerly married persons. In Case V Ruguru <sup>58</sup> Court held that since the defendant was not legally married to the plaintiff, she could not base a claim of occupancy on the ground that she was the plaintiffs wife. Therefore these are some of the benefits persons who share their property will enjoy in their union together as spouses. These benefits are granted as a matter of law and custom that is not repugnant to the grand norm<sup>59</sup>.

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<sup>58</sup> (1970)E.A 55

<sup>59</sup> Property rights in marriage and family by international centre for research on women and Uganda law Alliance.



### **3.2 IDENTIFICATION OF POTENTIAL RISK AS A RESULT OF NONE SHARING OF PROPERTY IN A CUSTOMARY MARRIAGE**

The reality is that most people in customary marriages do not obtain a divorce, they separate informally. Although the law permits customary forums of dispute resolution to mediate marital disputes, only a court with appropriate jurisdiction can grant a divorce. So the legal reforms introduced by the Act ensure greater gender equality and access to material resources are useful only if the parties dissolve their marriages in a court.

Married couple who separate informally will not benefit from the legal rules regulating the consequences of the dissolution of the marriage.

Second, most people married in community of property of the Act are not aware that the default regime in customary of property. Neither are they aware that they are legally entitled to an equal division of the joint estate. So even if they are willing and able to bring the matter to court, they do not know that they could seek an equal share, so they don't pursue the option. And in some cases, the parties to the divorce sign divorce papers without knowing the consequences of their actions.

Moreover, among the one hundred people we spoke to about these matters, about one third didn't believe seeking an equal share was the right thing to do. There is a perception that family property belongs to the husband and the husband's family.

There is a belief that if a spouse wants to leave a marriage, they should leave and just take their clothes (personal belongings) with them. The belief that spouse who leaves a marriage does not recognize the range of circumstances, especially abusive condition, under which many people are forced to leave a marriage. In the instance that a divorce ends up in courts, the courts do not always pay sufficient attention to the circumstances relevant to the redistribution of matrimonial property. This is contrary to the law on how to assess the division of assets on the dissolution of customary marriage. That the court examines all the circumstances relevant to the customary marriage and in particular the manner in which the property was acquired, controlled and used by the parties.<sup>60</sup> Even if the parties went to court they would not be guaranteed an equal division in the joint estate. This is because the court does not always comply with the terms of the Act. In

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<sup>60</sup> Article 26 Constitution of Uganda 1995

many cases, litigants relied on customary law to justify their claim to an uneven share of the matrimonial property. This also suggests that legal representatives are not assisting the implementation of the Act by ensuring that the correct law is applied and may be unaware of the parties' entitlement under the Act. There exists a great need not only for public information but also, and most importantly, training of all those involved in the implementation of the Recognition of Customary Marriage Act – for example, judges, lawyers, member of the public – in the principles and intricacies of this Act.

The Act has inadequately addressed how civil law remedies incorporated in the Act apply to customary law disputes. Concepts such as 'in community of property,' 'joint estate,' accrual system,' 'inheritance,' matrimonial home,' and so on imposes definitions on customary law events and matters that are ill conceived<sup>61</sup>.

### **3.3 THE POSSIBLE MEANS OF PREVENTING THE POSSIBLE RISK RESULTING FROM NONE SHARING OF PROPERTY IN A CUSTOMARY MARRIAGE**

There are therefore ways of solving disputes that arise as a result of conflict in sharing property in a customary marriage. There are informal and formal Dispute Resolution Institutions.<sup>62</sup>

#### **3.3.1 INFORMAL DISPUTE RESOLUTION INSTITUTIONS**

- Role of Community Rights Workers

One of the roles of the community rights worker is to offer immediate or preliminary solutions by providing initial legal guidance and information. Community rights workers are also trained to provide legal services as well as mediation and conciliation services for disputes arising between members of the community. As conciliators, they encourage the community to negotiate and settle their disputes among themselves.

- Family Gatherings

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<sup>61</sup> Property Rights in Marriage and Family by International Centre for Research on Women and Uganda Land Alliance.

<sup>62</sup> Property Rights in Marriage and Family by International Centre for Research on Women and Uganda Land Alliance.

Many cultures use family gatherings to discuss family problems to arrive at a solution. This involves hearing both parties, agreeing on the issues, providing information and counseling where necessary, and agreeing on a solution. Community rights workers may attend family gatherings if requested by one of the parties in conflict. The role of the community rights worker at a family gathering would be to sensitize the family on relevant laws and procedures to enable the family to develop a solution that is lawful.

- **Clan Meetings**

Clan meetings are also used for resolving family conflicts. Mediation at the clan level is usually done by clan leaders/elders that are considered to know the rules, values and norms of the particular community. Community rights workers may attend clan meetings to provide legal advice where necessary or to help record the outcome of the meeting in an agreement that both parties to the conflict sign as a way to bind the parties to implement the resolutions.

- **Religious Leaders**

Many married people seek help from religious leaders when faced with family conflicts. The role of the religious leader is usually to mediate the case in a way that enables the husband and wife to come to an amicable settlement. Religious leaders are also often known to follow up with the conflicting couple to ensure that the conflict is resolved and that there is peace in the home.

- **Legal Aid Clinics**

Legal aid clinics help parties mediate cases and often do not charge fees. They are run by lawyers and are certified by the Law Council. There are several legal aid clinics throughout Uganda, including clinics run by the Uganda Association of Women Lawyers (FIDA-U), Legal Aid Project (LAP) and Uganda Land Alliance (ULA).

### **3.3.2 FORMAL DISPUTE RESOLUTION INSTITUTIONS**

The law gives formal dispute resolution institutions particular roles and responsibilities. There is a hierarchy for the formal dispute resolution institutions so that if a person is unsatisfied with one level, s/he can appeal to the next level for redress.

- Local Council Courts

(LC Courts I to III)

There are three levels of Local Council (LC) courts: sub-county (level III), parish (level II) and village (level I). In the LC court system, a case starts at LC I court level, and if one of the parties is not satisfied with the decision at that level, s/he has a right to appeal to LC II court. If still not satisfied with the decision of that court, either party can appeal to LC III court and then on to a Chief Magistrates court.

The LC courts can hear land disputes that may arise relating to (1) customary land, (2) criminal trespass (when a person enters private property with the intention of committing a crime), (3) malicious damage to property (where a person intentionally damages another person's property), and (4) theft (where a person takes another person's property without that person's permission and without intention of returning it). The remedies a local council can decree include reconciliation, apology, compensation and caution. Local Council courts are not allowed to hear cases that have already been decided by formal courts or cases that are still being heard by a formal court (i.e., any of the Magistrates courts or the High Court).

- Magistrates Courts

There are three levels of Magistrates courts: Chief Magistrates, Magistrates Grade I and Magistrates Grade II. Decisions from Magistrates courts are subject to review by the High Court. Currently the country is divided into magisterial areas administered by Chief Magistrates who have general powers of supervision over all Magistrates courts within the area of their jurisdiction. Magistrates courts handle the bulk of civil and criminal cases in Uganda.

- High Court

The High Court of Uganda has unlimited original jurisdiction, which means that it can try any case of any value or crime of any magnitude. Appeals from all Magistrates courts go to the High Court. The High Court is headed by the Honorable Principal Judge, who is responsible for the administration of the court and has supervisory powers over Magistrates courts. The High Court has five divisions: Civil, Commercial, Family, Land and Criminal. Most of the business of the High Court is conducted at its headquarters in Kampala, but with the decentralization of the High

Court, its services are now available at its circuits at Fort Portal, Gulu, Jinja, Masaka, Mbale, Mbarara, and Nakawa.

- Qadhi Courts

When established, Qadhi courts will have power to hear cases of marriage, divorce, inheritance of property and guardianship. The Constitution allows for these courts, which will serve the Muslim community. There are no formal Qadhi courts in Uganda right now because Parliament has not yet passed the law to operationalize them. However, there are some informal mechanisms through which members of the Muslim faith can seek the help of their religious leaders to mediate in marriage disputes.

### 3.4 CONCLUSION

Therefore every person has a right to own property individually or collectively with other people.<sup>63</sup> Uganda's Constitution is heralded as one of the most gender neutral with regard to property rights in sub Saharan Africa including land rights both in content and language. It accords both men and women the same status and rights. In addition to the guarantee of property rights "without bias to gender or marital status," the Ugandan Constitution also decrees equal land rights for men and women during marriage and at its dissolution, with a clause on the use of affirmative action in favor of marginalized groups based on gender or other reason created by history, tradition or custom for the purpose of redressing existing imbalances.

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<sup>63</sup> Article 26 Constitution of Uganda 1995

## **CHAPTER FOUR**

### **RECOMMENDATIONS, OBSERVATIONS AND CONCLUSION**

#### **4.0 Introduction**

The recommendations and observations are made as a result of the research that has been undertaken.

#### **4.1 RECOMMENDATIONS**

After analyzing this study on the topic of Sharing Property in A Customary Marriage. I have come up with the following conclusions, observations and recommendations that should be addressed by all stakeholders from Uganda and other nongovernment organizations at both national and international levels. This is in the bid to promote equity and peace in the sharing of property in a customary marriage.

There have been attempts to modify the law relating to matrimonial property in Uganda. However these attempts have been futile. There was the Domestic Relations Bill 2003. This Bill had been in Parliament since 1965. It sought to define matrimonial property thereby clearing the doubt as to what constitutes matrimonial property to include the matrimonial home, property by express or implied agreement and immovable property owned by either spouse which is the basic income of the family. This bill was however rejected.

The other attempt has been in the Marriage and Divorce Bill, 2009. This Bill was a bit broader and under Clause 116 it defined matrimonial property to include separate property which a spouse made a contribution to and send money by a spouse for establishment of a business. The bill under clause 123 recognized separate properties even during the subsistence of the marriage and prohibited taking into account separate property in distributing matrimonial property. Likewise this bill has never been passed into law.

Therefore the recommendation would be for parliament to visit these laws and pass a conclusive Act as the current law is mostly case law.

## 4.2 CONCLUSION

In conclusion therefore there has been revealed a large destruction and damage to property in customary marriages when not explicitly divided among the members of the family. This research is therefore intended to shade light on the law and bring awareness to the community.

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