

**AN APPRAISAL OF THE LEGAL ROLES AND LIABILITIES OF EXECUTORS
AND ADMINISTRATORS OF ESTATES IN UGANDA**


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**A RESEARCH REPORT SUBMITTED TO THE FACULTY OF LAW IN
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DECLARATION

I, **KAVUMA CHARLES** declare that this thesis entitled "An appraisal of the legal roles and liabilities of executors and administrators of estates in Uganda" is entirely an original product of my efforts and has never been submitted to this University or any other institution for an academic award, whatsoever.

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APPROVAL

The undersigned certifies, he has read and hereby approves the thesis entitled "An appraisal of the legal roles and liabilities of executors and Administrators of Estates in Uganda" in partial fulfillment of the requirements for the award of a Degree of Bachelors of Laws of Kampala International University.

Signed



Date.....

15/11/2016

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DEDICATION

I dedicate this research work to my mother Maj. Sarah Navuga, my daughter Lovisa Julie Nakidde, my entire family and friends.

ACKNOWLEDGEMENT

This work is a result of combined efforts by different parties whose knowledge and commitment have enabled its compilation. I wish to sincerely acknowledge my mother, sisters, for the facilitation they extended to me both financial and moral. Special thanks go to Mr. Kahama Dickson for his tireless effort, guidance and time forgone when he supervised and moderated this dissertation.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

The law of inheritance provides for the manner of inheriting property, the mode of distributing properties of deceased persons and how other related matters should be dealt with. If a person dies, there are various legal consequences, the most important of which will concern the status of his partner, if the deceased was married or had a civil partnership, and the distribution of any property the deceased owned.

Property inheritance is where property is distributed to various people in the will by the testator with the assistance of his legal representative (counsel)¹.

Inheritance is the transmission of the right to property such as land and housing while succession means the transmission of all rights, duties and powers of the deceased, including her/his position.

Inheritance focuses on the transfer of property from one generation to the next. Succession focuses on the transfer of rights and duties as well as property.

It is where the owner creates a trust between himself and his legal advisor/representative that all the property he has is bequeathed to his family, relatives or charity can be disposed of by them after he is deceased or has passed on.

Inheritance is governed by a written or oral will. In the later case an ageing father invites clan leaders to physically witness the distribution of his land to his children; to the heir (who retained the largest portion) and those sons who previously had not benefited from gifts of land (unmarried sons mainly). On his death, the clan elders are expected to implement the wishes of the deceased's land distribution according to their customs.

The law governing property inheritance involves the distribution of the estate to the wife and children and other properties to other relatives.

¹ Okumu Wengi Jennifer, the Law of Succession in Uganda, Kampala. Women and the Law in East Africa, 1994.

1.1 Background

Process of administering estates

Due to the low incidence of will writing, intestate succession (where there is no will) is more common. The clan of the deceased male customarily administers his property, though the practice of giving widows the right to administer property is developing in some communities.

Clan members do not always discharge the duty to administer the estate correctly leading to property grabbing. In addition, this study will show that law should clearly provide for how succession should be handled and that the clan should be expressly restricted from interfering.

Research shows its better a surviving administers the estate rather than the clan head or family members. The administrator General should manage property on behalf of children who have lost both parents.

1.2 Justification of the Study ²

Administration of estates is the function of personal representatives. It entails the collection and realization of property belonging to the estate, payment of funeral and administration expenses, settlement of debts and liabilities, and eventually the division of the estate.

The relevant provisions of administration of estates are III the Succession Act and the Administrator General's Act Cap 157.

To enable personal representatives discharge their function effectively, the law gives them a variety of powers, and since the property of the estate vests in them and they hold the same in trust for beneficiaries, heirs and creditors, they operate under certain duties.

This study therefore is intended to critically examine the legal duties and liabilities of executors and administrators in the discharge of disputes as well as their impact in society.

1.3 Objectives of the study³

General Objectives

To examine the rate and instability of administrators and executors of estates III Uganda as provided for under the constitution and the subsidiary laws.

Specific Objectives

- a. To identify the obstacle that Administrators and executors of estates face in administering the estate.
- b. To identify the liabilities of executors and administrators of estates in the event that they mismanage/misapply the estate.
- c. To identify the role and liabilities of the Administrator General
- d. To identify any remedies available to the beneficiaries of an estate this has been mismanaged by the administrators of executors.

² This part provides the basis or rationale behind the study, and answers the question whether the study will add any value to the existing body of knowledge

³ The research objectives here denote the goals to be achieved by the project. These should be specific, manageable, attainable, realistic and time bound. The objectives assist in keeping the researcher focused throughout the study.

- e. To critically discuss the procedure of acquiring letters administration.
- f. To examine the law relating to validity of a will
- g. To identify the immunities and/or defenses available to the administrators and executors or estates.
- h. To identify any loopholes within the law of Administration of estates.

1.5 Hypothesis⁴

- i. There are specific laws that provide for executors and administrators of estates.
- ii. There are loopholes within the laws which are exploited to mismanage the estates.
- iii. There is little awareness of the law on succession as regards administration of estates.
- iv. Administrators and executors of estates in most case to do not discharge their obligations or duties.
- v. Administrators and executors of estates often times are not held accountable for mismanaging estates.

1.6 Research Questions

- a. Are there specific laws that provide for the roles, liabilities of administrators and executors of estates in Uganda?
- b. Are these laws enforced?
- c. Are there any mechanisms in place to enforce the rights of beneficiaries under estates?
- d. What are the roles of the Administrator General?
- e. Are there any defenses available to the administrators and executors of estates?
- f. What impact does the administrator General's office have on the ground?

⁴ Hypotheses denote the proportions, suppositions and unproved theories tentatively advanced to explain the observed facts or phenomena these are the assumptions that exist at the beginning of the research and they may

1.7 Scope of the study

This study covered Kampala Central in Uganda.

1.8 Methodology⁵

This chapter comprises of the research design, study area and population, sample techniques and size, data collection methods such as interviews, questionnaires, observation, data processing and analysis, and the limitation of the study.

In carrying out the study, the desk review method i.e. both library and internet, as well as other field research devices were utilized. The researcher personally interviewed officials in the administrator General's office, LC'S, personal representatives of deceased persons, and visited NGOs whose work is relevant to the area of study.

The interviews were face to face and interactive, not based on specific questionnaires. This method ensured that as much information as possible is obtained from the respondents, and this is in consideration of the limited time and resources available for the exercise. In addition people were very secretive and were not willing to answer questioners. The researcher at certain instances had to resort to observation where the respondents were very uncooperative live alone the officers being busy. In most cases it was very hard to get appointments with most of the officers due to their schedules.

1.8.1 Pre Field Activities

These were the activities carried out to collect data

- a. Review of existing literature from a number of scholastic materials like case law, Magazines, text books, newsletters, internet, statutes. This was done from foundation or human rights initiative library, Makerere University library, Makerere social research institute and from a number of nongovernmental organizations libraries.

⁵ Research methodology is the specific plan for carrying out the study of the research problem and shows how data would be collected, measured and analyzed so as to conform to the research objectives.

1.8.2 Data collection

The researcher used the following methods for data collection.

(a) Questionnaires:

The questionnaires were administered to selected respondents inclusive of the administrator general, local councilors in the area, executors of the estates and administrators.

(b) Key informant interviews

These involved interviewing the key respondents using a self determined questionnaire.

The main aim was to gather information with deeper insights regarding the intricacies and liabilities of executors and administrators of estates in Uganda.

1.8.3 Literature review

In his report **Frances Mayne** discusses duties, the appointment of executors and administrators and outlines whether there is in fact a difference between the two. He also discusses the remedies there are if there has been a breach of duty by an executor or administrator and the powers available to executors⁶.

So is there a difference between an executor and an administrator?

There are a number of subtle differences.

The first relates to their appointment. An executor can be appointed in the following manner.

By an Express appointment or implied appointment according to the Terms of the will.

An appointment can be made under a power conferred by a testator in his will. An executor can accept his office in a number of ways. Firstly he could out a grant of probate or he

⁶ Executors duties by Frances Mayne

could also do some act. Before applying for a grant, which would make him an executor de son tort. This is sometimes referred to as intermeddling in an estate and it has been held that payment of debts on behalf of an estate is classed as intermeddling. An executor de son tort may find he is personally liable for his actions even if he acted innocently and will be liable to the extent of the assets of the estate received by him.

Just because a person has been appointed an executor in a will does not mean to say that he has to act. An executor can renounce probate so long as he has not intermeddled in the estate.

Turning to the Administrator an administrator is appointed where the deceased died intestate without a will or where a will has been left but no executor is applying for the grant. For example the executor has died. A grant of letters of Administration with a will annexed.

The second subtle difference between executors and administrators is that property of the deceased vests in the executors on death and this applies to both real and personal property. This means that the executors' authority comes from the will and so has authority to act from death.

The grant of probate merely confirms the executor's authority.

So far as administrators are concerned until such time as a grant of letter of Administration has been issued, the estate vests in the Public Trustee. So the Administrator's authority comes from the grant itself. So before a grant has been issued the proposed administrator has limited authority. However, the doctrine of relation back applies once a grant has been issued which will protect the lawful acts of the administrator. However this only applies to actions taken to protect the estate and not to issue proceedings.

Executor's Duties

The duties apply equally to executors and administrators and unless the distinction is important I will merely refer to executor.

The executor's duties are set out in statute⁷ and this is in tandem with the laws in Uganda.

The general duties of an executor are:

1. To collect and safeguard the assets;
2. To pay the debts of the deceased;
3. To distribute the estate to the beneficiaries correctly entitled.

Sec 25(1) provides that an executor has a duty to "collect and get in the real and personal estate of the deceased and administer it according to the law"⁸

Akin to this is the Executor's oath, in the formal application to the probate Registry for a Grant, the executors give an undertaking to this effect.

So what is classed as an asset of the deceased for which the executors are responsible? Well, it is probably easier to outline property which does not devolve on an executor at the time of death. Which is:

1. Property held as joint tenants
2. Property enjoyed as a life tenant;
3. Property subject to a donation
4. **Mortis causa** that is a gift made in contemplation and conditional death;
5. Policies written in trust under the **Married Woman's property Act (1882)**
6. Lump sums payable under pension schemes or death in service schemes.

The statutory power to collect in the assets of the deceased include recovering assets by legal action if necessary. But how far can a beneficiary insist that an executor litigates on his behalf?

This issue was considered by the courts in **Clough Taylor Coutts and Co. Vs Banks**⁹. In this particular case an asset that had been specifically given by the will had been taken by a third party who alleged that the deceased had given it to him during his life time. The

⁷ Administration of Estates Act 1925, Trustee Act 1925, Trustee Act 2000 (in Uganda it's the Administrators General's Act cap 157, Trustees Act cap 164)

⁸ Sec 25(1) Administration of Estates' Act 1925

⁹ (2003)

court held that the executor had no duty to take anything other than normal or routine steps to collect in assets of the deceased. The Cost of litigation to cover the asset was held to be the liability of the specific legatee and not the estate.

If the executors' delay in collecting an asset results in a loss to the estate, the executor may find he is personally liable for the loss that is incurred for his failure to act. It was held in **Carney Vs Bond**¹⁰ that the executors should have acted quicker to call in the whole of an outstanding debt.

An executor has a duty to take reasonable care in preserving the estate **Job Vs Job**¹¹. So if he took reasonable care and the testator's house for example was accidentally burnt down in a fire he will not be liable to the loss. There is a duty to sell an investment if it is not appropriate for the executor to retain it, within a reasonable period of time. For example if the deceased owned shares in a company as in the case of **Grayburn Vs Clarkson**¹².

Those who are designated by the term of the will or appointed by a court to probate to manage the assets and liabilities of the estate of the deceased.

When a person dies leaving property, that property called an Estate is usually settled or administered under the supervisions of special courts depending on the state, such courts are called probate, surrogate, or orphan's courts.

States require court supervision for the settlement of estates for a number of reasons. Courts ensure that the assets of an estate will be properly collected, preserved and assessed, that all relevant debts of the deceased and taxes will be paid and that remaining assets will be distributed to their heirs according to the provision of the will or applicable laws.

¹⁰ (1843)

¹¹ (1877)

¹² (1868)

The duty of settling and distributing the estate of a deceased is assigned to personal representatives of the deceased. **A personal representative** may be an executor (male) or executrix (female) or an administrator (male) or administratrix (female).

An executor or executrix is the person named in a will to administer the estate. An administrator or administratrix is a person appointed by court to administer the estate of someone who died without leaving a will.

Executors and administrators act as officers of the court because they derive their authority from the court appointments. They are also considered the fiduciaries or trusted representative of the deceased. As such they have an absolute duty to properly administer the estate solely for its beneficiaries.

Probate is the process by which the court establishes that a will is valid. The first step in the probate process is to file the will in the appropriate court with a petition to admit it to probate and to grant letters testamentary to the person designated as executor of the will.

Letters testamentary are the formal instruments of authority and appointment given to an executor by the probate court, empowering that person to act as an executor.

Liability considerations for Executors and Administrator¹³ as Kiplinger's report.

Your aunt Lillian has just called to ask if you will serve as executor for her estate after her death. You are honored that she has considered you for this important responsibility but you also know that there are risks associated with becoming an executor or administrator.

The most potentially damaging risk is liability for actions undertaken on behalf of the estate.

The estate's beneficiaries who are likely your relatives may sue you if any of the following situations occur¹⁴.

¹³ So you have agreed to be an Executor." 2001 by Kiplinger in his Retirement report.

¹⁴ *ibid*

1. You fail to properly secure and insure the assets of the estate and it suffers a loss as a result;
2. You diminish the estate through imprudent investments or inadequate record keeping,
3. You fail to pay taxes on the estate in which case you may be personally liable for interest and penalties;
4. You delay settlements of the estate unnecessarily or are tardy in executing important transactions;
5. You engage in actions that constitute a conflict of interest;
6. You improperly delegate decisions to others who have no legal authority over the estate
7. You approve a co-executor or co-administrator's breach of duty.

Fortunately these problems can be avoided if you take a few simple steps:

1. Most important of all stay in touch with the estate's beneficiaries. Keep them informed of your actions and the general condition of the estate;
2. Promptly meet required dead lines;
3. Maintain accurate records of all estate transactions and document all decisions made. Keep receipts of distributions made to beneficiaries;
4. Obtain the written consent of all beneficiaries when changing estate investments
5. Obtain a court order from the probate court for significant estate transaction. Petition the court if the will is unclear regarding particular items;
6. Keep the affairs of the estate confidential
7. Avoid conflicts of interest. Do not put your own interests ahead of the interests of the estates' beneficiaries and do not use assets of the estate for your own gain or profit.

By using common sense and following these guidelines you can effectively settle an estate and avoid potential law suits.

If an executor is unable or refuses to serve if there is no will, or if the will is deemed to be inauthentic or invalid, the court appoints an administrator.

Executors

A person making a will-called a testator- should find out whether his or her choice of executors is willing to serve in that role. This small but sensible courtesy can prevent the spending of needless time and money in administration of the estate. A person named as an executor in a will is free to accept or reject the position within a reasonable time following the testator's death. If it is rejected, the court then must appoint another representative, causing a delay in the settlement of the estate and its final distribution to the heirs and incurring greater legal fees for the estate¹⁵.

Many people choose their surviving spouse as executor since that person has the greatest knowledge of their financial affairs as well as the family situation.

Some people name several persons to serve as co-executors to ensure that the estate will be handled fairly and honestly.

Frequently, those making a will choose a professional, such as an attorney or trust company, to act as a co-executor and to assist with complex issues of the estate.

It is also prudent for a testator to name an alternative executor to serve in the event the designated executor is unable or refuses to serve. A testator may change an executor as long as the change is recorded properly in the will.

Administrators

A court usually appoints an administrator when a person dies without leaving a will. In most jurisdictions, courts are required by the statute to name the spouse of the deceased as the Administrator. Where no spouse is involved, administration is usually assigned to the next of kin; such as parents, brothers, sisters, nieces and nephews or cousins.

¹⁵ Ibid (Page 12, "so you have agreed to be an executor", 2001 by Kiplinger in his retirement report)

Terms of office

As a general rule, executors and administrators are required to take an oath as prescribed by the statute before beginning their duties. The taking of the oath constitutes acceptance of the office.

In some jurisdictions, statutes require the executor or administrator of an estate to file a bond to protect those interested in the estate. The amount of an executors or administrators bond will be forfeited if the representative is found to have deliberately mismanaged the estate.

The authority of an executor or administrator terminates only when the estate has been completely administered or the executor dies, resigns, or is suspended or removed. An executor can be removed from office for grounds specified by law, such as mismanagement, waste, abuse or destruction of property, disloyalty, improper administration, negligence, or other misconduct in the administration of the estate. A representative can also be removed for failure to file a proper inventory, accounts or tax returns within the required time, for failure to comply with a court order requiring him to furnish a bond, or for bankruptcy of the estate.

The representative should be removed where the personal interests conflict with official duties or where there is such enmity between the personal representatives and the beneficiaries, which might interfere with the proper management of the estate¹⁶.

General Duties

The general and primary duties of the administrator or executors are to administer the estate in an orderly and proper manner to the best advantage of all concerned, and to settle and distribute the assets of the estate as quickly and reasonably as is practicable. Executors must submit the will to probate court, then dispose of the estate according to the will. Both executors and administrators must make an inventory and appraisal of the estate, then file that information with the court.

¹⁶ Kiplinger's Retirement report

Executors and administrators are held liable for the debts and taxes of the estate, as well as losses resulting from unauthorized or improper investments of estate funds.

Executors and Administrators are as a rule allowed a reasonable compensation for the services they perform in the administration of a deceased's estate. This right arises from and is controlled by statute, unless the will specifically provides the amount of the executor's compensation. Commissions are the most common form of compensation to Executors and Administrators¹⁷.

In the famous report of **Lorabella, What does the Personal Representative Get?** It shows that while the personal representative does receive financial compensation for her services, this amount varies from one state to another as well as being dependent upon the circumstances.

According to the report if a last will and testament exists, then it should be checked to see what it indicates for the personal representative's fee. It should provide either an exact amount, percentage of the estate, a reference to the states' guideline, or a specific bequest in lieu of amount.

Furthermore according to the report, if the will indicates that the fee will be paid according to state laws, then the fee should be calculated accordingly. In some states this will be a product of a percentage value and the gross valued of the estate. In other states, the value of the fee is determined by the probate court¹⁸.

¹⁷ So you have agreed to be an executor' 2000. Kiplinger's retirement report (September)

¹⁸ Lorabella's Report of "what does the personal representative get?"

CHAPTER TWO

A CRITICAL ANALYSIS OF THE LAW RELATING TO ADMINISTRATION OF ESTATES.

2.0 Introduction

This chapter deals with the critical analysis of the current law as pertains the legal duties and/or roles of executors and administrators of estates in Uganda and points out the lacunas therein.

In this chapter the researcher also discusses the various cases that have been decided on the said topic. These cases include Ugandan cases, Kenyan cases, Tanzanian cases as well as English cases.

In addition the range of the years in which these cases were decided varies so as to show cases the development in the area.

Administration of estates is the function of personal representatives¹⁹. The relevant provisions on administration of estates are in the **Succession Act²⁰**. To enable personal representatives discharge their functions²¹ effectively, the law gives them a variety of powers, and since the property of the estate vests in them and they hold the same in trust for beneficiaries, heirs and creditors, they operate under certain duties.

2.1 THE ADMINISTRATOR GENERAL'S ACT

Immunities, Power and Duties of the Administrator General.

Legally, the Administrator General is protected and is not liable under the law, for any act done by him in the performance of his duties.

The administrator General's Act²² sec 3, grants immunity to the Administrator General for acts done in performance of duties unless done with gross negligence or willful

¹⁹ W Musyoka A Casebook on the Law of Succession

²⁰ Cap 162 Laws of Uganda

²¹ Functions of personal representatives entail collection, realization of property belonging to the estate, payment of funeral and administration expenses, settlement of debts and liabilities and eventually the division of the estate.

²² Cap 157

illegality. The Act describes the powers and duties of the Administrator General. His or her powers and privileges supersede the succession (Amendment) Decree, meaning that he or she has, if it is in the interest of the beneficiaries, the discretion to distribute property of the deceased not in strict adherence to the succession decree.

Sec 16 Cap 157 empowers the Administrator General to dispose off property of an estate under his/her administration subject to any wishes by the next of kin.

Sec 17 requires the Administrator General, to make an **inventory** of every estate, keep an account of all **receipts, deeds, letters of payments and dealings in any such estate**²³.

Section 4 of the Act requires death to be reported to the Administrator General, who may apply for grant of letters of administration.

Under ***section 12 and 13, the Administrator General is to receive particulars of estates of deceased persons***. The Act requires that in all cases where an application for letters of administration is made, a notice of application should be given to the office of the Administrator general and a **letter of no objection** be obtained²⁴.

The Administrator General has the right to consent or object to applications for letters of administration. Except for widows as in the case of **Administrator General v Akello Joyce Otti, Donato Otti**²⁵, widowers or executors appointed by will, all applications to court by persons seeking to administer estates require the consent of the Administrator General²⁶.

The Administrator General also assets to grant of letters of Administration for estates valued below UgShs2, 000/=.

The Administrator General may apply for letters of Administration in the cases where;

²³ However, the section provides that "*the Administrator General, may in his discretion, destroy any books, private papers, bills, receipts, memorandums and similar documents of no value which she or he has received along with the estate and which are not claimed by beneficiaries*".

²⁴ Sec 5 and 6 Administrator General's Act cap 157

²⁵ Civil Appeal No. 15 of 1993 (1996) UGSC (4 March 1996)

²⁶ Sec 5 Administrator General's Act cap 157

- a) The deceased left a will appointing the Administrator General sole executor.
- b) There is a will with no named executor.
- c) The executors named in a will have died or renounced probate.
- d) Two months have elapsed since the testator died and no letters of administration or probate have been obtained.
- e) The deceased died intestate.

In addition, the Administrator General has power under section 8 Cap 157 to apply for letters of administration within one month of the death of an intestate.

The Administrator General has power to administer the estate of an intestate without any letters administration or formal proceedings where the estate does not exceed Shs. 20, 000. In such cases the Administrator General may take possession of, and all the estate to discharge debts and is required to pay any surplus to the beneficiaries.

Section 18 Cap 157 requires the Administrator General to give notice, in the gazette, to creditors and claimants of all estates under his or her administration.

Under **Sec 21 Cap 157** he/she may incur expenditure on acts necessary to manage estates in his or her charge. The Administrator General may also distribute property to the beneficiaries of estates under his or her administration after deducting all debts, fees, and expenses incidental to the collection, management and administration of the estate.

The Administrator General has power to call for sworn statements as to wages due to a deceased person under section **13 Cap 157**. Under **Sec 15**, the Administrator General may authorize an agent to take possession of property to protect an estate and deduct fees, costs, and expenses incurred in the course of discharging his duties.

Sec 20(1) Cap 157 empowers the administrator General to receive payment out of every estate, the amount received to be specified by the Minister of Justice.

The Act empowers the Administrator General to apply to Court for directions regarding any estate in his or her charge²⁷. The Administrator General may also require claimants to the estate to verify their claims or institute proceedings. ***The Administrator General has the duty to transmit accounts in connection with the estate or a public officer to the Minister after Verification by Court.***

2.2 THE SUCCESSION ACT

Personal representatives of the deceased are given several powers and duties under the law of Succession (succession act cap 167). These are tailored to assist them in the administration of the estate. The relevant provisions of succession Act are sections, 270, 271, 272, 273, 274, 275, 276, 276, 277, 278, 279, 280, 281, 284, 293.

See 270 of the Succession Act Cap 162 provides that ***"an executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he or she may think fit, subject to sec.26 and the second schedule"***²⁸.

From the researcher is cognizant of the fact that the law in the books is to certain extent fair. However in conducting this research he was able to come face to face with the reality on the ground.

Many of the respondents were ignorant of their entitlement under sections 27, 26 and the second schedule in matters of ill testate succession. In consequence the estates were distributed in total disregard of the law and many of the respondents were not even aware. The majority of the female respondents had been denied a share in the estates of their late husbands.

One of the lady respondents after her husband's death in 2009 she was forced out of residential home with her children. As a result she went back to her father's house. The researcher interviewed this respondent and she had this to say,

²⁷ Section 30 Administrator General's Act cap 157

²⁸ Succession Act cap 162

"After my husband passed on his clan members convened a family meeting and they appointed an administrator of the estate. Consequently they resolved that the deceased's property should be taken over by his brothers. They said that according to customs of the land a woman could not inherit property. According to them this was their family property. Therefore to avoid any more problems I picked up my children and went back to my father's home."

It's worth noting that the appointed administrator and the clan members acted in total disregard of **section 26** and the **second schedule**²⁹. This provision is categorically very clear that a wife or husband and the children of the intestate who were normally resident in the residential holding are entitled to occupy it.

Types of succession

Testate or testamentary:

This type of succession refers to instances where the deceased left a valid will while intestate succession is where the deceased left no will or no valid will. The law establishes certain institutions and officers to deal with inheritance, for example, the formal courts of Judicature, the Administrator general's office, Registrar general's office and Local councils. In addition, the powers and functions of the various institutions and offices are defined.

The law also sets out the procedures to be followed in inheritance matters under a procedural and substantive. The law provides for procedural aspects including: powers and duties of the administrators or executors; jurisdiction of the courts procedure for obtaining letters of administration or grant of probate; and intermeddling with an estate, in addition the law provides for substantive aspects.

Testate succession arises where a deceased person made a will or a document stating what should be done about his or her affairs after death in accordance with terms of the law.

²⁹ See 26 second schedule rule 1

The right to testamentary disposition that is to dispose of one's property as one wishes, is recognized under the law of Uganda, although there are limits placed on it.

Review of literature will indicate that writing of wills per se is uncommon, most succession is intestate: only 23% of respondents reported that wills are always written in their communities.

The customary studies indicate low legal awareness, negative attitudes super towards will writing and preferences for existing customary structures. ***For instance among the Iteso, it is common for a man to write in a book what he would like to be done with his estate. However this would not satisfy legal formalities like the requirement for witnesses in making will.***

In other words, where wills are written the legal requirement for valid wills are often not followed. The customary construction of wills, where by validity depends on consequences and effects are at variance with the statutory. The customary concept that a will should satisfy social communal concerns is prevalent hence legally valid wills which do not conform to the communities rules about bequests may be changed after the testator's death. According to the

Chief Magistrate Kisoro

"People sometimes make wills and they are not followed. This is because clan members interfere a lot and destroy the intentions of the testator"

What happens if the will was silent on the executor?

Where there is a will but no executor expressly appointed, the person(s) who would be entitled to administer the estate if the testator had died without making a will namely widow/ widower, adult children or close relative can apply to court for authority to administer the deceased's estate i.e. for letters of administration with the will annexed. Application is made after getting a certificate of no objection from the administrator general.

Intestate succession

Sec 25 of Succession Act, states in part: ***a person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition.***

Under **section 26** of the Act provides that, all such property devolves to the personal representative in trust for the persons entitled. The decree creates a statutory distribution scheme which determines who shall inherit and in what proportions.

Testate succession is uncommon and intestate succession is the norm. Both customary and written laws and religious tenants define the estate to include land and personal property. This study will show that Male children are favored in inheritance. The view is that females should get less because they will marry and share their husband's property.

However customary rules that protected female children such as the Bakiga practice of giving land to daughters "for shedding tears" are being eroded. There is developing support for treating male and female children equally though most customary laws and practices in Uganda favor male relatives as heirs.

This study has also covered practical aspects such as the procedure for acquiring letters of administration as well as probate.

What is essential for getting letters of administration?

- a) Report the death to the Administrator General's Office with all relevant documents including a letter from the local council of your area. Introducing you and informing him or the death of such a person, a death certificate if any and a copy of the will if the deceased left one.
- b) Apply to the Administrator General for a Certificate of No Objection, A Certificate Of No objection is clearance which enables you to apply to court for letters of Administration. The Administrator General issues a certificate of No objection after scrutinizing the above documents and confirming that the applicant is the right

person who should administer the state. The administrator General may summon a family meeting to establish certain factors in case there is a dispute.

- c) The application is filled in court in form of a petition by the applicant requesting to administer the estate. The applicant also signs a document in which he/she undertakes to administer the deceased's estate in a just and proper manner according to the law.
- d) The application is advertised in the newspaper for 14 days.
- e) If any objections are raised by the public, they are heard and decided by the court. Thereafter letters of administration are issued upon the court confirming that the applicant is the right person entitled to administer the estate.
- f) The administrator then proceeds to administer the estate and becomes the personal and legal representative of the deceased. After 6 months. The administrator must inform the court as to how the estate is being managed by way of proper accountability (Inventory).

2.3 THE TRUSTEE'S ACT³⁰

Section 2(1) of the **Trustee's Act Cap 164** provides

"This Act, except where otherwise expressly provided applies to trusts including, so far as this act applies there to, executorships and administratorships constituted or created either before or after the commencement of this act."

Furthermore Section 15 inter alia provides as follows that the trustee shall;

- a) Accept any property, movable or immovable, before the time at Which it is made transferable or payable;
- b) Sever and apportion any blended trust funds or property;
- c) Pay or allow any debt or claim on any evidence that he or she or they think sufficient;

³⁰ Cap 161

- d) Accept any composition or any security, movable or immovable, for any debt or for any property, movable or immovable, claimed;
- e) (e) Allow any time for payment of any debt; or
- f) Compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to him or her or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or her or them in good faith.

2.4 PUBLIC TRUSTEES' ACT

Section 3 Public Trustee Act³¹ provides as follows

- (1) A district commissioner shall be the agent in his or her area of the public trustee; but the public trustee may appoint such other person as he or she shall think fit to be his or her agent in that area either generally or in any particular trust estate or in any matter arising out of any trust estate.
- (2) The public trustee may, at his or her discretion, delegate to an agent all or all of the powers and duties conferred or imposed upon him or her by this Act.
- (3) An agent shall, in all respects, act under the direction of the public trustee who shall not be answerable for any act or omission on the part of the agent which is not in conformity with the power or duty delegated by the public trustee or which shall not have happened by the public trustee's own
- (4) An agent, other than an officer of the Government, shall find security to the satisfaction of the public trustee for the performance of his or her duties and may be remunerated either by salary or such fees as the Minister may from time to time by rule prescribe.

³¹ Cap 161

2.5 COLLECTION, REALIZATION AND MANAGEMENT OF ESTATES.

2.5.1 Introduction:

The property making up the estate of the deceased vests in the personal representatives.'

Sec 180 Succession Act provides that *"the executor or administrator, as the case may be, of a deceased person ill his or her legal representative for all purposes and all the property of the deceased person vests in him or her as such"*.

Sec 25 Succession Act provides that *all property of an interstate devolves on the personal representative in trust for the persons entitled under this act.*

The role of the personal representative is generally the collection of the assets, preservation of the assets, payment of debts and liabilities and eventually the distribution of the property among the heirs and beneficiaries³².

Part IX Succession Act provides for **Privileged Wills**³³

2.5.2 COLLECTION AND PRESERVATION OF ASSETS.

The personal representatives are under a duty to collect and preserve the assets making up the estate. For them to discharge this duty effectively, they should not be inhibited in any way by anybody. The relevant provision in the Succession act governing collection and preservation of assets in **Section 279** which states that "An executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him or her at the time of his or her death.

In the matter of the estate of the late James Shiraku Inyundo³⁴. Kuloba. J held that; *"A beneficiary who is not an administrator should not interfere with the administrator's work and should give the administrator a free hand to discharge his duties. A beneficiary cannot compel the disposal of assets"*.

³² W Musyoka A Casebook on the law of Succession.

³³ SEC 52, SEC 53 Succession Act cap 162

³⁴ Nairobi high court probate and administration number 920 of 1986

In that case a beneficiary sought orders to sell an asset and thereafter apply the proceeds to settle medical bills, legal fees, pay rates and retain the balance for the maintenance of the widow of the deceased. The said beneficiary was not the administrator of the estate. His application was rejected. The court ***held that a beneficiary has no right to compel the sale of assets, particularly those enjoyed by him in common with other beneficiaries.*** A beneficiary should not interfere with the administration of an estate and should generally give the administrator a free hand to discharge his duties.

That a beneficiary has no right to compel administrators to dance to his tunes. It would be wrong for a beneficiary to demand the settlement of unproved liabilities and the applicant's proposal of how the balance should be shared is usurping the powers of the administrators.

In addition, there was no evidence to prove that the estate was being wasted or otherwise mal-administered by the administrators and suffice it to note that the rest of the beneficiaries except the applicant were happy with the present status thus the application was dismissed.

This reasoning in this case is intandem with that in the Ugandan Supreme Court Case of **Administrator General Vs Akello Joyce Otti**³⁵

The researcher while at the administrator general's office observed similar stories from the people who had come to the office to lodge their complaints. One of these was James. James is a grandchild and apparently his grandfather's estate is in the hands of the administrator general. ***James had come to check how his grandfather's estate was distributed. He claimed some of the family members were dissatisfied with how the elders had distributed the deceased's property. The deceased passed on way back in 1953.***

The staff in the administrator general's office advised him that he is not the right person to complain. That it should be children of the deceased who did not seem to have a problem with how the estate was being administered and the said distribution.

³⁵ (Civil appeal no. 15 of 1993) (1996)UGSC 9 (4 March 1996)

In **Administrator General vs. Akello Joyce Otti, Donato Otti**³⁶, this was an appeal arising from a dispute as to who should administer the estate of the late Charles None Otti. He did not leave a will. Upon his death his widow Joyce Akello (first respondent) and father Donato Otti (second respondent) instructed their lawyer, to petition the high court for letters of administration on their behalf. The said advocates then wrote to the appellant asking for a letter of no objection, to be included in the petition. The appellant declined to issue the letter and instead he applied to the high court for the letters of administration.

The respondents then lodged a caveat against the grant of letters of administration to the appellant. It was then that the appellants filed a suit against the respondents for the unlawful objection by them to his petition for the grant of letters of administration.

It was held by **S.T Manyindo Deputy C.J** that; *"And so the only question is whether the appellant was right to withhold consent to the second respondent. I would answer the question in the negative since all the evidence showed that the second respondent was managing the estate well and that he had been responsible for managing some of the deceased affairs even during the lifetime to the deceased. Everybody except Sarah was happy with the respondent's performance.* Sarah was an outsider whose intention was motivated purely by greed. The appellant should never have intervened on her behalf or at all. I would therefore dismiss the appeal with costs to the respondents.

In addition, In the matter of the estate of David Murage Muchina³⁷, it was held by Kamau AJ that; *"the estate of a deceased person vests in the personal representative who should be afforded the opportunity to take care of the estate, given that in the end he will be required to account to the beneficiaries and third parties for his administration of the estate."*

In this case executors filed a summons within the cause asking for restraining orders against an intermeddler who was not a beneficiary. The deceased died testate, and in his

³⁶ Ibid

³⁷ Nairobi High court succession cause number 2077 of 2002

will he did not name the intermeddler a beneficiary, but the will dully provided for ten children. The court gave restraining orders, but directed that she be allowed to remain in possession of the land where she resided pending the completion of the administration.

Furthermore **Kamau AJ** held, that it is imperative that there be at all times a personal representative on record for any estate of a deceased person so as to prevent or arrest any waste or damage pending distribution.

The said personal representative is under a statutory duty to account to all the beneficiaries and other interested third parties as was pronounced in the case of ***Charity Stephens and others Vs Joseph Stephens and another***³⁸.

An estate of a deceased person should therefore not at any time ***be in a state of limbo for want of a personal representative***. The said personal representative should save as may be provided under the law, be afforded free hand to perform his duties in law, the gross estate vest him to the exclusion of all others as provided under section 250f the ***succession Act***

Furthermore this position was re-echoed in the case of **In the matter of the Estate of Hemed Abdullah Kaniki** (deceased)³⁹ **Kamau AJ** held that

"holders of a grant of letters are under a statutory obligation to protect all the property making up the estate and a duty to account for their administration of the same, in the circumstances they should not be inhibited in the discharge of that obligation on account of the pendency of a revocation application".

The applicants' were the administrators of the estate, while the respondents were the applicants with respect to a pending application for the revocation of the grant made to the administrators.

³⁸ Civil Appeal Number 18 of 1987

³⁹ Nairobi High Court succession cause number 1831 of 1996

There were orders made in the revocation application pending the hearing and disposal of the revocation application restraining the applicants from doing certain things with regard to the estate.

The applicants argued in the instant application that those orders were prejudicial to the estate and the estate was being exposed to wastage as the administrators could not collect rent from the tenants nor pay the rates due to the local authority.

The applicants sought the variation or the setting aside of those order. the court found in favour of the applicants and varied the orders.

The court stated that the personal representatives had a duty to administer the estate and in the end to account for the said administration, and therefore there was no need to restrain them from exercising their duties pending the hearing and disposal of the revocation application.

2:5.3 Power to enforce causes of Action.

To facilitate the collection of assets the personal representatives are given power under **Sec 2 Public Trustees Act⁴⁰** those estates managed by the Public Trustee

Section 2⁴¹ states as follows; The public trustee shall be a corporation sole by the name of the public trustee and as such shall have perpetual succession and an official seal, **and may sue and be sued in his or her corporate name**, but any instrument sealed by him or her shall not, by reason of his or her using a seal, be rendered liable to higher stamp duty than if he or she were an individual.

In **Sargent Vs Gautama⁴²** it was held by **Duffus JA** that where an estate is to be joined in an action all the legal representatives of the deceased should be added as parties and not just one of them.

⁴⁰ Cap 161

⁴¹ Public Trustees Act cap 161

⁴² (1968) E.A 338

An executor sought to be joined to an action to ventilate an estate's claim, while the other executor did not wish to be involved. The court directed that all the legal representatives of the estate be joined to the suit as a parties and not just one executor.

In the **Public Trustee Vs Jotham Kinoti and Another**⁴³ it was held by Khamoni J; *"that the authority only covers property that has been set out in the succession cause"*.

The Public Trustee, as an administrator of the estate of the deceased, sued the defendants seeking among other orders, their eviction from property allegedly belonging to the deceased. It was found that the land in question did not belong to the estate of the deceased as the family of the deceased had sold the same before the Public Trustee was appointed as administrator of the estate.

More still **In the Matter of the estate of Kahiro Kabunyi**⁴⁴ it was held by **Githinji J** "That a right to occupy the land of another is an overriding interest which terminates with the death of the person to whom such right accrues"

The applicant was claiming a share in the land of the deceased. She claimed that her late grandfather (Kubai Gathaara) had an interest in the land before it was adjudicated and subsequently registered in favour of the deceased (Kahiro Kibunyi)

The court held that the deceased (Kahiro Kibunyi) got a first registration, and by it any interests of the deceased grandfather (Kubai Gathaara) of the applicant were extinguished, and the applicant's grandmother (Edith Wambui), who lived on the land till her death, only acquired an overriding interest taking the form of a right to occupy the land, and which interest died with her.

Githinji further state, that by the time of death of Edith Wambui she had no title to the share in the land she was occupying. She would only have got a little if Kahiro Kibunyi had in his life time transferred a portion to her. Alternatively she would have got the title if she had obtained a decree of the court that she was entitled to a specific acreage of the land.

⁴³ Nairobi High Court Civil case no. 3111 of 1985

⁴⁴ Nairobi High court succession cause number 467 of 1986.

Edith Wambui did not file a suit in the life time of Kahiro Kibunyi for a declaration that Kahiro Kibunyi held a share of the land in trust for her. She had not filed such a suit against the legal representative of Kahiro Kibunyi before she died.

A declaration of trust such as is sought would only have been made in a suit filed in the normal way not only the succession proceedings, pleadings which conform with rules of procedure are required. The probate court has no jurisdiction to make a declaration in a matter like these involving complex customary rights of ownership of land.

In addition, the claimants claiming through Edith Wambui have not obtained a grant of letters of administration in respect of the estate of Edith Wambui so that they would have capacity to pursue her interests in this dispute.

In conclusion it is evident that Edith Wambui had no legal estate at the time of her death as she had not obtained a declaration of trust against Kahiro Kibunyi or legal representatives or obtained a share of the land through transfer by Kahiro Kibunyi or his legal representative.

2:5.4 Power of sale, Mortgaging and Leasing.

The administrator is granted powers of sale, mortgaging and leasing these powers for a variety of reason. It could be to raise funds to settle debts and liabilities, or raise money to pay legacies.

The relevant provision is **Section 16 Trustees Act**⁴⁵ which provides as follows;

1) Where trustees are authorized by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in

⁴⁵ Cap 164

or mortgage of all or any part of the trust property for the time being in possession.

2) This section applies notwithstanding anything to the contrary Contained in the instrument, if any, creating the trust, but does not Apply to trustees of property held for charitable purposes.

In **Shital Bimal Shah and others Vs Akiba Bank Ltd and others**⁴⁶. **Emukule J** held that *"The duties of the personal representatives include that to settle debts, and to facilitate the payments of debts, personal representatives have the power to mortgage the estate property to raise the funds required for that purpose"*

The residuary legatees of the estate of the deceased sought injunctive orders against the personal representatives mortgaged the deceased, after the personal representatives mortgaged the estate property ostensibly to clear certain debts. They contended that the debts sought to be cleared were not incurred by the deceased personally. It was alleged that the personal representatives by granting a charge over the estate property were in breach of their duties as trustees, and the charge purportedly created was a nullity.

The court declined to grant the injunction, upon the finding that the powers and duties of personal representatives and trustees include payments of debts and mortgaging of property to settle debts, consequently the personal representatives had acted within their powers.

2.5.5 Powers of investment;

The rationale for the power of investment is similar to that for sale, mortgaging and leasing. In addition, it is used to preserve assets that are due to minor beneficiaries.

The **Succession Act** in **Part xxxvii** provides for investment of funds to provide for legacies.

The Trustee Act is more elaborate on the powers of investment, as set out in **Part II Trustee Act**.

⁴⁶ Nairobi High court (Milimani Commercial Courts) Civil case no. 567 of 2004

Section 3 thereof authorizes the Trustee to invest any trust funds in his or her hands in the laid down manner according to the Act.

In addition **section 4** of the **Trustees Act** allows the Trustees to exercise their discretion while investing the trust funds however this is subject to any consent or direction required by the instrument, if any, creating the trust or by law with respect to the investment of the trust funds.

In the Matter of the Estate of Charles Odhiambo Odiawo⁴⁷ (deceased) **Koome J** held that *"Where part of the estate is held in trust for a minor, directions ought to be given by the court on the investment of the trust funds"*.

This application sought for determination of two issues;

- a) In what manner should the proceeds of the Trust Account held at Victoria Commercial Bank Ltd in the name of the minor be invested and how should it be disposed of.
- b) Who should bear the cost of this application?

Prior to the deceased's death, he had operated two accounts with Victoria Commercial Bank one in his personal name and a second fixed account in the name of the minor to be operated solely by himself. Upon the issuance of the grant, the administrator of the deceased estate had been able to operate the deceased's account.

There was however no direction as to how the account operated for the child should be death The bank has no material interest in the matter save that they wish to b indemnified and absorbed from all the liability in connection with the Trust Account.

Administrator who is by virtue of the grant of letters of representation the trustee of a minor would wish the said account transferred to Standard Chartered Bank and the amount be deposited into a fixed deposit account and Bankers cheque be made for school fees of the minor and Kshs50,000 quarterly be made to her for the upkeep of the child.

⁴⁷ Nairobi High Court Succession cause number 1525 of 1999

Accordingly it was *held that the sum held on the minor's account at Victoria Bank be deposited at Standard Chartered Bank in an interest earning fixed deposit account. The account for the said minor shall be held and operated by the trustee.*

2.5.6 Payment of Expenses, Debts and Pecuniary Legacies.

After collection of assets, the next duty of the administrators is settlement of debts and - liabilities. This is provided for under **section 16⁴⁸ Trustees Act**. Any expenses incurred in the due administration of the estate should be borne by the estate, as demonstrated in the cases below;

According to **Section 277** Succession Act⁴⁹ it is the duty of an executor to perform the funeral of deceased in a manner suitable to his or her condition, if the deceased has property sufficient for the purpose.

Further more as per **Section 280** Succession Act, expenses are to be paid in priority. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death charges, including fees for medical attendance, and board and lodging for one month previous to his or death, are to be paid before all debts.

In addition according to **section 281** the expenses of obtaining probate or letters of administration including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate are to be paid next after the funeral expenses and deathbed charges.

More still under **section 282** Wages due for services rendered to the deceased within three months preceding his or her death by any laborer, artisan or domestic servant are next to be paid and then the other debts of the deceased.

Under **section 283** except as provided in sections 280, 281 and 282 no creditor is to have a right of priority over another by an instrument under seal, or on any other account, but

⁴⁸ Ibid

⁴⁹ Cap 162

the executor or administrator shall pay all such debts as he or she knows of, including his or her own equally and rateably, as far as the assets of the deceased will extend.

In **Re Marquardt, deceased, ex - parte Administrator – General**⁵⁰. It was held by **Hamilton CJ** that "Where expenses are incurred by an administrator for the benefit of a better realization of mortgaged property, although with the approval of the joint action of mortgages, being for the benefit of the estate generally, such expenses must be borne by the state".

In **Re, the Estate of GWL cane, deceased and re, the Trusts of the said GWL cane**⁵¹; it was held by **Sir R W Hamilton CJ** that, *"Personal representatives and trustees are entitled to remuneration for managing the property of the estate of a deceased person, but they would not be called upon to make good a loss arising from breach of trust where such loss is offset by gains elsewhere"*

In this case, the deceased left a will appointing his sister and brother as trustees, The sister drew insurance money and used it to maintain the children of the decease, while the brother personally managed his property in East Africa, but without paying off an overdraft that the deceased had with a bank.

The value of the East Africa property increased, however following a general increase in Land value. The brother sought remuneration for managing the assets, and the court was also asked to give direction as to the liability of the trustees with regard to the increase of the bank overdraft.

It was held that the brother was entitled, as trustee, to remuneration for managing the East African property and that the trustees were liable to make good the increase in the overdraft although they were responsible for it, since the loss arising was made good by the increase in the value of property.

⁵⁰ (1913 - 1914) 5 EALR 162

⁵¹ (1919 - 1921) 8 EALR 26

In addition in **Kamrudin Mohamed and Anor V s Hilda Mary Coelho and others**⁵² it was held by **Sir Udo Udoma CJ** that *"a specific bequest is not to be utilized to settle the debts of the estate, except as a last resort"*.

A testator bequeathed a specified leasehold property to his wife, and gave direction regarding the payment of certain summons seeking direction whether the property bequeathed to the widow could be utilized to settle debts owing by the estate.

It was held that since the specified property was not under the terms of the will to be utilized to settle the debts owing by the estate, it could not be touched in that respect, except as a last resort.

2.5.7 Distribution of the estate;

Distribution of the net estate follows payment of debts and liabilities, and of the testamentary and administrative expenses⁵³. The provisions governing distribution of estates are sections 25, and Part V of the Succession Act particularly sections **26, 27, Part V of the Succession Act particularly sections 26, 27.**

2.5.8 Pendency of Contentious Proceedings;

The estate should not be distributed where there are contentious proceedings pending, whether for revocation of grant, reasonable provision or any other. The rationale is that the determination of such proceedings may affect the distribution and it would be prudent therefore to await the outcome of any such proceedings.

Under **the Law of succession Section 72(a) Kenya Laws** provides;

'72. No grant of representation shall be confirmed until the court.

(a) Is satisfied that no application under Part III is pending ... '

⁵² (1965) EA 336 54 (1965) EA 336

⁵³ W Musyoka A casebook on the law of Succession

In **Okoyana Vs Musi & Anor**⁵⁴. (Platt, Gachuhi JJA and Masime AJA) held that, *"Distribution of the estate should not be done during the pendency of a contentious application or before the person purporting to distribute or participate in distribution has obtained representation to the estate"*.

In that case a grant made to the administrator of the estate of a deceased person was challenged by the deceased's widow, who filed an application for the revocation of the same on the ground that the application for grant omitted relevant material. While the application for revocation was pending, the parties entered into a consent order to facilitate the subdivision of the land making up the estate and to have the subdivided of the land making up the estate and to have the subdivided land given to them.

The administrator later appealed against the consent order. The appeal; was allowed. It was held that distribution of the estate could not be done before the revocation application was dealt with, since it was still uncertain as to whom the administrator of the estate was, and the widow could not agree to distribute property before letters of administration were made to her. This was the position in the English case of **Burns Vs Campbell**⁵⁵ as well as in **Bond Liebig (T) Ltd Vs Mallya**⁵⁶.

2.5.9 Ascertaining the beneficiaries and creditors

The assets making up the estate are ideally available for distribution to two classes of persons; creditors and heirs or beneficiaries. The heirs of the deceased may include the deceased's spouse or civil partner of the deceased, who has not formed a subsequent marriage or civil partnership, a person who was cohabiting with the deceased when he or she died, a child of the deceased any other person whom the deceased treated as the child of the family, and any other person who was being maintained, either wholly or in part, by the deceased immediately before his death and for this case, the applicant must also prove that the deceased was maintaining him or her immediately before his death this requirement was subject to a detailed examination by the court of appeal in **Jelley V**

⁵⁴ 56 (1987) KLR 104

⁵⁵ (1952) 1 KB 15

⁵⁶ (1975)E.A 266 at 269

Liffe⁵⁷ AS Stevenson LJ. Payment of debts and liabilities take precedence over the distribution of the estate, on the other; it is important that the creditors and the beneficiaries be ascertained first. This exercise obviate disputes later with creditors or beneficiaries who are likely to bring proceedings against the estate if they are left out.

In the Matter of the Estate of Muniu Kamau (deceased)⁵⁸ Nambuye J held, "That the mental instability of survivor of the deceased doesn't disentitle the person from benefiting from the estate of the deceased, and in distributing the estate the court takes into account the needs of all survivors".

During the hearing of a distribution dispute the court noted that one of the survivors of the deceased was mentally unstable. It was stated that such a survivor has to be provided for from the estate of the deceased intestate. The court further stated that in the distribution of the estate the court takes into account the needs of all the beneficiaries.

2.5.10 Transition from Personal representative to Trustee⁵⁹

The office of the personal representative is in essence not that of a trustee, although in many respects he stands in a position similar to that of a trustee. However, in certain circumstances he is in fact a trustee.

Where the administration of the estate of a deceased person involves any continuing trust, whether by way of life interest or for minor beneficiaries or otherwise, the personal representative shall, unless other trustees have been appointed by a will for the purpose of the trust, be their trustee thereof⁶⁰.

The case in point is the English case of **George Attenborough and Son V s Solomon and another⁶¹**, where **Viscount Haldane LC, Lord Atkinson and Lord Shaw of Dunfermline** held,

⁵⁷ (1981) farm 128, CA

⁵⁸ Eldoret High court Succession cause number 7 of 1998.

⁵⁹ Ibid

⁶⁰ The Law of Succession Act, Section 84 (Kenya)

⁶¹ (1913) AC 76

"That the transitional from personal representatives to trustees, with respect to the capacity in which they hold the property of the deceased, does not occur automatically but only upon the personal representatives assenting the property to themselves in their capacity as trustees after complying with the necessary formalities. The assent of the personal representative can be inferred from conduct".

In that case certain articles of silver plate belonging to the testator were pledged by one of the executors of the will of the deceased with a pawn broker. The said article fell into the hands of the executor in his capacity as the deceased's executor and trustee. The issue was whether the respondents, the executors and trustees of the estate of the deceased, could recover the articles from pawn broker the appellants.

It was held that the executors had assented the property to themselves and had become joint trustees with respect to it; consequently the one executor had no property to pass as executor to the pawn brokers. In the premises the appellants had no answer to the respondent's case.

2.5.11 Expenses on Preservation of Gifts⁶²

Suffice it to note that pending distribution, it often happens that expenses are incurred in preserving a gift or devise or legacy. **Ipso facto** in such event the expense is borne by the beneficiaries of such gifts or the general estate of the testator. The **common law** position on this issue is illustrated in the English case of

In **Re Rooke; Jeans Vs Gate house**⁶³ where **Maugham J** held that

"The costs of the preservation and upkeep of property specifically devised and bequeathed between the date of the testators' death and the date of the executor's assent are payable by the specific devisees and legatees".

This position is **intandem** with the position in **In re Pearce**⁶⁴

⁶² A case book on the Law of Succession by W. Musyoka

⁶³ (1933) 1 Ch 970

CHAPTER THREE

REMEDIES AVAILABLE TO BENEFICIARIES AND CREDITORS

3.0 Introduction

Ipsa facto, oftentimes personal representatives discharge their duties in a manner which is unsatisfactory to the creditors and beneficiaries. For example, they may misapply the assets and generally administer the estate in a manner which is in breach of the trust bestowed upon them the law. The law has provided a variety of remedies to creditors and beneficiaries with respect to misconduct by personal representatives. During **the process of administration court action is in most cases inevitable**. Personal representatives may require directions from the court, or they may require court orders to facilitate recovery of debts, or to restrain trespassers or intermeddlers.

Beneficiaries and creditors may be unhappy with aspects of the process of administration, and may require the court to intervene with a view of giving directions⁶⁴. The law gives a variety of remedies to all these groups. This study has cases dealing with such matters, and these cases provide principles which govern administration suits in general.

Administrators of estates are required to keep records of their administration, and often have to account to beneficiaries, creditors and the court. These matters will be dealt with in the cases in this study.

Beneficiaries and creditors as a fore mentioned have remedies in the event that the personal representative of the estate mismanages representatives discharge their duties in a manner which is unsatisfactory to the creditors and beneficiaries. For example they may misapply the assets find generally administer the estate in a manner which is in breach of trust bestowed upon them by the law. The law has provided a variety of remedies to creditors and beneficiaries with respect to misconduct by personal representatives.

⁶⁴ (1909) 1 ch 819 at page 821

⁶⁵ W Musyoka A casebook on the law of succession.

In **Re Estate of Kariuki**⁶⁶, the case demonstrates that a person who purchases property which) makes up an estate of a deceased person from a person who has no legal authority to sell such property, acquires no interest in such property, and has no remedies as against the estate, especially if he acquires the same while well aware that the seller had no legal title to it. It was *inter alia* held by **Khamoni J** that

"A purchaser of the free property of a deceased person acquires no interest in the asset unless he buys it from the administrators, and he has no protection of the law unless he is a purchaser for value without notice.

In that case the applicant was a purchaser of an asset forming part of the estate of a deceased person. It was sold to him by a person other than the deceased proprietor or the administrator of his estate. The seller in fact had no beneficial interest in the estate.

The application sought rectification of the certificate of confirmation of grant so as to facilitate the transfer of the asset to the name of the purchaser.

The court further held that the applicant was not a purchaser for value without notice since he knew the person who sold the asset to him had no title neither in law nor in equity, and therefore the asset could not be transferred to him.

3:1 Remedies through Administration Proceedings;

The probate and succession proceedings are not suitable for addressing concerns raised by creditors, and in some respect by beneficiaries. They are also often inappropriate where the personal representative desires to get direction from the court on certain aspects of the administration process. The most appropriated procedure in the circumstances is through administration proceedings⁶⁷, taking the form of suits commenced under the **Civil Procedure Act**⁶⁸ and **Rules**⁶⁹, either by way of **originating summons** or **plaint**.

⁶⁶ 68 (2002) 2 KLR 172

⁶⁷ Ibid (W Musyoka A casebook on the Law of Succession)

⁶⁸ Civil Procedure Act cap 71 Laws of Uganda

⁶⁹ Civil Procedure Rules Statutory Instrument no. 71-1

The case in point is **Official Receiver Vs Sukhdev**⁷⁰ where **Madan J** held that "An originating summons under 0.36 (in **Uganda its order 37**) rule 1 of the Civil Procedure Rules is not the proper procedure for seeking decisions **on disputed questions of fact**⁷¹."

Orders were sought against an executor of a will, that he transfers land to a beneficiary, that he administers the estate and that he renders accounts to the court.

The originating summons was premised on order 36 r.1 (Kenya) of the Civil Procedure Rules. The application was refused.

The court held that the originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained.

The provisions of Order 36, rule of the Civil Procedure Rules of Kenya are **intandem** with **order 37 not he Civil Procedure Rules of Uganda** and also Order 55, rule 3 of the English law.

There are several English authorities on this position in **Re Carlyon**⁷² **North J**, held that the court has jurisdiction to determine summons under order 55, rule 3 such questions only as the court could have determined in an administration action before the order came into existence.

The same learned judge held in **Re William Davies**, that there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will.

⁷⁰ (1970) E.A 243

⁷¹ Originating Summons are applicable and relevant where the matters are simple and straight forward and does not extend to complex matters or questions of law. The case in point is *Vicent Kawunde Trading as Oscar Associates vs. Kato* H.C.O.S 0004/2007 where the case was dismissed because it was brought by way of originating Summons yet it required oral evidence. It therefore follows that where the suit involves complex questions of law even if the subject matter will be covered under 0.37 the appropriate procedure is to draft a plaint under Order 4 rule 1 and Order 7 of the Civil procedure rules.

⁷² (1887), 56 U ch 291

In addition there are several Ugandan authorities to this effect. The case in point is **Nakabugo vs. Francis Drake Serunjogi**⁷³ where it was held that

"the proper procedure by originating summons was intended to enable simple matters to be settled by court without the expenses of bringing an action in the usual way but not to involve matters which involve a serious question. It was further held in the same case that it was trite law that when the dispute at facts are complex and involve considerable amount of oral evidence an originating summons is not the proper procedure. And normally originating summons is a suitable procedure where the main point at issue is the construction of document or statute or one of pure laws"

This position was re-echoed in **Bhai vs. Medhi Khan** where it was held that

"an enquiry should not be ordered under originating summons where willful default was alleged on the part of the administrator"

In **Kamuye and others vs. The Pioneer General Assurance society Limited**⁷⁴. The subject matter was annulment and removal of a caveat lodged against the grant of probate to the plaintiff and four others. In that case the caveat lodged against the grant of probate to the plaintiff was annulled and removed and the said executors including the defendant proceeded and were granted probate.

The reasoning in that case is **intandem** with that in **George Talyebwa Nyakana vs. Beatrice Kobusingye & Ors**⁷⁵

In **Esther Mbatha Ngumbi Vs Mbithi Muloni and others**⁷⁶ Gichem, Tunoi and Shah JJA held that *"Questions affecting rights and interest of persons claiming to be beneficiaries can be determined through a suit brought under order 36 of the Civil Procedure Rules of Kenya. (In Uganda its Order 37)"*.

⁷³ HCC No. 52 of 1981 reported (1981) HCB 58 at page 59

⁷⁴ HCCS No. 84/89

⁷⁵ (Civil suit No. DR "O.S" of 1992) [1992] UGHC 13 (21 December 1992)

⁷⁶ Nairobi Court of Appeal number 207 of 1995

In that case, an originating summons under Order 36 r.1 of the Civil Procedure Rules (Kenya) was taken for the determination of the question whether a woman who had been married earlier, was entitled to share in the estate of a deceased man.

Oral evidence was taken and the court concluded that the woman had been properly divorced under customary law by returning the bride price from the first husband, and that she had properly married the deceased under customary law and she and her children were therefore heirs to his estate.

In that case, there never was any dispute that the appellant had been legitimately married under the Kamba Customary Law to Peter Musyoki Mati who she subsequently left and returned to her parents, She thereafter got married to the Late Ngumbi Mutie. Accordingly she had her first marriage to Peter Musyoki dissolved by returning the dowry to her first husband by her father and thereafter a goat slaughtered and eaten to signify that they were no longer husband and wife. This evidence was properly collaborated.

Furthermore, in **Rebecca Nyakeru Nyongo and others Vs Simon Kamau Gitau**⁷⁷ **Gicheru, Ornolo JJA and Basire AJA** held that,

"The estate of the deceased is entitled to accounts and a share in the profits of a business partnership in which the deceased was a member, but the law does not imposed a time limitation within which the same should be done"

In that case, a partner in a business died, and his widows obtained representation over his estate. The widows then brought an action under Order 36 r 4 of the Civil Procedure Rules (Kenya) seeking dissolution of the partnership, transfer of certain plots and taking and sharing of accounts. The High Court granted the orders. An appeal was brought seeking that a time limitation be fixed for the taking of accounts and the sharing of profits. It was held that there was no law which requires that court to impose such time limitation.

⁷⁷ Mombasa Court of Appeal Civil Appeal number 245 of 1996

3.2 Action Against Personal Representatives. .

Where personal representatives commit a breach of trust, the beneficiaries have a right to move to court to protect their interests. The most appropriate course of action is to ask for an account of the administration from the personal representatives⁷⁸.

Jessel MR, James LJ and Lush LJ, held in the case of **In re Morgan: Pillgrem Vs Pillgrem**, Jessel MR in this case, the executor was appointed by the will of the testator with directions which, in effect, made him a trustee of the business, and he was to carry it on and account for the profits to the cestui que trust.

After the will was proved, he continued to carry on business under the will as a trustee.

However at a certain point, the lease of the premises in which the business was on was surrendered to him and he took a new lease for a longer period of those premises, and also of two adjoining cottages, and continued to carry on business in them.

The first question then is what is the effect of his having taken this lease? The renewed lease would not have been granted but for the surrender of the old lease.

It is settled that a trustee cannot get a benefit by dealing with trust property. How, then, could this trustee get any benefit from the new lease, this being the position of the matter, he was a trustee of the new lease. In 1979 he borrowed in his own name, for his own use in carrying on the business, a sum of money from the appellant, and he deposited the lease with him.

It is true that the appellant had no notice that Pillgrem was not the lawful owner of the property comprised of the lease. If he had enquired into the landlord's title he would have got notice. He was therefore a purchaser without notice, who did not get the legal title; therefore, he must take the lease subject to prior equities, that is, to the trust on which it was held.

⁷⁸ Supra

He acquired nothing beyond that, except the right to the parchment. At a subsequent period, he issued execution against the chattels of his debtor, and among other chattels were there lease hold premises, and in order to enable the sheriff to seize, the lease was handed to him. ***I asked the counsel if the sheriff could seize trust property for the debt of the trustee, and it was admitted that he could not.***

The result was that the execution gave the creditor no better title than he had before; therefore he got no title to the lease under the execution and therefore he has no legal title to the property, and as to his equitable interest he must be postponed to the cestui que trust.

3.3 Actions against the Recipients of Assets.

Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled such assets to follow them into the hands of the person holding such property.

This is in line with **Section 332 of the Succession Act** which provides that, *When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he or she is liable to make good the loss or damage so occasioned.*

Furthermore **section 333⁷⁹** provides for **Liability of executor or administrator for neglect. It's to the effect that** when an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he or she is liable to make good the amount.

In the case of **Overseas Finance Corporation Ltd Vs The Administrator General of Tanganyika Territory** (in his capacity as Administrator of the estate of Winifred Judith Napier Clark) **and Oliver Sydehham Chapman** (Administrator Ad Litem of the estate of the Late Robert Napier Clark)⁸⁰

⁷⁹ Succession Act Cap 162

⁸⁰ (1942) 9 EACA 1

It was held by **Sir Joseph Sheridan CJ** (Kenya), **Sir Norman Whitley CJ** (Uganda) and **Sir Henry Webb CJ** (Tanganyika) that *"A beneficiary is entitled to trace estate property or money to which he is entitled to in succession to the hands of the person who has wrongly received such money"*.

In that case, an advocate as entrusted with some money by his clients for the purpose of purchasing certain property. Apportion of the money was misappropriated by the Advocate and his wife, who pre- deceased him.

The clients sought to recover the money from the mining company (the advocate and his wife having both since died), which action was resisted by the Administrator - General in his capacity as the administrator of the estate of the wife of the advocate.

It was **held** that *where a person holds money in a fiduciary capacity, and wrongly uses it or part of it in maintaining or developing his own property, the beneficiary whose money has been so wrongly used is entitled to follow that money into the property so maintained or developed, and is entitled to a charge on the property for the amount of the trust money so wrongly used*.

This position is in consonance with the position in **Hallet's case**⁸¹, where it was held that "If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands"

In this case **Jessel MR** said⁸² "The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is a very clear and well established doctrine. You can, if the sale is rightful take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale in the sense adopting the sale for the purpose of taking the proceeds if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of

⁸¹ 13 ChD 696

⁸² At Pages 708 and 709

the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds.

The proceeds have been invested together with money belonging to the person in a fiduciary position, in a purchase. He may have brought chattels with it. Now, what is the position of the beneficial owner as regards such purchase? I will first take his position, when the purchase is clearly made with what I will call, for shortness, the **trust money**, although it is not confined, as I will show presently to **express trusts**.

In that case, according to the now well-established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as security for the amount on the property for the amount of the trust money.

But in the second case, where a trustee has mixed the money with his own, there is a distinction, that the **cestui que trust**, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely but with mixed fund. He is however still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee ... "

Another English authority to this effect is in the case of **In re Diplock: Diplock Vs Wintle (and Associated Actions)**⁸³ Lord Greene MR, Wrottesley and Evershed LJ, held that

"Where there is an initial fiduciary relationship, the person beneficially entitled to the property can trace it into the hands of anyone holding the property, except in the cases where such as person is a bonafide purchases for value without notice"

In that case the testator had in his will given substantial discretion to his executors to apply his residuary estate for such charitable institutions or other charitable or benevolent object or objects in England as they may select and to be paid to such institutions and objects in

⁸³ (1948) 1 Ch 465

such proportions as the executors deem fit. A substantial proportion of the estate was paid to one hundred and thirty nine charitable institutions without first applying to court. Later the next of kin of the deceased upon learning of the contents of the will, challenged the validity of the residuary bequest, and intimated the challenge to the executors.

The lawyers for the executors wrote to the beneficial charities asking them not to spend the moneys disbursed to them until they received further communication from the executor's lawyers. Several actions were filed by the next of kin of the deceased centering on whether next of kin had any claim against the executors of the testator or their estates in respect of the devastavit or other misapplication of the testator's residuary estate.

The Court of Appeal held that disappointed beneficiaries or next of kin had a right to trace assets wrongly distributed to the hands of the persons receiving them and to recover the same.

However suffice it to note that in the discharge of their duties personal representatives⁸⁴ have **defenses** they can fall back on in the event of liability. As of whether or not they can be successfully relied upon once evoked is subject to discussion.

3.4 Defenses of Personal Representatives⁸⁵

The law avails some defenses to personal representatives where they are accused of devastavit and maladministration. The defenses are statutory, and stated in the Succession Act⁸⁶, the Trustee Act⁸⁷.

3.4.1 The Defense where personal representatives have acted honestly, reasonably and bonafide⁸⁸

Section 58 of the Trustee Act⁸⁹ is to the effect that, if it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any

⁸⁴ Executors and administrators of estates.

⁸⁵ 1 bid (A case book on the Law of Succession by W. Musyoka)

⁸⁶ Cap 162

⁸⁷ Cap 164

⁸⁸ In good faith.

⁸⁹ Trustees Act cap 164

breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the breach.

In **re Pauling's settlement Trust; Young husband and others Vs Coutts and Company**. It was held by **Wilmer L.J**, **Upjohn L.J** and **Harman L.J**, that

" A personal representative is personally liable for a devastavit, and must replace the loss caused to the estate, unless he can avail himself of a defense, such as that under section 60 (Kenya) of the Trustee Act, where he has acted honestly, reasonably and in good faith"

In that case, a bank holding trust fund lost a sum of £2,600 in a transaction in which it was advised by its solicitor's, although the bank did not act as per the solicitor's advice. The transaction was carried out without the knowledge or consent of the beneficiaries but the bank acted honestly and in good faith. The court found that **section 62 of the English Trustee Act**, the equivalent of **section 62 of Kenya Trustee Act**, did not afford a defense to the bank. In Uganda its equivalent to **section 58 Trustees Act**.

3.4.2 the common law defense where beneficiaries have acquiesced to devastavit.

This defense is illustrated in the English case of **Holder V s Holder and other**⁹⁰ where **Harman, Danckwerts** and **Sach LJJ** held, that

"There is no fixed rule that the beneficiary who acquiesces in devastavit should have knowledge of the legal consequences of the facts, and whether it is fair for the court to apply the defense of acquiescence depended on the facts of each case"

In that case, a testator left a will appointing he defendants his executors and creating a trust for sale with an equal division of the proceeds among his ten children. At some stage

⁹⁰ (1968) 1 ALLER 665

an executor who desired to purchase some of the properties in the estate renounced probate and recited that he had not intermeddled and thereafter bought two farms. The plaintiff brought an action objecting to the sales to the executor who ,had renounced probate.

The court held that the renunciation was ineffective and the executor remained in office, and since his interference with the administration of the estate was minimal there was nothing to prevent him from purchasing the properties, as the information he got of the properties came into his possession as tenant rather than as executor.

CHAPTER FOUR

DATA ANALYSIS, PRESENTATION AND INTERPRETATION.

4.0 Introduction

This chapter deals with the analysis of data obtained from interviews and questionnaires as obtained from various respondents. Through the information gathered from the fresh data, the researcher discusses various issues related to the role and liability of administrators of estates. The actual performance of executors and that of the administrator General is also discussed.

In addition, this Chapter also discusses the issue whether the effect of the administrator General's office is felt on the ground.

4.1 The performance of the administrator General's office

The administrator General or Public Trustee draws its mandate from **Article 276⁹¹** The **Administrator General's Act⁹²**, **Public Trustees Act⁹³**

The cases reported to the department rapidly increased in the **1970's** during the times of political turmoil as this introduced estates of missing persons. The HIV/AIDS scourge too enormously contributed to the increase in the number of reported cases in the **1980's** and **1990's**. At the moment the total number of files in the department is approximately **66937+**. Each file has no average 3 pending issues or cases that may involve, ownership of properties, establishing who the beneficiaries are, and say, establishing the boundaries of the land⁹⁴.

⁹¹ 1995 Constitution of Uganda.

⁹² Cap 157

⁹³ Cap 161

⁹⁴ All these cases emanating from one file may delay the process of dealing with the file and final closure of the same, thereby increasing both the workload and case backlog.

4.2 One of the greatest impediments in the performance of Administrator general's office is the issue of case backlog.

In the past, the department gave no special priority to the issue of backlog basically due to limited **staff strength, poor facilitation** and **inadequate funds**. This remained the position for many years until 2007 when the department was incorporated in **JLOS SIP 11** under **family justice**. It was then that the problem of back log was noted as a major challenge of the department just like the other institutions under the Justice Law and Order Sector⁹⁵.

In carrying out the research an analysis was made that led the researcher to conclude that the case backlog problem is really working against the effective administration of estates and ditto the dispensation of justice.

One of the interviewees expressed her concern of how she was handled at the administrator General's office in Kampala.

"When I went to the administrator general's office the staff were shouting at me, telling me that they were few and yet the cases were very many. That I was not a special case unless if I wanted to be worked upon by one of the internship students"

Another respondent a man from Kasangati was practically thrown out because he was just a mere grandchild yet he claimed am also a beneficiary in the estate of my Grandfather. I was not given chance to explain myself. The staff said they had many cases to deal with. They threw my papers at me and ordered me to leave.

Another respondent a female lawyer came complaining that her client's file had gone missing from court record. This was an application for letters of administration. This very office had issued the letter of no objection. She had thus been referred back to the administrator general's office to get a copy of the documents. Alas the copies at the administrator general's office could also not be found.

⁹⁵ [www.jlos.go.ug/uploads/cas %20Bac](http://www.jlos.go.ug/uploads/cas%20Bac).

However the department has come up with an initiative to reduce case backlog in JLOS Institutions⁹⁶.

The department under this program devised several strategies to fight case backlog. To date the department has cleared several cases as shall be highlighted below.

Definition of Case Backlog⁹⁷

JLOS had no common definition of the term case backlog and therefore each institution had to grapple with defining it. The sector however agreed that all cases that were pending beyond two years constituted case backlog. The department defined case backlog in terms of performance time lines set for particular activities. For instance in an activity like Administration of Estates by the Administrator General, where;

- Inventories and accounts were not filed within six months from the date of the grant of letters of administration, this qualified as case backlog.
- Estates not wound up within one year from the date of the grant of letters of Administration from court, constituted backlog.
- other activity was issuance of certificates of no objection where;
 - a) Applicants whose certificates of no objection have been rejected should be informed within 14 days from the date of lodging the application, and any application(s) beyond the prescribed time are considered backlog.
 - b) Certificates of no objection should be granted within 28 days from the time application for the same is lodged with the department, all cases not handled within this time are backlog.

4.3 Areas of backlog in the department;

The department identified two focus areas vital in the case backlog reduction program and these were;

⁹⁶ March 2011, at Imperial Royale Hotel.

⁹⁷ Ibid

- a) Issuance of certificates of No objection to be enable beneficiaries apply for letters of Administration.
- b) Administration of estates by the Administrator General.

It was realized that the reason why the department had a growing case backlog were;

- a) It was taking or many estates under its administration.
- b) It was unable to effectively administer some of the estates it was taking on, given its capacity and resources (both human and capital)
- c) There were also delays in the issuance of certificates of no objection.

4.4 Strategies to reduce case backlog in the department.

The department set timelines for the completion of cases as follows;

- i. All certificates of no objection are supposed to be issued within 28 days from the date of lodging the application for the same and the unsuccessful one should be rejected within 14 days.
- ii. Estates should be wound up within one year.
- iii. All payment should be made within 7 days.

The department also came up with a policy of intensifying the issuance of certificates of no objection, while reducing the number of estates to be administered, in order to avoid accumulation of more case backlog. **We resolved to take no estates only in exceptional circumstances⁹⁸**

The department embarked on the **weeding of dead wood files⁹⁹**. The exercise commenced in May 2010 and to date they have closed **24496 files**, earmarked **1652 estates** for winding up, indentified **136 files** under Public Trustees, hence capturing **26184files**.

⁹⁸ supra

⁹⁹ This exercise is intended to rid the department of inactive files in order to make it easy to locate active files.

The researcher found out that the department also resolved to wind up estates especially those that had been in the department for a long time. However most of the files are still pending before court because of the **"new stringent court requirements"**. The courts have asked the *department to furnish family consents indicating what the beneficiaries agreed to the distribution and the shares given to them! And that the beneficiaries should in all case be invited for a meeting and informed that the Administrator General intends to wind up their estate*¹⁰⁰.

From the above research findings the researcher comes to a conclusion that in an attempt to lessen the backlog, caution must be taken so as to avoid miscarriage of justice. The doors of justice should not be closed on an innocent applicant who comes to the administrator general with a genuine case. It is therefore a matter of striking a balance.

In respect to this the researcher further found that there cases at the administrator general's office meaning that these estates are directly under him. However its surprising that in most of these cases the complainants were contesting the way the estates had been distributed by the elders or family members. This work of distribution of the estate is supposed to be done by the administrator of the estate following clearly laid down guidelines according to the Act.

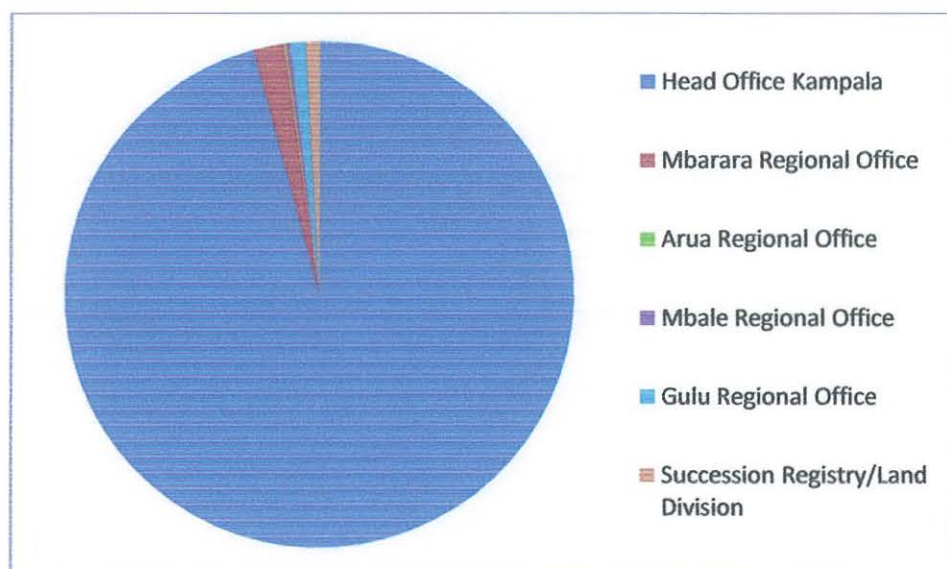
¹⁰⁰ In an interview with one of the officers in the administrator general's office, he contended that most of earlier distributions were reached, not out of consent, but under the succession Act on intestate distributions. On the issue of contacting the beneficiaries, those who took properties many years back are not willing to incur expenses on this account, and the department has only one vehicle to use to visit most of these very many places, let alone knowing their present contacts! None the less, the department raised this matter with the courts' representative in its committee meeting which took place in March 2014 to discuss how best this issue can be resolved. We are yet to receive courts response on the matter.

4.5 The statistics of Case backlog reduction in the department

Table 1: Total number of files in the Department

Location	Files
Head Office Kampala	66937
Mbarara Regional Office	1366
Arua Regional Office	90
Mbale Regional Office	197
Gulu Regional Office	668
Succession Registry/Land Division	627
Total	69887

Figure 1: total number of files 0065s in the department

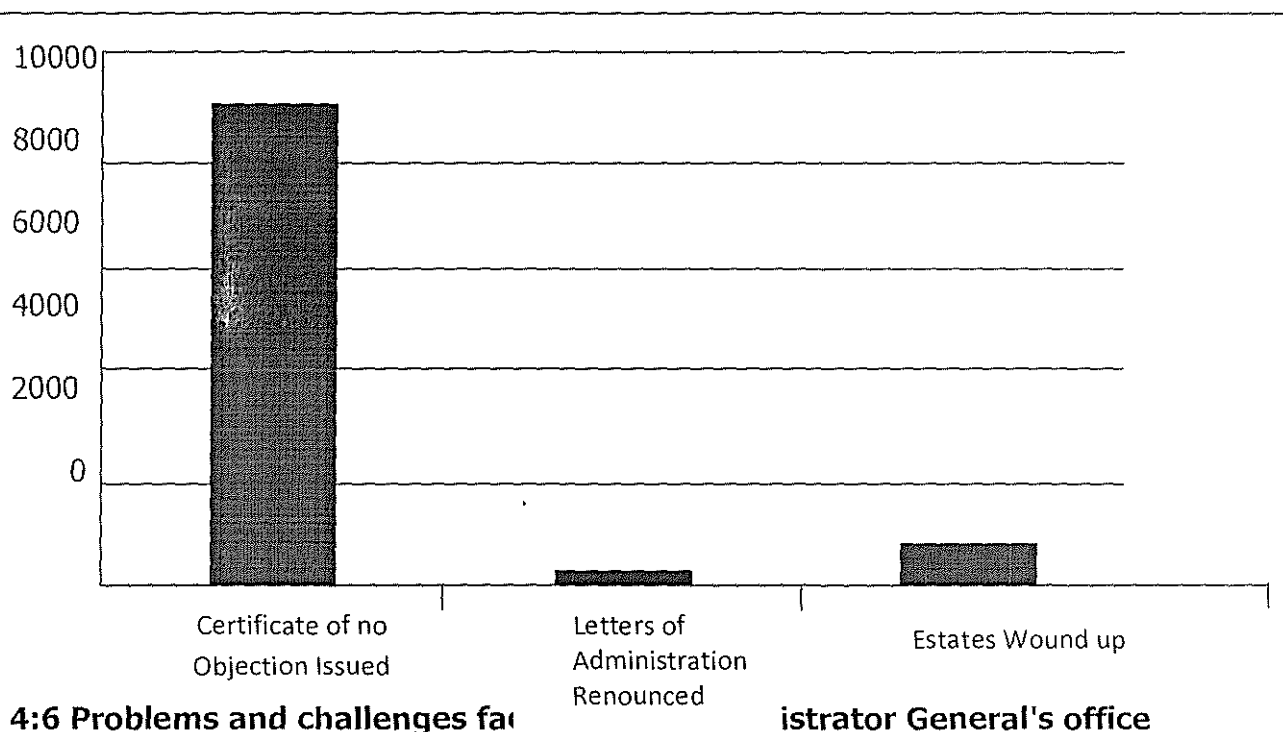


- Cases less than two years old 6211
- Therefore cases which constitute the backlog are 63676

Table 2: Files closed since adaptation of Case Backlog reduction program in the department (May 2010 to Feb 2014)

Item	Files
Certificate of no objection issued	9124
Letters of administration renounced	220
Estates wound up (these have been lodged before courts of law)	800
Total	10144

Figure 2: files closed since adaptation of Case Backlog reduction program in the department (May 2010 to Feb 2014)



There are a number of challenges which favour the rise of case backlog and these are;

Delays by clients;

Many clients open up files and for one reason or another do not follow their application within the stipulated time frame. There are always inordinate delays in getting the report from the chief Administrative Officers¹⁰¹.

The public is ignorant of the laid down procedures of obtaining certificates of no objection and have not been in position to meet their obligations on time in order to enable the department serve them expeditiously.

One of the respondents a lady whose man had passed on and his estate had devolved upon the administrator general for administration had come to office to withdraw the land title. The staff fruitlessly explained to her that this was not the way to get what she wanted since she did not even have the custody of the child. They advised her to go back and convene a family meeting so as to seek their approval. However the lady just exchanged words with them assuring them of how she was not ignorant and that she was determined to stay at these offices¹⁰² until and when they gave her the land titles.

Delays by officers;

Whereas there are new changes, policies and approaches on how best the department can deal with case backlog, there have not been corresponding training to prepare staff of the new changes. This has caused a lot of resistance to changes being made in the department by some members of staff who have **not appreciated why office should not take on management of estates**. This in turn has negatively affected the speed of case backlog reduction in the department.

In the research findings one of the respondents a widow from Mityana when interviewed expressed her concern. She lamented that

"Some of us come from very far yet when you reach here the staff have the guts to tell you that government offices open at 9am and when they go for lunch

¹⁰¹ This is due to a number of factors as explained in the user committee meeting of 4-3-2011

¹⁰² Administrator general's offices Kampala

they go forever. They go at 1pm and come back any time between 2pm and 3pm. Sometimes the person you want to see is not in the office and you end up bouncing"

Political interference;

There is a lot of **political interfere with undue regard to the law**. The issue of orders from above is a great impediment in the dispensation of justice without fear or favour.

One of the respondents was a soldier dressed in full army attire had also come to the administrator general to seek recourse. However the said soldier went a head to boost of how he had influence from big shorts in government and thus he was going to get his desired end easily and by all means. Alas while everyone queued up the officer who came much later was worked on first and he left.

Court process;

Court processes of compelling the Administrator General to take over estates where there are irreconcilable differences between beneficiaries, thereby dragging the department into cases whose particulars are not known or those which take long to be resolved.

- The requirement that the department ¹⁰³files the individual consent of the beneficiaries that they received their shares per entries in the final/accounts¹⁰⁴.
- Requirement that Administrator General be indentified before issuance of letters of administration (this is not provide for under the Administration's General Act)

Failure to restructure the department and/ or make it autonomous.

The department needs to be upgraded to the directorate level (or made autonomous like the DPP), if it is to fully realize its dreams of effective management of cases and reduction in case backlog.

¹⁰³ The administrator general's office

¹⁰⁴ Ibid

With restructuring the department could set up a public relations desk which would be in charge of speaking for the department and handling the many complaints that often interfere with work schedule and set timelines. Restructuring would also enable the department to create new posts, recruit more staff and establish an estate management unit to oversee the estates' management functions.

Difficulty in winding up of estates;

Whereas several estates have been earmarked for winding up, we have since established that other files lack records, thereby making them difficult to wind up.

The winding up exercise is also expensive. It requires making inventories, advertising in the Newspaper's and filing them in courts. The funding for this exercise is still insufficient and the disbursement is not timely¹⁰⁵.

Inadequate funds;

There are inadequate funds to notify the clients on the progress of their applications. Several certificates of no objection remain in the offices for months before the clients come for them.

Administration of estates involve identification of beneficiaries, inspection of properties, making searchers in land registries, distribution and transferring the properties into the names of the beneficiaries. The department does not have sufficient funds to discharge the above obligations.

Ignorance of the law of succession matters.

Both the elite and the illiterate are ignorant of the Law of Succession. Quite often the RDC's Local official and the IGG have questioned the mandate of the Administrator General in several cases, thereby delaying their dispensation.

¹⁰⁵ Report presented at the review conference for the JLOS case backlog quick reduction programme, on the 7th March 2011 at Imperial Royale hotel.

Perceived and actual corruption

The elaborate procedures, processes and systems are often construed to imply a corrupt system. Some clients who open files do not return to followed up their files due to stringent legal requirements and perceive this as corruption.

Obsolete laws and slow reform process;

The statutes relating to succession matters i.e. The **Administrator General's Act, Administration of small estates Act, Public Trustee Act, Succession Act, Estates of Missing Persons Act and Estates of persons of unsound mind Act**, are archaic and require amendments to cope with the modern practice. The reform process is still too slow. In **Law and Advocacy for women in Uganda Vs Attorney General**¹⁰⁶, section **27** of the succession Act, were nullified, leaving a vacuum on intestate distribution! There IS no law at the moment providing for distribution of property of an intestate.

Succession wrangles.

Wrangles between the family members normally delay distribution and winding up of estates. These cases are at times difficult to resolve and often end up in court, hence delaying closure of the file.

Difficulty in detection of rightful persons;

Identification of the rightful beneficiaries IS still difficult due to lack of National cards. I personifications and fraudsters are rampant.

Networking.

Weak linkage with other bodies like lands, courts and the police. There is no smooth cooperation between these stake holders yet they all need each other in the discharge of their duties. Needless to note that they are all mandated by the statutes that create them to play a role in protecting the beneficiaries under a given estate.

¹⁰⁶ Constitutional Petition no. 5 of 2006

Computerization.

Failure to embrace automation of the entire department affects fast tracking of files.

4.7 Gender concerns in the arena of execution and administration of estates in Uganda.

The researcher in the research findings found that the gender issues were pertinent in the field of administration and execution of estates. There were common scenarios from the stories of the women respondents that they had been denied a chance to manage their late husbands. Many of these female respondents were not even recognized as beneficiaries in the said estates. Some were denied their rights to land and other inheritances.

4.7.1 The context and importance of the problem.

Whereas women's rights are generally fairly reflected In Uganda's legislative instruments including but not limited to the succession Act¹⁰⁷ ***majority continue to suffer under the weight of lack of implementation.*** It is therefore important to articulate the legal and constitutional context of women's rights in Uganda in order to understand the urgent need to address associated problems.

4.7.2 The constitution in relation to gender rights.

The Constitution of Uganda provides ***equality for all, and freedom from any form of discrimination based on sex, race, colour, ethnic origin, tribe, birth, creed, religion, social economic, standing, political opinion, or disability***¹⁰⁸.

Men and women are entitled to **equal rights in marriage, and its dissolution (Article 31 (1) (b), and all persons are protected from deprivation of property.** In addition, **Article 32 mandates the state to take affirmative action in favour of groups marginalized on the basis of gender for the purpose of redressing imbalances,** while **Article 33 (1) states that women shall be accorded full and**

¹⁰⁷ Cap 162 of 1972

¹⁰⁸ Article 21 of The Constitution.

equal dignity with men (2). The state **shall provide facilitation and opportunities to enhance the realization of women's potential and advancement.**

4.7.3 Outline of inheritance entitlements in the Succession Act.

The succession Act defines the persons eligible for inheritance and their respective share entitlement. Succession Act provides a definition of consanguinity or kindred that transcends gender.

Kindred are persons related to the deceased through parental and or sibling ties who are bound to benefit from their estate.

The constitution of Uganda affirms that the state shall provide facilitation and opportunities to enhance the realization of women's potential and advancements.

The widow/ widower inherit a **15%** share of the estate. The act defines **children** as **lineal descendants** and these include;

Legitimate children arising out of a statutory marriage, illegitimate children arising out of casual relationships, and children who have been legally adopted.

The Succession Act also recognizes dependants as beneficiaries, among which is a spouse (wife or husband), parent, brother, sister, or grandchild, who, at the time of death, was wholly or substantially dependent on the deceased.

A spouse becomes a legal heir in the absence of ascertainable lineal descent ties. All of the above categories are accorded equal inheritance rights, regardless of gender, although there is an implied preference for a male over a female heir. Marriage laws are vital in the assessment of women's rights as beneficiaries under estates because they are directly linked to inheritance entitlements. Suffice it to say that a widow should ideally be the best administrator of the deceased husband's estate. This is so because she is in the best position to know her husband would have wanted these assets to be managed. Be that as it may in most cases the widows also contributed to the estate either in monetary terms or in an intangible way.

It is therefore my submission that these women and lor widows should be granted letters of administration where they apply for them. However it has to be just and equitable in the circumstances. Widows or widowers should be encouraged to apply for letters of administration.

They should also be given a chance to inherit chattels because they have the best interests of the family at heart.

4.7.4 Root cause of problems in implementation of rights of women.

Despite the provisions and protections provided to women both by Law and the constitution, *customary laws and practices are deeply embedded in the culture and remain dominate at the grassroots.* Those traditional patriarchal practices governing divorce, inheritance, and property rights continue to place Uganda women at a disadvantage, by denying them any right to own and administer property.

Women are seen as property themselves that can be inherited by men. And if a woman' separated from her husband and returns to her parental home, she loses all rights to land, irrespective of her contribution to its development.

In addition, the gender structure of land rights in Uganda varies across the country, but is highly unequal, as women land rights are generally restricted to access while men are likely to have ownership rights. Only 17% of the women own land despite the fact that they constitute 50.9% of the population and comprise 70-80% of the agricultural labour force.

Lack of control over land reduces women's access to and control of the proceeds from agricultural production, as well. While men can easily obtain loans with land as collateral, few women are able to do the same. This imbalance in opportunities is seen as an underlying factor in poverty among women that restricts improvement in their livelihood and affects women's status and decisions making in society¹⁰⁹. Without secure rights to land, both women's ability and incentive to participate in income expanding economic activity are reduced.

¹⁰⁹ National Gender policy 1997

4.7.5 Policy implication for women

In addition, the Succession Act stipulation that grants **15%¹¹⁰ of the deceased's property to the surviving spouse is limited to those who are in legally recognized marriages**. As **cohabitation** is the most popular form of relationship in Uganda this provision drastically disadvantage most women by failing to record rights to cohabiting spouses, regardless of the time spent in relationships, or their efforts in the accumulation of property.

The question in regard to this is whether under cohabitation a surviving spouse can apply for letters of administration? Most of these issues have been tackled in the Proposed **Marriage and Divorce Bill**.

However there is opposition to the said bill. This opposition has come from all comers including the **religious leaders¹¹¹**. The Catholic Church in Uganda condemns the bill as decreasing the role of religion in marriage, giving more importance to material wealth and land. **Sheik Hassan Kirya** also voiced resistance to the draft **Marriage and Divorce Bill** to the **monitor newspaper** suggesting that Islamic law will continue to take precedence over civil law, regardless of whether the bill is passed; AS for the new changes, we the Muslims are not concerned because marriage is part of worship and therefore it has its own rules".

Customary law is still a great impediment in realization of women's rights to property and this has a direct bearing on administrators and executors of estates. It means that the personal representatives while distributing the estate they always leave out the women and the girls merely because of customary laws. Very few

¹¹⁰ Sec 27 (1) a) (ii) Succession Act cap 162

¹¹¹ Religion constitutes one of the shaping forces in identity formation and sex gender system, indeed religion is one of the important forces in influencing our belief system, whatever the priest says is taken as the gospel truth e.g. after the seminar that lasted for three days in the diocese of Hoima, the parish Rev, Father Boniface Wamala was invited to give a closing comment on the seminar and this is what he said;

"You may hold seminars, conferences and debates until Christ comes back but these will not change anything, the women must to submit to men as the church submits to Christ. Whatever you say and wish, Women will remain women and will continue to be impregnated by men"

women will become personal representatives if any. It is these loopholes that the researcher seeks to point out and also suggest solutions.

"One of the respondents had been twice dispossessed- first when her husband died and his clan left her out when dividing up his estate, and again when she was denied a share in her father's land. But this time she's fighting back".

When her husband died fifteen years ago, she did not struggle with his relatives for a share of his estate; she moved back to her own family's home in central Uganda's **Luwero district** with her three children to start a new life.

But when her father died, his sisters decided only her younger brother was entitled to a share in the land, and asked her to leave.

Uganda's constitution grants women equality and legal protection against discriminatory traditional practice, but there have been no reforms to the law and the constitutional provision has had little impact.

Across sub-Saharan Africa, customary law is hindering efforts to reform land tenure and increase women's access to and ownership of land.

Despite that fact that women form the majority of subsistence farmers in Africa, and play a critical role in food security, they typically have limited control over land.

"Far fewer women own land than men," says Fatou Diop Sall, "and often have access to land only through male family members, marking them as dependent mothers, wives or daughters. In cases where couples divorce, or a man died, women often run the risk of losing their entitlement to land¹¹².

Sall says **Senegalese law** stipulates that men and women have equal access to land. But just as in Uganda, the reality on the ground is markedly different. Women's representation

¹¹² Sall is the coordinator of a research project on gender and society at the University of Gaston in Senegal.

on village land councils, for example, is limited; when it comes to inheritance, women are also excluded¹¹³.

The respondent's grandfather originally gave the piece of land in question to her father, and her aunts ruled it belongs to the clan; having been married, they say, she must look to her deceased husband's family.

"It's because of culture which dictates that girls are worthless and should get their share where they get married," she told IPS. She has turned to the courts to defend her rights. "I approached the resident district ~ commissioner for **Nakawa**, who helped me by taking the case to court." **This respondent** is a defiant exception to the rule in Uganda and elsewhere.

Magadelena Ngaiza, a senior lecturer at the **University of Dar es Salaam**, says ignorance of their rights is still blocking women from land ownership. In her native Tanzania, legal provisions to address land rights inequalities between men and women have not yet had the desired effect.

"The majority of women are not aware of what the law states with regard to land ownership. They are not informed that they have such rights and must demand for them. Most do not even consider themselves landowners and actually are surprised by such a suggestion," she say¹¹⁴s.

The respondent's case is being heard in Nabweru court and she is convinced she will get justice.

"I will not rest until I get my share, in fact even your very own brother can deny you a share because a girl should not inherit property this is unfair," she says.

¹¹³ Despite what the law says, women are blocked from land control by cultural and economic factors. Most women do not have the financial might required to purchase a piece of land. When families are sharing out pieces of land, women are not allocated portions," Sall says.

¹¹⁴ She says attempts at improving women's land rights must begin with massive awareness creation, educating, women on existing land law and policies. Women must also be empowered economically to ensure they can access land and not just be tied to be small scale farmers.

"Any discussion towards improving women's land rights must go beyond empowering them at a small scale. We must visualize a situation where they become large scale producers and this requires them to own large tracts of land. Financial might is what will make a difference here, Sall says

4.7.6 Critiques

Research findings;

A study conducted in the districts of **Wakiso and Mpigi in September 2009** exposed some of the actual practices occurring in relation to women and inheritance claims for land. Among the beneficiaries who use the land of deceased person, **59%** were children of the deceased, **10%** were widows, **14%** were grandchildren, **10%** were new landowners, **7%** were squatters. In terms of use of land, widows are very much in a marginalized position.

The study revealed that in cases where the deceased dies **intestate**, some women are included among the beneficiaries of the deceased property and are granted **letters of administration** by the **Administrator General's office**. However, the research also shows that *those accorded rights to administer the deceased's estate do not always distribute the property in the proportion to entitlement¹¹⁵*.

Furthermore, some administrators were found to use their powers either to sell off property or to invest it without the consent of beneficiaries, particularly when those beneficiaries were women. Of those women who were affected by faulty administrators, 17% had approached the office of the Administrator General to halt these transactions. This statistics implies that the majority of women have been exploited and deprived of their property.

Community dialogues also exhibited women's frustration with both the bureaucracy and systems of the Administrators General Office. *Both women and men encountered many challenges when attempting to claim their property both in terms of public access to and use to the Administrator General's office.*

Of the women interviewed in the study, 69% had gone to the Administrators General's Office to obtain letters of no objection as beneficiaries of the deceased's property. But discussions revealed that most women had not been motivated

¹¹⁵ Women's gains from the implementation of succession law in Uganda; voices from Wakiso and Mpigi Districts, Uganda.

to go to the Administrator General's Office on their own volition; rather, male relatives, heirs, or caretakers with vested interests in the estate led them there.

These women were vulnerable to land rights abuses by these people because of their ignorance of the Law, their limited literacy and the alienating procedures of the Administrator General's Office. It was however observed that the few women who had proper access to the Administrator General's office felt relatively secure over their land rights.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

In light of the foregoing submission, it is worth noting that theoretically there are laws providing for the roles and liabilities of the said executors and administrators of estates in Uganda. However even with these laws there are still enormous challenges and shortcomings in dispensing the said duties.

The Ugandan Government has a lot of potential to make significant progress towards the implementation of the existing laws pertaining the roles and liabilities of executors and administrators of estates. The rationale behind these laws is to safeguard and protect the beneficiaries under the estate. Where this is not achieved as is always the case then the law is not given effect to.

Section 11 of the Administrator General's Act provides that it is an offence termed intermeddling to take possession of, move or do anything without legal authority, with the property situated in Uganda of a deceased person.

The penalty, under the Act, is three months imprisonment or a fine not exceeding Ug shs. 200 or both, notwithstanding civil liabilities.

The Succession Act section 202¹¹⁶ provides that, subject to Section 4 of the Administrator General's Act, administration shall be granted to the person who is entitled to the greatest proportion of estate. Section 27 of the Succession Act grants the greatest proportion of 75% to the children to share and gives 15% to widow(s). Where there is more than one widow, the children or, in the case of a widower, the 15% may be the largest share.

¹¹⁶ Cap 162

According to the research findings the researcher found out the one of the reasons as to why some beneficiaries are victimized was Cultural factors. Culture is at the heart of most of the discriminatory practices against Women.

It is therefore my submission that social justice and equity suggest there is need to strengthen the formal mechanisms to prevent discriminatory customary practices and give effect to **Article 247(b)** of the Constitution decentralize services and protect beneficiaries

5.2 RECOMMENDATIONS

Recommendations on carrying out duties by administrators and Executors of estates. The office of the Administrator General should be decentralized to bring its services closet to the district and local level, in accordance with the proposals discussed in the relevant section on the Administrator General's Act. This will help to facilitate the selection of administrators and monitoring of their duties.

The administrator should continue to file an inventory of the estate and provide accountability to court issuing the grant after six months. The court shall cause all such records to be sent to the High Court through the Chief Magistrates court annually.

Intermeddling with any estate should be made a penal offence punishable by one year's imprisonment and/or a fine. There should be an actionable claim for recovery, and/or compensation against all persons whom intermeddle in estates of deceased persons. The law should enable tracing of property and attaching the property of the intermeddler to compensate the estate of the deceased person. Where a person obtains letters of administration or grant of probate through fraudulent means, such person shall be liable on conviction to imprisonment of two years and/or fine.

5.3 Recommendation for effecting administration of the case backlog reduction program¹¹⁷.

There should be strengthening of linkages with other institutions like police, Local councils, land office, and court. For effective execution and administration of estates there is dire

¹¹⁷ Ibid

need to have onto board all stake holders. These will check the powers of administrators and executors in the dispensation of their duties.

The police should be enjoined in the administration process. **Section 21(e) Police Act¹¹⁸** provides for the role of police in the execution of orders or directions issued by the Administrator General or court on succession and estate matters.

The local government council should also work hand in hand with the administrator general as well as all the relevant institutions to protect the beneficiaries under estates. The Local Government council has the following powers or role in Succession matters;

- a) To mediate in a situation where the rights of a child are infringed upon and, especially with regard to the protection of the child's right to succeed to the property of his or her parents¹¹⁹ and all the rights accorded to a child in **Section 10 of the Children's Act¹²⁰**.
- b) Registration of death for transmission to the Registrar General as provided in the **second Schedule, part 2(14) of the Local Government Act**

The other stake holder is the courts of law. The **Administrator General Act sec 11¹²¹** provides that no person may administer the estate of a deceased person without legal authority. To do so constitutes the offence of intermeddling. ***Only the formal courts have power to grant the authority upon application for either grant of probate or letters of administration¹²²***.

In summary the courts play the following roles, Settlement of disputes arising from the distribution of intestate property by the personal representative. The courts also grant

¹¹⁸ Cap 303
¹¹⁹ Suffice it to note that these powers do not include any powers of distribution of the property by the Local Councils, Section 10 (4) of the Children's Act cap 59
¹²⁰ Children's Act cap 59
¹²¹ 1997
¹²² Cap 157

Probate or letters of administration Section 234(1) Succession Act¹²³. The courts can also revoke letters of administration or probate.

In addition there should be **training of staff (in estate management, investigative skill, ADR¹²⁴, charge management)**. This will enable them to solve family wrangles that delay distribution and winding up of the estates. As already pointed out the researcher witnessed and/or observed with his naked eyes how some of the staff in the administrator General's office were handling the people without any professionalism. Therefore more training will go a long way in improving their services.

Furthermore there should be complete computerization of the Administrator General's department. This will help to ensure easy retrieval of information on files and tracking down the same. The researcher interviewed respondents whose files had gone missing from the registry.

This means that they will be delayed while tracing the file. It goes without saying that justice delayed is justice denied. Therefore computerizing the system will help a great deal in effective management of files and all information.

More still the government should encourage field tours to neighboring countries or to countries where this strategy of reduction of case backlog has been successful. This will enable the stakeholders to get ideas on their implementation.

Parliament of Uganda should push for faster law reform process. Most of the laws concerning administration and execution of estates in Uganda are archaic and need to be reformed. Some provisions of the Succession Act have been rendered unconstitutional but up to date they are still on the law books. These provisions have not yet been repealed and replaced.

¹²³ The proper court with jurisdiction over a petition depends on the value of the estate. The Administration of estates (Small Estates (Special Provisions) Act Section 2 cap 156 confers powers on Magistrates' Courts to grant probate or letters of administration in respect to small estates of deceased persons. These are defined under Section 1 as Estates with a value not above Ushs 100,000. In case of large estates the applications shall lie in the high court.

¹²⁴ Succession Act as amended.

An example in **Law and Advocacy for women vs. Attorney General**¹²⁵ Section 27 of the Succession Act on distribution of an intestate's property was nullified leaving a vacuum in the law. Apparently there is no law on distribution of an intestate's property. Therefore parliament should pass the laws a little faster in order to avoid the vacuum.

In addition there should be awareness creation and civil education of the role and responsibilities of the administrator general's office. The Administrator General's Office is responsible for implementing the Succession Act under the Administrators General Act¹²⁶ and is mandated to manage and distribute properties of the deceased. However, the majority of people in rural communities are not aware of this office and its function nor do they understand Uganda's Legal Provisions for inheritance.

There should also be an Increase in the budget allocation and timely disbursements. In the research findings the researcher interviewed one of the staff at the administrator General's office who said that there were inadequate funds which limits the follow-ups of estate matters.

They are not able to follow the beneficiaries by visiting them because the resources are limited. Therefore government should consider increasing the budget allocation to this sector.

There should be restructuring of the department or giving it autonomous status. This will go a long way in effecting change because with such a status it will make it self accounting and responsible.

Consequently, most women have failed to exercise their rights to land and property. They remain marginalized as well as potentially victimized by others.

The current policy on the implementation of women's legal rights must be revised to address this problem. Action needs to be taken to educate and sensitize the community as well as women about their legal entitlement to land and inheritance of property.

¹²⁵ Constitutional I Petition no 5 of 2006

¹²⁶ Cap 157

Accessibility of the AGO¹²⁷ needs to be augmented, not only through improved communication and feed back mechanisms between it and local governance, but through the establishment of offices at the district level¹²⁸.

These recommendations would improve the effectiveness of executors and administrators of estates in discharge of their duties. They would also improve the implementation of the succession Act along with rural women's ability to benefit from those legal provisions that protect their rights and livelihoods.

5.4 Policy recommendations as regards the gender perspective in administration of estates:

Rural women should to be sensitized about the Administrator General's office and its functions by modes that are accessible to them¹²⁹. Such knowledge will enable them to utilize the services of this office effectively. Women need to be sensitized about legal details of the succession Act, marriages and Divorce Act, and other relevant inheritance law. Such knowledge will enable women to interpret the law so that they can demand their rights from husbands and after authorities. This knowledge will empower them to realize their land rights¹³⁰.

Public education and sensitization campaigns are necessary to create good will for women's land and inheritance rights. These campaigns will begin to address the underlying traditional structures that undermine women's social statues and their motivation to claim the rights that are guaranteed to them by law.

¹²⁷ Administrator General's Office.

¹²⁸ Women's Land Rights initiative/Policy Brief March 2011, (Uganda Land Alliance and Uganda Media Women's Association) Women's gains from the implementation of succession law in Uganda; Voices from Wakiso and Mpigi; Districts in Uganda

¹²⁹ The AGO also poses a number of challenges for rural women in terms of accessibility, alienation, cost given its urban location.

¹³⁰ *ibid*

There is need to introduce a feedback mechanism so that resolutions from the Administrator General's office are communicated to reach relevant local governance structures¹³¹.

Implementation of the Succession laws would be facilitated through the AGO's¹³² guidance at the local level.

In theory, Ugandan women 'enjoy' constitutional and legal guarantees that safeguard their rights to property and their advance in society. However, the study revealed that these rights do not translate into practice. There policy recommendations would go a long way to address both the underlying deep structures as well as the practical challenges women face when attempting to claim their rights to property and land. Such measured and practical action would facilitate the implementation of the succession law and its agenda to improve the position and living conditions of Ugandan women.

¹³¹ In this case the sub county and parish chiefs.

¹³² Administrator General's office.

BIBIOGRAPHY

BOOKS

1. Dr Stephen Cretney, Judith Masson and Rebecca, Principles Of Family Law I 7th edition
2. Forfeiture And The Law Of Succession, (Law Commission No. 295)United Kingdom
3. FIDA- Uganda, A Simple Guide On How To Make A Will, June 2003
4. Hema swaminathan, cherryl walker, Margaret A rugadya, women's property rights, HIV And AIDS And Domestic Violence- Research Findings From The Two Districts In South Africa And Uganda, Cape Town Press; HSRC Press, 2008
5. Nigel Vaughan And Gillian Daglous, Bromley's Family Law, 10th Edition 2006, Published By Oxford University Press.
6. Margaret Owen, A World Of Widows- University Of Chicago Press Published By Zed Books 26th September 1996.
7. William Musyoka, A Case Book On The Law Of Succession 2006 Lawafrica Publishing Company Limited Nairobi.

ARTICLES

8. Nsamba Gayiia F. 1999. "Implementing Land tenure Reform in Uganda: a complex Task Ahead" Drylands issues paper NOo. 84 International Institute for Environment and Development"
9. Policy Brief March 2011. (Women's gains from the implementation of the Succession Law in Uganda: Voices from Wakiso and Mpigi Districts, Uganda.
10. Report presented at the review conference for the JLOS case backlog quick reduction program, on the 7th March 2011 at the Imperial Royale Hotel.
11. The Law of Succession in Uganda, Presented by M/s. Aryanyijuka Annette Winfred- at Women's Law Centre.

LIST OF CASES

1. Administrator General Vs Akello Joyce Otti And Another Supreme Court Civil Appeal No. 15 Of 1993
2. Bond Liebig(T) Ltd Vs Mallya (1975) E.A 266 At 269.
3. Clough Taylor Coutts And Co. VS Banks And Others (2003) WTR 15
4. Diplock Vs Wintle (1848) 1 Ch 465
5. Esther Mbatha Ngumbi Vs Mbithi Mulon And Others Nairobi Court Of Appeal Number 207 1995.
6. George Talyebwa nyakama vs Beatrice kobusingye and others (civil suit no. DR "o.s" of (1992) [1996] UGHC 13 (21 December 1992)
7. Grauburn vs Clarkson (1868) LRCH A pp 605
8. Kamrudin mohammed and another vs Hilda mary coello and others (1965) EA 334 54 (1965) EA 336
9. Nakabugo VS Francis Drake Sserunjongi. HCC No. 52 of 1981 reported (1981) HCB 58 at page 59
10. Okoyama vs musi & Anor 56 (1987) KLR 104
11. Overseas finance corporation ltd vs the administrator General of Tanganyika territory (1942) 9 EACA 1
12. Rebecca Nyakeru Nyongo and others vs Simon Kaman Gitar Gicheru, Ornolo Mombasa court of appeal Number 245 of 1995
13. Re: pauling's settlement trust : young husband and others vs coutts and company (1968) 1 ALL ER 665
14. Sargent vs Gartana 1968 EA 336
15. Son vs Solomon and another (1913) AC 76