

**GENDER AND THE LAND REFORM
PROCESS IN UGANDA**

*Assessing Gains and Losses for Women
in Uganda*

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August, 2004

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1. BACKGROUND

Land in Uganda is the core factor of production and one of the three basic resources, next to people and time. It is the backbone of our agriculture-based economy, and as such a sensitive matter. Women's struggle for gender balance with particular regard to land is a direct result of the fact that, whereas women have played the central role in agriculture and food production, history, tradition and customs (such as polygamy, bride wealth and succession) have deprived them of actual ownership of land.

1.1 Gender and Property Rights

Property rights evolve over time depending on economic and political factors; and therefore property rights regimes have to adjust to potential impacts (negative and positive) on growth, poverty reduction, social peace and good governance. The question of property rights is a very sensitive one particularly so because it involves relinquishing powers and privileges for the holders. Property is seen from two angles, one is the modern capitalist conception, which evolves around the relationship between a person (the owner) and the thing, or item that is owned.

The extreme end of the capitalist conception of property rights is "absolute property"; that is, the right to dispose of property in a manner that the owner decides. Property almost has no meaning except as a right of an individual or group to exclude others from access, use or control. Presently however, there is a dichotomy where the indigenous land tenure systems are clashing with modern trends. The capitalist concept of 'absolute property rights' has obscured the gendered nature of property rights in African setting. The traditional land tenure systems are based on relationship between persons expressed in terms of "rights" over things.

The need to legislate for gender and property rights is mostly two-pronged. One has to do with economic considerations such as efficiency – the fact that agricultural production is predominantly done by women. The second has to do with human rights. The principle of property rights entails deciding not only on disposal but also decision on in-puts and proceeds. Women are currently denied this right¹.

Whereas the transfer of land is limited to either out right purchase or inheritance,

women have been deprived of either option and have thus turned to legislation as the most viable option. Women have historically been eliminated from the possession of property and whereas they are responsible for production, the meagre money earned from the sale of products is often taken by the husbands or used up on family needs. In the rural set up, the common practice is that the women farm the land and take care of the home while the men spend the money. In the urban set up, where there is an increase in the number of working class women, a woman owning property is often ridiculed by society. Therefore, it is not surprising that in this set up, the purchase of land by women is not the norm.

With respect to inheritance, patrilineal descent in the communities, particularly in the rural areas ensures that land is not passed on to daughters but to sons. This is based on the cultural belief that the girl child will marry and be provided for by the husband. Furthermore, the giving of land to girl children is disfavoured as it enhances the transfer of family wealth to another clan. Women's rights to land have thus been limited to usufruct rights. So in spite of the fact that there is no "explicit bar" to a woman owning property, there are obvious cultural constraints to a woman's right to own land, that the family institution cannot undermine. The cry for women's ownership of land though often addressed as "a women activist" issue is in reality a development, environmental protection and productivity issue. The input of women into the lives of the household and the nation at large cannot be undermined.

Customary law, practices and attitudes governing divorce, inheritance and property rights continue to place Ugandan women at a disadvantage. Women's existing rights of access to and use of land are deeply embedded in the country's cultural and social systems and are regulated through marriage and kinship ties. Deeply entrenched patriarchal traditions and values deny widows any right to own land properly. If a woman separates from her husband and returns to her parents' home, she loses all rights to matrimonial land, irrespective of her contributions to its development.

Research has shown that the gender structure of land rights in Uganda varies across the country but is highly unequal, with women's rights generally restricted to access. While men are likely to have ownership rights, women's rights are less secure than those of men. Only 7% of the women own land themselves although women constitute 50.9% of the Ugandan population and they contribute 70 – 80% to the agricultural labour force².

Lack of control over land also reduces women's access to and control of the proceeds of agricultural production. Women's productivity is also hampered by inadequate access to credit. Few women are able to secure loans from traditional financial institutions because they do not have collateral. This imbalance in opportunities for access to and control over productive resources and benefits is seen as a major underlying factor in women's lower status in society and decision-making³. Evidence shows that, particularly for rural women, this inequality of access to the key productive asset is a fundamental determinant of poverty and social disadvantage. Without secure rights to land, women's ability and incentive to participate in income-expanding economic activity are reduced⁴.

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1.2 The Policy Framework

The draft Poverty Eradication Action Plan 2004⁶ in chapter 4 on "Enhancing production, competitiveness and incomes" identifies access to land and its sustainable use as critical issues for the eradication of poverty since land is the basis for the livelihoods of most Ugandans and particularly the rural population where the incidence of poverty is highest. Under the environment and natural resource sector, land is recognised as a key production resource that constitutes 50% of the assets held by an average household⁷.

Reforms in the land sector focus on protection of land rights of the poor, improved access to land and tenure security based on the recognition that:

- Serious differences and inequalities between men and women in access to land, both within local communities and from one locality to another, affects the production capacity of households;
- Women and other marginalized groups are unable to own and inherit land in some parts of the country and sometimes totally disinherited if their husband die thus their rights need protection;

In Chapter 4 of the draft PEAP, it is acknowledged that agriculture and other

natural resource based sectors provide the foundation for the development of a competitive exports sector. Both PEAP and the Plan for Modernization of Agriculture (PMA) recognize women's role in agriculture and their special category among the poor. The PMA aims at ensuring that all intervention programmes are gender-focused and gender responsive. It notes that the decision whether a particular area of land should be used for large-scale production or small-scale farming responds to private initiatives⁸, government's role being ensure that a conducive environment to facilitate the functioning of land markets is possible to enable investors' access land.

Private investment on land is encouraged to facilitate a shift from subsistence to commercial agriculture responsive to market opportunities, a factor that dislodges peasant farmers who derive livelihood from subsistence agriculture. On the basis of the above, government formulated a sector framework called "the Plan for Modernisation of Agriculture (PMA)" aimed at making agriculture more profitable by increasing productivity and profitability by shifting from low-value staples to higher valued commodities⁹.

In all this, land reform is catalyst for enhancing food security; redistribution land through the market facilitates investment and enhances efficiency in the use of factors of production; contributing to resource conservation by providing up-to-date inventories of the natural resources and improving the allocation of land to its optimal use. The Poverty Status Report¹⁰ recommended that in order to enhance production, competitiveness and incomes of the bulk of Uganda's population through agriculture, needs to strengthen women's (and widow's) land rights beyond the consent clause in the Land Act. It recognises that enabling household to increase their incomes largely depends on the extent to which land matters are addressed for meaningful agricultural transformation¹¹.

The focus of the LSSP is the protection of land rights of the poor, improved access and tenure security to be achieved through policy and legal reform; linking land reform to poverty reduction; covering the strengthening of women's rights, improved access to land for the poor and a framework for urban and peri-urban land rights management (a land use policy is being finalised).

Both, the LSSP and PEAP acknowledge that improved balance of rights within the household (strengthened rights for women in particular) has potentially powerful impacts on incentive and productivity since women have limited

rights to consent on disposal of certain land assets, a presumptive share of 25% of the deceased husbands' land and usually no rights to a share on household assets in the event of divorce.¹²

1.3 The 1995 Uganda Constitution

Evidence shows that, particularly for rural women, this inequality of access to the key productive asset is a fundamental determinant of poverty and social disadvantage. Without secure rights to land, women's ability and incentives to participate in income-expanding economic activity are reduced.¹³

It is inherent and clearly evident, that the need to legislate for the marginalized members of society and put in place law that is in public interest, to provide for what is acceptable and demonstrably justifiable in a free and democratic society is the major thrust of all gender principles revealed in the 1995 Uganda Constitution. It is heralded as one of the most gender neutral with regard to property rights in Sub-Saharan Africa including land rights, both in content and language. It accords both men and women the same status and rights.

However, enabling legislation for the provisions to come to life is wanting or has manifested failings contrary to constitutional intent. Notwithstanding the intent and language, in practice there is unequal treatment of women, children and orphans as far as land rights is concerned. It is imperative therefore, analysis centres on specific provisions, the rights sought and attained without creating any contradiction in law.

In articles 26(1) and 26(2)¹⁴, the fundamental right of every person to own property individually or in association with others, in addition to protecting the right of every person not to be deprived of personal property without compensation is guaranteed. The guarantee is without bias to gender or marital status since all persons are equal before and under the law as stated in article 21(1) and (2)¹⁵. In view of this Constitutional right, no enabling legislation under this Constitution should deprive a proprietor or owner of land of his/her interest in the property.

In article 31(1)¹⁶ on marriage, the Constitution guarantees equal rights to both men and women at commencement, during and at its dissolution. Enforcing this provision are articles 32 and 33, which provide for affirmative action in favour of women and in particular, article 32(1)¹⁷ provides that the State shall take affirmative action in favour of marginalized groups based on gender or

other reason created by history, tradition or custom, for the purpose of redressing existing imbalances. Article 31(2)¹⁸ directs Parliament to make appropriate laws for the protection of the rights of widows and widowers to inherit property of their deceased spouses.

The rights in issue are basic rights of shelter and food; these arise automatically when one enters the marriage with their free consent under article 31(3). This protection equally extends to children since article 31(4) of the Constitution provides that “it is the right and duty of parents to care for and bring up their children”. However, the attestations of several women, pointing to the fact that deprivation of a home is not only through selling off of land, but also when one is chased away from her home of marriage, on assumption that they can return to their homes of birth, upon death of a spouse where they own no land.

In objective XV¹⁹ of the National Objectives and Directive Principles of State Policy, the significant role women play in society is recognized and subsequently affirmed by article 33(3) which provides that the state shall protect women and their rights, taking into account their unique status and natural maternal functions in society. The Constitution further prohibits laws, customs or traditions, which undermine the dignity, welfare or status of women in article 33(6). Therefore, there should be no discrimination against women regarding land and property rights due to custom or tradition. Nonetheless, discriminatory treatment against women abounds.

2. GENDER IN LAND LAW

Since Uganda's independence in 1962, there had been no significant land tenure reform besides the 1975 Land Reform Decree²⁰. Prior to the decree there existed three legal tenures; mailo, freehold and leasehold all introduced during colonial rule, with customary tenure un-recognized (holders were thus tenants to the crown –Queen of England). The 1975 Land reform decree abolished all forms of tenure greater than leasehold and eroded the rights of customary land holders and declared all land "public land". However, this decree was never implemented for its full implications to be seen.

According to the 1995 Uganda Constitution, all land in Uganda²¹ is vested in the citizens in accordance with the tenure systems: customary, freehold, mailo and leasehold. Customary tenure allows for the ownership of land regulated by customary rules, limited to a particular place or group of people.²² It is the most common form of tenure, though the rules vary according to tribes/clans. Mailo land is common to the central region and derives its status from the 1900 Buganda Agreement. It establishes a modified freehold system that operates in perpetuity characterized by feudalized tenancies whose presence is accepted and recognized by the landlords²³. Leasehold estates are estates created as a result of a contractual agreement between a lessor (landowner) and a lessee. Finally, the freehold land tenure system is a private ownership of land for an unlimited or indefinite time.

It should be noted from the start that the laws relating to land do not expressly discriminate between men and women regarding the right to own land. Section 3 of the Registration of Titles Act²⁴ recognizes the right to own landed property by any person as long as it is lawfully in his or her name. The section specifically disclaims any intentions to limit or abridge any laws relating to the property of married woman. The laws governing marriage, divorce or succession do not specifically mention land rights but always refer to 'property rights'.

Under Article 32(1), the State is enjoined to take affirmative action in favour of marginalized groups on the basis of gender or other reason created by history, tradition or custom, for the purpose of redressing existing imbalances. Uganda's Parliament has special seats for Woman Members of Parliament (56 in total) Persons with Disabilities (5 in total PWD's), Workers Representatives (5 in total), Youth Representative (4 in total) and 10 Army representatives.

The enforcement of this principle in the political arena does not detract from the idea of equality whereby every citizen has an equal right to be elected in an open constituency. Affirmative action in relation to property ownership is a similar application of the principle of equity. The land sector remains dominated by men at all levels²⁵, many people still regard land as a “man’s issue” notwithstanding the legislative changes that have introduced minimum quotas for women’s representation on various land sector decision-making bodies in order to guarantee women’s interests.

The main thrust of gender in land law reform for Uganda has been the transformation of domestic land tenure relations by providing for ownership of the matrimonial home. Six sections of the Land Act²⁶ sought to address the principles of property rights and gender embedded within the articles of the 1995 Constitution relating to land.

Affirmative action on gender and property rights is enforced in the following sections of the Land Act;

- Section 47(4)²⁷ where the Uganda Land Commission (a Constitutional body charged with the responsibility of holding and managing land on behalf of the Government of Uganda) has at least one female out of its five members.
- Section 57(3)²⁸ requires one third of the membership of District Land Boards (minimum of 5 members) to be female.
- Section 65(2)²⁹ requires Area Land Committees should have at least one female out of four members.
- Section 16(4-b)³⁰ requires Communal Land Management Association are required to have at least one third female members in their managing committee
- District Land Tribunal though not a requirement of law are in practice constituted with at least one woman out of three members

These changes are in accordance with Constitutional provisions regarding affirmative action and provisions in the Local Governments Act. Despite failure to entrench the requirement in the composition of the District Land Tribunals, whose jurisdiction includes determination of disputes on land, it may be difficult to oppose decisions made by a majority male tribunal.³¹ Affirmative action here would have assisted in getting women and socially vulnerable groups fair hearing

However, section 27³² specifically states that any decision taken on customary tenure that denies women, children, and persons with disability access to, ownership, occupation and use of any land violates constitutional principles, are therefore invalid. Henceforth, all customary practices and norms, exercised through traditional institutions that are permitted to resolve or tackle matters related to customary tenure whether through mediation or otherwise, must not disregard the rights³³ of access, use and ownership of land that are guaranteed in law for the groups specified.

It is pertinent to note that customary land is governed by customary norms and practices that often times disregard the protections accorded by the Constitution to the vulnerable. Where, customs prevail, areas of conflict between statutory law and customary norms are evident.

Section 20³⁴ aims at increasing the legal protection of women's interests. Specifically, restrictions were imposed on sale, mortgage and transfer of land upon which the family lives and derives sustenance without express consent of the resident spouse(s) and children before undertaking any transaction. This is further strengthened by providing for the lodgment of a caveat on a certificate of title indicating the requirement for consent by the spouse claiming protection.

However, considering the socialization of men and women³⁵ it is doubtful that consent will be given without coercion or violence. Therefore, the state must ensure that the conditions for implementing this section are free from family or community coercion or violence.

2.1 Co-ownership of Land by Spouses

The concept of spousal co-ownership is the owning of property equally between a husband and wife or wives either as joint owners or as tenants in common. The main distinction between these two modes of land holding is the principle of survivorship, which applies to a joint tenancy but does not apply to a tenancy in common. In a joint tenancy, upon the death of a tenant, the property vests in the surviving tenant or owner of the land. With a tenancy in common, the property though owned equally, has distinct and fixed, yet undivided shares; whereby each owner has ascertained interest separate from the other in the same property. On the death of a tenant, the heir inherits the deceased's interest. An owner of property under a tenancy in common can deal with their interest

in the property without affecting the interests of the other owner. In a joint tenancy, the dealing in the land by one owner affects the interest of the other owner unless consensus is attained.

A joint tenancy under land co-ownership between spouses would imply that when one spouse dies, the property evolves to the surviving spouse; this raises issues in respect to inheritance by children and other dependants, and the cultural ways of land inheritance. In the present cultural set up in Uganda, patriarchal customs governing inheritance dictate that property typically reverts to the husband's family in the event of his death, or to the husband in the event of divorce, therefore the concept of a joint tenancy may not hold. It was thus appropriate to advocate for a tenancy in common under the land co-ownership by spouses.

In Uganda, the first major attempt to secure co-ownership rights was during the debate on the Land Act, 1988, when the "Matembe Amendment"³⁶ was debated arising from pressure mounted by the furry of activities that civil society organizations³⁷ were engaged in during the land reform process. The proposal was an excellent landmark of aspirations for co-ownership and contained the following principles;

- The land to be co-owned was defined as the place of residence, or the principle source of income or sustenance for the family, or land voluntarily designated as fitting by the parties to a marriage.
- Spouses were owners in common, both in monogamous and polygamous marriages
- In the event of a transaction, restrictions were imposed to the effect that either party (s) had to sign all the documents or, in order to provide for flexibility, a spouse could assign the duty to the other spouse in writing, while indicating that they understood the nature of the transaction.
- An irrebuttable (irrefutable) presumption that the spouses held land in common, cast the burden on the person acquiring an interest in the land to determine whether the land was subject to the provision.
- Co-ownership was to apply to customary tenure only.

Unfortunately, by the close of the debate on the Matembe Amendment, the legislature adopted the principles and referred the matter to the first parliamentary counsel for refinement, regrettably, the clause was not published

in the final Act and it has since been referred to as the “lost clause”. What came out was the consent clause in section 39 of the Land Act (cap. 227).

Apart from fault in legislative drafting, the Matembe Amendment had excessively long sentences and inappropriate punctuation, which eroded intended meaning. Its major strength was enforceability supported by case law. Advocates, for the amendment were besieged by the predicament, that Section 61 and 51 of the Registration of Titles Act respectively, gave the registered land owner paramount interest and rendered a certificate of title conclusive evidence of ownership, thus conferred an impeachable title on the registered owner.³⁸

Fortunately, these provisions had already been subject of court interpretation in the case of *UPTC v Abraham Kitumba & Mulangira SCCA 36/95*, Justice Karokora of the Supreme Court stated that:

“The law is clear that if a person purchases an estate which he knows to be in the occupation of another person other than the vendor, he is bound by all the equities which the parties in occupation may have in the land.”

The second dilemma for advocates of co-ownership was the claim that such a provision would be unconstitutional and to that extent void in the face of article 26 (2)³⁹ which protects the right of every person not to be deprived of personal property without compensation. However, this right is not one of the rights that the Constitution prohibits from derogation under Article 44⁴⁰, if in the exercise of a proprietor’s rights over property; spouses are not prejudiced in enjoying their rights.

Article 44(1) of the Constitution states that:

“In the enjoyment of rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.”

Thus, there was a need to legislate for the marginalized members of society and put in place a law that is in the public interest, which according to article 43(2) (c) would be to provide for what is acceptable and demonstrably justifiable in a free and democratic society.

2.2 Consent on transfer of Family Land

The consent provision under section 39⁴¹ imposes restrictions on sale, mortgage, transfer of land by spouses and other transactions in respect of family land. Any such transfer would require mandatory written consent of the resident spouse without which such a transaction is void. Before amendment⁴² to the Land 1998, the provision had included dependent children (minor and majority age) and orphans; this has been replaced.

The consent envisaged in the provision above is far from the idea of “co-ownership” as initially intended, yet it is one of the most important achievements for women, since it limits the landholder’s ability to alienate the family land. The obligation to elicit prior written consent does not accord “proprietary rights”, but “power to approve or disapprove” a land transaction. However, consent where there is no ownership is relatively meaningless, since it is not clear on what basis a person who is not a registered proprietor derives the right to consent or deny consent. Previously the interest of the consent giver was not ascertained or pronounced, as is in the Land (Amendment) Act 2004, thus the privilege was granted in a vacuum.

According to the Uganda Law Reform Commission, banks were more agreed to the concept of co-ownership than the requirement for consent in writing, since consent can be coerced and majority of the women are illiterate⁴³. It is problematic and nearly impossible to identify all the people who need to consent especially in cases of polygamy that involve multiple wives. In Uganda, most marriages are customary and not registered; very few people have birth certificates, which make it difficult to verify their true age, identity and parentage. There is no national identification system to ease the required process of identification by the law. It is thus much easier to verify the names of both spouses on the title.

To enforce the consent clause a caveat is provided for. Whereas it is appreciated that women may have problems going to the registry, where land is registered, the importance of registering that interest cannot be undermined. In the case of *Katalikawe vs. Katwiremu and Ano*, Civil Suit No. 2 of 1973 the principle was stated that:

“In a land system based on registration, there are basically two interests, the registered estate and other registrable interests such as mortgages and

charges...Registered interests, especially the registered estate are known as rights in rem and bind the whole world. The other interests are the rights in personam, such interests may more or often arise from contracts for sale of land before transfer."

The caveat in effect creates a registrable interest under the law. In Uganda, an unregistered instrument cannot pass any interest in registered land.⁴⁴ This where efforts such as systematic demarcation and building the capacity of district land offices to deal with land titling and management of land records becomes important. The law is continuously revolving in the right direction but it should be expected that short of a paradigm shift, the ideal state of gender equity in land rights would not emerge.

2.3 Security of Occupancy

Section 38A⁴⁵ maintains the thrust of the original Matembe Clause and is framed on the legal basis of "spousal rights" and "family land". It re-introduces the prescribed land under the Matembe clause but in a more elaborate manner. Its major principles are:

- Spouses are guaranteed Security of Occupancy on family land
- Security of Occupancy entails the right:
 - To access and live on family land
 - To use family land, give or withhold consent to transactions that affect the spouse's rights on the land
- The scope of land covered is defined as:
 - Ordinary residence of the family
 - Ordinary residence and land from which sustenance is derived.
 - Land the family freely decides to treat as such.
 - Land treated as family land based on norms, customs, traditions or religion of the family.
- The rights above do not apply to spouses who are legally separated
- Consent not to be withheld unreasonably
- The rights accorded are not rights to own the property but to occupy it, which translates into a legal right to occupy it.

The Land (Amendment) Act 2004, is a sober attempt to provide "veiled co-ownership" for limited land rights in the manner of consent to the disposal of

family land. The woman is only protected in relation to the land defined. Any other land acquired during the marriage is not protected. The husband can dispose of it as he deems fit so long as it is registered in his names.

Section 38A⁴⁶ Subsection (5) greatly weakens this by implying that security of occupancy is conditional on an existing marriage. It therefore does not take care of a woman rendered landless by virtue of separation or divorce. In the existing cultural set up, the term “legally separated” is subject to misinterpretation and is bound to be a subject of court interpretation. Whereas in law there is a judicial separation by court and separation by agreement, under customary law, different cultural communities have different ways of ending marriages. There is thus a likelihood that a spouse may decide to separate where consent is denied and sell off the land.

In section 39(5), consent should not be withheld unreasonably. The District Land Tribunal, has broad discretion to grant consent for the disposal of land if it determines that the woman “unreasonably” withheld her consent. The Tribunal has been given discretion to determine what is “unreasonable” which may be influenced by political or social factors and give the husband ago ahead to dispose of the family land if the wife unreasonably withholds her consent. Although this order can be appealed, few women can afford the fees and expenses involved. This leaves a lot of room to undermine the limited occupancy rights given to the woman. The exclusion of children was commendable in view of the problems earlier pointed out.

A comparison of the three positions, of consent, co-ownership and security of occupancy is summarised in the table 1 below. There are still efforts needed to ensure, that property rights are tenable for the spouses. However in Uganda, majority of the couples are cohabiting in illegalised marriages, thus achievements in the arena of legislative reforms may not be beneficial to them.

Table 1: Comparison of Consent, Co-ownership and Security of Occupancy

Charateristics	Co-ownership	Consent	Security of Occupancy
Beneficiaries	Spouses	Spouses Children Orphans	Spouses
Rights and Powers guaranteed	Ownership, powers, privileges and rights	Power to give or withhold consent to transactions	Right to live on Right to use Right to access Power to right to give consent or withhold consent to any transaction
Conditions	Applicable to spouses at start, during and end of marriage	Applicable only when transactions on family land happen	Only applicable to subsisting marriages Applicable when transaction happened on land defined below
Tenure/land	Applicable to customary land only	Applicable to family land Applicable to all tenures	Invoked for land that spouses occupy as residence, derive sustenance or family land based on norms, customs or culture
Conclusion	Legal right to own land	Legal right to give or withhold consent	Legal right to occupy land Can be equated to a tenancy

2.4. Succession, Divorce and Domestic Relations Laws

Section 7(1) of the Succession (Amendment) Decree, no. 27 of 1972 provides that residential holdings normally occupied by an Intestate person prior to his death, as his official residence or owned by him as principle residence including

the household chattels shall be held by his personal representative upon trust for his legal heir. This is a direct contradiction of the Uganda Constitution, which directs Parliament in Article 31(2)⁴⁷ to make appropriate laws for the protection of the rights of widows and widowers to inherit property of their deceased spouses.

A wife or husband and male children under 18 years and female children under 21 years who are unmarried normally residing in the holding are entitled to occupy it and have a right to cultivate, till and farm the land as long as they are residents, however, the occupancy is still subject to the rights of the legal heir.

Section 4 of the Succession Act, Cap 139 on “Interest and powers not acquired nor lost by marriage” states that:

“No person shall by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her property which he or she could have done if unmarried.”

The Divorce Act (Cap 215), which is only applicable to marriages under the Marriage Act, the Marriage of African Acts, the Hindu Marriage and Divorce Act, makes some reference to property rights, which include land rights. Section 27 provides:

“When a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife, and the wife is entitled to any property, the court may, notwithstanding the existence of the disability of covertures, order the whole or any part of such property to be settled for the benefit of the husband, or of the children of the marriage, or of both’.

This section gives the court discretion to deny the woman her right to property in case of a divorce or judicial separation as a result of here adultery. It is only applicable to women and men are not affected. Section 16 provides:

“Where judicial separation has been decreed under this Act, the wife shall, from the date of the decree, and whilst the separation continues be considered as unmarried with respect to property of every description which she may acquire or which may come to or devolve upon her, and such property may be disposed of by her in all aspects as if she were an unmarried woman...”

This section protects the woman's right to own land at the time of separation. It is silent as to what happens to land acquired during the marriage. More so, the court must first grant the separation order before the section is applicable

Draft Domestic Relations Bill, 2003

Section 66(2) provides that owning in common by either spouse of immovable property which provides the basic incomes for the family and on which the family derives sustenance, acquisition of interest by a spouse in the property is as follows; acquisition of 20% of the share of the property by the other spouse after five years of marriage, 30% after 10 years and 50% after more than 15 years of marriage.

Section 72 provides that matrimonial property cannot be transferred or disposed of without the written consent of the spouses and dependant children.

3. CHALLENGES FOR GENDER LAND RIGHTS

The legal structure of land rights in Uganda tends to favour individualized ownership rights to exclusive parcels of land. The derived rights within this framework, are very vulnerable mainly those of female family members who use and occupy land but whose rights do not amount to ownership, tend to be less secure. Moreover, there is no prescribed penalty for non-compliance with the law as is often the case with either given rights, which makes the rights mostly enforceable by virtue of a privilege of education, power or influence. Without these, rights are often subject to abuse, in spite of their existence in the statute books.

In Uganda, the legal framework for equality and non-discrimination is inadequate because there is a tendency to only protect women within a marriage only to the extent of their residence and the land immediately surrounding the residence. All women who are unmarried, widowed, divorced, or separated, are not adequately covered. Furthermore, even where the law is adequate, it alone cannot significantly impact on rural women unless other steps are taken.

One of the pitfalls of gender land rights is the absence of a land policy in Uganda. The land law in Uganda was virtually developed on a piece meal policy based on a situational response to arising issues. A situation quite apart compared to Tanzania for example, whose National Land Policy of 1995 recognised the existence of discrimination of women in matters related to access and ownership of land.

The law is continuously evolving in the right direction but short of a paradigm shift, gender will directly threaten exclusive property rights of individual women and is a direct infringement on of men's ownership rights. It challenges the deeply vested clan-based interests in preserving the traditional patterns of ownership of land⁴⁸. The resistance to such changes is inevitable and unless if adequately prepared for it.

REFERENCES

1. Abby Sebina-Zziwa, Land Policy in East Africa: Keynote address on Property Rights in Eastern Africa, 2002 Kampala, Uganda
2. Catherine Kyokunda Kambona, 2003: The Experience Of The Land Co-Ownership Clause In Uganda: Paper Presented At A Workshop On The Family Land Rights Campaign
3. Draft Land Bill, 1997 Clause 15,
4. S. Kawamara-Mishambi and Irene Ovonji-Odida (2003) on “ The campaign to advance Women’s Property rights in Uganda” in No shortcuts to Power; African women in Politics and Policy Making edited by Anne Marie Goetz and Shireen Hassim, Zed Book: London.
5. MFPED, 2003: Uganda Poverty Status Report (Achievements and Pointers for PEAP Revision)
6. NAADS, 2000: Master Document of the NAADS Task Force and Joint Donor group, MAAIF: Kampala
7. Obaikol Esther and Herbert Kamusiime, Perspectives of the Legal fraternity on the Land Act, 1998. Uganda Land Alliance
8. Privy Council holding in Assets Co. Ltd v Mere Roihi & Ors [1905] AC 176
9. Rugadya Margaret (2001): Gender as discussed in Parliament; Experience of Uganda Land Alliance, Dar-es-Salaam
10. Rugadya Margaret and Harriet Busingye, Gender Perspectives in the Land reform Process, 2001, Uganda land Alliance
11. Uganda Law Reform Commission, Commercial Justice Reform Programme, “Reform of the Laws relating to Secured Transactions”, July 2002

END NOTES

- ¹ *Sebina-Zziwa Abby, (2002), Land Policy in East Africa: Keynote address on Property Rights in Eastern Africa, Kampala, Uganda.*
- ² *Sebina-Zziwa Abby, (2002), Land Policy in East Africa: Keynote address on Property Rights in Eastern Africa, Kampala, Uganda.*
- ³ *National Gender Policy.*
- ⁴ *Nsamba-Gayiiya, Eddie (2000)*
- ⁵ *Sebina-Zziwa Abby, (2002),*
- ⁶ *Draft PEAP 2004, is the core development policy that will guide Uganda's development towards a modernized economy by 2017, presented at a Stakeholder Workshop, MFED.*
- ⁷ *Ibid, page 57*
- ⁸ *Ibid, page 61*
- ⁹ *NAADS, 2000: Master Document of the NAADS Task Force and Joint Donor group, MAAIF: Kampala*
- ¹⁰ *MFPED, 2003: Achievements and Pointers for PEAP Revision*
- ¹¹ *Draft PEAP 2004, MFED*
- ¹² *Draft PEAP 2004, MFED, page 60*
- ¹³ *Land Sector Strategic Plan, 2001-2011: Utilizing Uganda's Land Resources For Sustainable Development, at 15.*
- ¹⁴ *The Constitution of the Republic of Uganda, 1995, page 25*
- ¹⁵ *Ibid, page 20*
- ¹⁶ *Ibid, page 29*
- ¹⁷ *Ibid, page, 29*
- ¹⁸ *Ibid, page 29*
- ¹⁹ *Ibid, page 6*
- ²⁰ *Kawamara-Mishambi, Sheila and Ovonji-Odida, Irene (2003) in No shortcuts to Power; African women in Politics and Policy Making, Zed Book: London.*
- ²¹ *In Chapter 15, Constitution of the Republic of Uganda 1995 and the Land Act Cap 227*
- ²² *See, Rugadya Margaret A. (2002), Land Tenure and Land Management in Uganda: 1900-98.*
- ²³ *Odoki Commission Report, 1995*

- ²⁴ *Cap 205*
- ²⁵ *Land Sector Strategic Plan, 2002*
- ²⁶ *Cap 227*
- ²⁷ *Land Act Cap 227*
- ²⁸ *Ibid*
- ²⁹ *Ibid*
- ³⁰ *Land Act (Cap 227)*
- ³¹ *Information obtained from interview of the Deputy Chief Justice Hon.*
- ³² *Land Act Cap 227*
- ³³ *Women, children and Persons with disability*
- ³⁴ *The Land (Amendment) Act 2003,*
- ³⁵ *The Land (Amendment) Act 2003, Section 19*
- ³⁶ *Was drafted by a coalition of NGO's, a technical team from Ministry of Water, Lands and Environment, the First Parliamentary Council spearheaded by Hon. Maria Matembe, Woman MP Mbarara District*
- ³⁷ *NGO's intensively lobbied for Co-ownership under UWONET and Uganda Land Alliance as Network*
- ³⁸ *See Privy Council holding in Assets Co. Ltd v Mere Roihi & Ors [1905] AC 176*
- ³⁹ *1995 Constitution of the Republic of Uganda*
- ⁴⁰ *Catherine Kyokunda Kambona, 2003: The Experience of Land Co-ownership Clause in Uganda*
- ⁴¹ *Land Act Cap 227*
- ⁴² *The Land (Amendment) Act, 2004*
- ⁴³ *Uganda Law Reform Commission, Commercial Justice Reform Programme, "Reform of the Laws relating to Secured Transactions", July 2002*
- ⁴⁴ *See Chatalal v Shudulbandi (1960) E.A. 1*
- ⁴⁵ *Land (Amendment) Act 2004*
- ⁴⁶ *Land (Amendment) Act 2004*
- ⁴⁷ *Ibid, page 29*
- ⁴⁸ *Ibid*