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OCCUPANCY, CONSENT OR CO-OWNERSHIP: POLICY AND LEGAL RESPONSES AROUND THE MATRIMONIAL HOME IN UGANDA

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**By Margaret Rugadya¹
Coordinator Advocacy
Associates for Development²**

¹**Margaret A. Rugadya** holds a Masters in Arts (Sociology), Postgraduate Diploma in Management, and a Diploma in Legislative Drafting pursuing a Masters in Management Studies by Research (Strategic Planning). Worked as Programme Officer of the Uganda Land Alliance, has conducted research on natural resource-based livelihoods and social policy,

² **Associates for Development** is a research and advocacy institution on land based resources, promoting the emergence of a poverty focused discourse on “land-based resources and livelihoods” through research, poverty responsive advocacy and poverty focused policy communication to policy makers, development partners and CSO’s.

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1. BACKGROUND

1.1 Introduction

Property rights evolve over time depending on economic and political factors; property rights regimes have to adjust in relation 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. In our political set-up and social organization, the power holders are at the same time the policy makers. This is further compounded by the fact that the majority of the citizens (particularly women) are blind to the tools of oppression to subvert undesirable policies in their favour. Some of these tools are the ideology that; land belongs to men or that land belongs to the clan. Another is that women have access to land through marriage.

In Uganda, the 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 the limitation of the practice of women succeeding to property in their homes of birth) have deprived them of actual ownership of land. The transfer of land is limited to either out right purchase or inheritance; women have been deprived from either of these options and have thus turned to legislation and policy as the most viable option. In spite of the fact that there is no explicit policy or legislation barring women from owning property.

From the sociological point of view, 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 the manner in which the owner decides. Property almost has no meaning except as a right of an individual or group to exclude others from access, use of or control. This is contrary to the African indigenous understanding of rights vis-a-vis land. Presently however, there is a dichotomy where the indigenous land tenure systems are clashing with modern trends.

The capitalist concept of 'absolute property rights' that 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 right³.

1.2 Land Law in Uganda

Since Uganda's independence in 1962, there had been no significant land ownership or tenure reform besides the 1975 Land Reform Decree⁴. Prior to the Decree there existed three legal tenures; mailo, freehold and leasehold all introduced during colonial rule, with customary tenure unrecognised (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

³ Abby Sebina-Zziwa, Land Policy in East Africa: Keynote address on Property Rights in Eastern Africa, 2002 Kampala, Uganda.

⁴ Sheila 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.

of customary land holders and declared all land public land. However this decree was never implemented for its full implication to be seen.

The Land Act 1998 is based on the 1995 Constitutional articles or principles related to the land sector. Only two (sections 40 and 28) of the Land Act sought to address gender, land and property rights. It provides for consent of the spouse before undertaking a land transaction. The Act specifically states that any decision that provides women, children, o persons with ‘disability access’ to ownership, occupation and use of any land or that violets constitutional principles, shall be invalid.

The second section nullifies customary practices and norms that deny women and persons with disability the right to own, use and access land. In addition, the Act permits traditional institutions to resolve matters related to customary land tenures through mediations by land tribunals. This gives the women a choice to decide what body would make fair decisions. The tribunals themselves as well as all other land administration bodies have a provision of a third women representative giving them the hope to meaningfully participate in the processes that determine norms and rules. Through these bodies, they also resist those they perceive to be against their interest and dignity

2. POLICY RESPONSES

2.1 Uganda’s PRSP (PEAP)

PEAP is the core government development policy that will guide Uganda's development towards a modernized economy by 2017. It adopts sector wide approaches and forms the basis of planning for all sectors under the Medium term Expenditure framework. Its priority is agricultural modernisation, whose thrust is on large commercial holdings. It is structured around four pillars. In Pillar 3, the PEAP advocates for a shift from predominantly subsistence to commercial agriculture responsive to market opportunities a factor that would dislodge many 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 commodities⁵. PMA recognises that land reform is catalyst that would contribute to modernisation of Agriculture by;

- Enhancing food security through redistributing land to the landless and land poor thereby giving them opportunities to be directly productive;
- Facilitating investment and enhancing 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.

It has been recognised that Pillar 3 that aims to improve the ability of the poor to raise their incomes, is yet to deliver the desired results in the land sector because:

- There are serious differences and inequalities between men and women in access to land, both within local communities and from one locality to another;
- Women are unable own and inherit land in some parts of the country and sometimes totally disinherited if their husband dies;
- Priorities in drafting the 1998 Land Act included protection of the land rights of all, including orphans, widows and divorced women.

⁵ NAADS, 2000: Master Document of the NAADS Task Force and Joint Donor group, MAAIF: Kampala

The Poverty Status Report⁶ thus recommends that if the Government of Uganda is interested in moving the bulk of its population out of poverty through agriculture further actions are needed to strengthen women's (and widow's) land rights, beyond the consent clause in the Land Act, which requires written consent of the spouse if the household head intends to sell land on which the family depends for its livelihood.

The report recognises that the success of PEAP in enabling household to increase their incomes will largely depend on the extent to which land matters are fully address for meaningful agricultural transformation⁷. The policy challenges is to strengthen the property rights of women mainly because the clause on spousal co-ownership of land was omitted from the Land Act. This has been partially tackled by providing for "right of occupancy of family land" in the Land Act Amendment (2003) Bill, which is yet to be assented to by the President and does not provide for proprietary rights that can influence decision-making at household level.

2.2 Land Sector Strategic Plan (LSSP)

Is the sector wide approach developed to maximise the contribution of the Land Sector to overall policy goals stated in the PEAP and PMA. It provides a framework for the successful implementation of Constitutional reforms and Land Act 1998 depends on addressing sector wide issues by creating an enabling environment for the participation of all stakeholders in effective sue and management of Uganda's land resources

Among others the key Land Sector issues, the LSSP recognises are:

- Absence of a comprehensive national (land use and land tenure) policy: During the drafting of the Land Bill 1998, the Uganda Land Alliance strongly felt that preparation of such important legislation ought to be have preceded by a comprehensive land policy which would guide the principles of the law. Especially in areas where there was an apparent conflict between the proposed law and the various government policies such as PEAP and PMA. It is envisaged that the National Land Policy when in place will address issues of gender bias and protection of vulnerable groups. It is expected that the Policy will recognize protection accorded to tenants in occupancy, women, children, orphans and other disadvantaged groups as a deliberate policy decision to cushion these groups against potential social and economic impacts of the land markets.
- tenure insecurity and vulnerability of specific groups (women , children, aged and poor) and inequitable systems and processes in tenure relations. One of its strategies is to mainstream gender in all land sector activities, check lists and guidelines for land sector activities to ensure the needs of both women and men of the various vulnerable groups are developed as well as monitoring indicators for gender balance of programmes.

2.3 The National Gender Policy

The National Gender Policy was put in place to address the gender imbalances in access and control of resources in Uganda. The overall goal of the policy is to ensure that gender concerns are incorporated into the national development process in order to improve the social, political and economic lives of the people in Uganda particularly women. The Policy directs planning, resource allocation and implementation of development plans and monitoring and evaluation of programmes all levels of society from a gender perspective. The Policy emphasises the need for equal participation of women and men in economic, political, civil and social development, it notes the gendered disparity in access to and control over economically

⁶ MFPED, 2003: Uganda Poverty Status Report (Achievements and Pointers for PEAP Revision)

⁷ Ibid

significant resources and benefits, land ownership by women is a crucial element of that exclusion

3. LEGAL RESPONSES

It should be noted from the start that the laws governing marriage, divorce or succession do not specifically mention land rights but always refer to ‘property rights’. Property rights include land rights so any reference to property rights in this paper includes land rights. Secondly, 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 Act Cap 205 recognises 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 specially to the property of married woman.

3.1 The Constitution of the Republic of Uganda, 1995

The 1995 Constitution is gender neutral with regard to property rights including land rights. It accords both men and women the same status. Objective XV of the National Objectives and Directive Principles of State Policy recognises the significant role women play in society.

The Constitution provides that every person has a right 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 – Article 26(1) and (2). The said rights are guaranteed without bias as to gender or marital status – Article 21(2). In view of this Constitutional right, whatever provision is made under the existing 1995 Constitution should not be seen to deprive the proprietor or owner of land in whatever manner of his/her interest in the said property.

In as far as marriage is concerned, the Constitution guarantees equal rights to both men and women in marriage, during marriage and at its dissolution – Article 31(1). Article 31 directs Parliament to make appropriate laws for the protection of the rights of widows and widowers to inherit property of deceased spouses.

Article 32(1) provides that the State shall 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. Clause (2) of this article enjoins Parliament to make relevant laws for the purpose of giving full effect to this. One cannot turn a blind eye to the existence of imbalances created by history, tradition and custom which were well recognised by clause (5) of Article 33.

Article 33 (3) 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 – Article 33(6).

3.2 Co-ownership and the Constitution

Whereas the issue of co-ownership raises pertinent issues on the Constitutionality based on Article 31, it is important that Article 43 and 44 be equally analysed. One of the dilemma’s for advocates of co-ownership have been face with, is the claim that such a provision would be unconstitutional and to that extent void in relation to article 26 (2); which protects the right of every person not to be deprived of personal property without compensation. It has to be noted that the protection from deprivation of private property is not covered as one of the rights that

the Constitution prohibits from derogation under Article 44⁸. Furthermore, Article 44(1) of the Constitution states:

“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.”

If in the exercise of a proprietor’s rights over their property, spouses were not prejudiced in enjoying their rights, the debate on co-ownership would not be a common feature in our laws. There is therefore a need to legislate for the marginalized members of our 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.

An example is under Article 32(1) that enjoins the State 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.

3.3 The Land Bill, 1997

In drafting, the Land Bill 1997, the technical committee included some provisions aimed at increasing the legal protection of women’s interests in land. A specific clause imposed restrictions on sale, mortgage and transfer of land by family members; any such transfer would require written consent of the resident spouse and dependent children⁹. Another clause voided any decisions affecting customary land that disregarded the rights of women and children, specifically where those decisions denied them access, ownership or use of land¹⁰. Yet the same draft stated that any decisions on customary tenure (80% of land is under this tenure) would be made in accordance with customs, an area for potential conflict.

3.3.1 The Matembe Clause:

During the debate on the Land Bill 1998, Hon. Matembe moved an amendment to the effect that on customary tenure;

where land is held or acquired for joint occupation and use by spouses, the spouses will hold the land as joint owners and the recorder shall register the spouses accordingly.

In case of polygamous union, each wife shall jointly own with her husband a piece of land on which she resides and works. Where there are many wives occupying and working on the same piece of land, they shall hold the land jointly with their husband

The clause was restricted to customary tenure and subject to fault in legislative drafting, it was opted that it should be expanded to cover other tenures and any other possible situations, the subsequent draft that came to be known as the Matembe Amendment had excessively long

⁸ 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

⁹ Clause 15, the Draft Land Bill, 1997

¹⁰ *Ibid*

sentences with inappropriate punctuation, though an excellent landmark of the aspiration for land co-ownership¹¹.

It's main features were;

- Spouses were owners in common. Each has the liberty to deal with their separate shares without affecting the rights of the other.
- land covered was the principle place of residence, or the principle source of income or sustenance for the family, or land voluntarily designated as such
- various polygamous settings were covered.
- in the event of a transaction, either both parties would sign all the documents or, for flexibility, a spouse could assign the duty to the other in writing indicating that they understood the nature of the transaction.
- for an irrebuttable presumption was provided hence no need to register the interest.
- a person acquiring an interest in the land had the burden of determining whether it was subject to the clause.

The strength of the Matembe clause was reinforced by case law that obliges a dealer to verify who is in actual possession of land. In the case of *UPTC v Abraham Kitumba & Mulangira SCCA 36/95*, Karokora JSC 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.”

This set aside Section 61 of the Registration of Titles Act gives the registered owner paramount interest and section 56 renders a certificate of title as conclusive evidence of title. This implies that registration is conclusive and confers an impeachable title on the registered owner.¹² Fortunately, these provisions have been a subject of court interpretation and unfortunately, the Matembe clause was not published in the final Act and it has since been referred to as the lost clause.

3.4 Land Act 1998

By the close of the debate on the Matembe clause, the legislature adopted the principles and referred the matter to the first parliamentary counsel for refinement, unfortunately, 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 40 of the Act.

3.4.1 The Consent Clause

It was intended to reduce insecurity of family members by limiting the landholder's ability to alienate the family homestead on which the family resides and derives sustenance. This was to be achieved by obliging the landowner to elicit prior written consent of family members (spouse, dependant children and) orphans to any transaction on family holdings. Although these rights were not proprietary, gave family members the power to approve or disapprove a transaction with the result that any transaction that is carried out without their consent is void.

It was a guarantee to security of tenure though far from the idea of co-ownership. Consent where there is no ownership is relatively meaningless, since it is not clear on where a person who is not a registered proprietor derives the right to consent or deny consent, if the interest is not ascertained or pronounced. The requirement for consent has been used to escape from the

¹¹ Catherine Kyokunda Kambona's Paper Presented At A Workshop On The Family Land Rights Campaign

¹² See Privy Council holding in *Assets Co. Ltd v Mere Roihi & Ors* [1905] AC 176

principle of co-ownership, the reality is that this privilege cannot be granted in a vacuum. The matrimonial home was thus not protected because;

- It is only applicable in respect of land where there was both a residence and where the family derived sustenance. Its operations are thus limited to rural areas, in urban set up, residential holdings rarely co-exist with income generating businesses.
- Its application was limited to only disposal related transactions on land, where proprietor was not disposing off there would be no breach of any law
- provision did not deal with the defacto unequal situation of women in respect to security of tenure, since consent can be coerced. The provisions was bound to increase transaction costs in the land and property markets because;
- It is problematic and impossible to identify all the people who need to consent especially in cases of polygamy that involve multiple wives and children (including those born out of wedlock).
- It is also almost impossible to verify that all the necessary consents have been obtained.
- The strict enforcement of this provision of the LA would be likely to severely inhibit land market transactions even for prospective private purchasers.
- Ironically the Parish Land Committees (that gave consent on behalf of children below majority age and received the consent made by the children of majority age and the spouse.) can be influenced; therefore its implementation was untenable.
- It meant that the Committees would be involved in family matters, an infringement of the right to privacy and the sanctity of the family.
- With respect to dependant children of majority age, the provision would make them feel secure and discourage them from developing themselves.
- The inclusion of orphans with rights to inherit was rather redundant as the situation is well covered the Succession Act.
- The requirement for written consent assumed that spouses were literate and could therefore put their consent in writing, whereas the reverse was true
- The caveat provided for an ordinary caveat which lapses after 60 days of notice to the caveator that the proprietor has applied for the removal of the caveat, hence the need for renewal.
- It was ambiguous because it did not define words like “deriving sustenance” and “ordinarily resident”. This placed the portfolios of banks at risk since the words where subject to several interpretations. According to Uganda Law Reform Commission, banks are more agreed to the concept of co-ownership than the requirement of consent.¹³ This is because it is much easier to verify since the names of the names of both spouses would appear on the title.

3.4 The Land Act Amendment Bill, 2003

The bill came to the House late 2002, as a bill for technical amendments to tidy up and facilitate the implementation of the Land Act 1998 . Originally, the issue of co-ownership and other of a more profound nature were not included. Activists especially, the Uganda Land Alliance returned the Co-ownership concept, which the legislators adopted as family land to negate, the negativity associated with co-ownership on the whole (see annexes 2, 3, and 4).

3.5.1 Family Land

It introduces the concept of family land and re-introduced the prescribed land under the Matembe clause but in a more elaborate manner.

¹³ Uganda Law Reform Commission, Commercial Justice Reform Programme, *“Reform of the Laws relating to Secured Transactions”*, July 2002

Its main features are:

- Co-ownership is passed as security of occupancy of spouses
- Introduces the concept of family land and expounds it as land on which ones resides, derives sustenance, or that recognised as family land based on norms, customs, etc
- Spousal rather than family security of occupancy secured which guarantees one the right of **access**, to live on, to use, to give or withhold consent.
- Assessed against idea of co-ownership security of occupancy NOT co-ownership
- Consent not to be withheld unreasonably
- Concepts used are defined such as ordinary residence.

3.5.2 Achievements

The scope of land covered ranges from residence, to land on which the family derives sustenance, or where the family decides it falls in that category and in addition, there is recognition of family land based on norms, customs, traditions or religion of the family.

The caveat was strengthened beyond the ordinary caveat under the Registration of Titles Act. Whereas a spouse may lodge a caveat under the existing law, the implications of a caveat, as observed by the format in which it is registered, is that it is purely an encumbrance on the title, all the importance of registering that interest cannot be undermined. In the case of *Katalikawe v 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 registerable 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 rights granted are in effect giving a registrable interest under the law. A registrable interest has been defined as the system of conveyancing whereby the entitlement of named persons to legal estates in land is shown by their being recorded in a national register.¹⁴ In Uganda, an unregistered instrument cannot pass any interest in land.¹⁵ The legal basis for this assertion is that sec 51 of the Registration of Titles Act states that:

“No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage....”

The word “ordinary” rather than “principle” is used. Whose definition is derived from case law¹⁶, which greatly limits the likelihood of ambiguity since it has already been subjected to interpretation. The exclusion of children was commendable.

3.5.3 Shortcomings

However in case of a judicial separation, the question of requirement of consent or security of occupancy does not arise. it implies that the security of occupancy is conditional granted on a mutually existing relationship. It therefore does not take care of the landless woman by virtue of separation or divorce. It clearly portrays a giving with one hand and a taking away with the other.

¹⁴ See Oxford Companion to Law Dictionary p.1052

¹⁵ See Chatalal v Shudulbandi (1960) E.A. 1

¹⁶ See Krishna Pyari v Surjit Singh [1964] E.A. 278; Malu v Muliso, Kenya Supreme Court Election Petition No. 1 of 1963 (unreported)

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. Subsection (5) therefore greatly weakens the provisions of this section.

On the other hand, the Land (Amendment) Bill 2003, is a sober attempt to give 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 and 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. Worse still accorded is that of security of occupancy, which does not translate into a legal right to own the property but only a right to occupy it.

Be that as it may, even this limited right is subject to the discretion of the Land Tribunal , because the Tribunal has been given discretion to give the man a go ahead to dispose of the family land if the woman unreasonably withholds her consent. Determination of what is ‘unreasonable withholding’ is at the discretion of the Tribunal and there is a lot of room to undermine the limited occupancy rights given to the woman. Although this order is appealable, few women can afford the fees and expenses involved

4. CHALLENGES AND WAY FORWARD:

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, i.e. secondary land rights, 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 given rights, which makes the rights mostly enforceable by virtue of a privilege either of education, power or influence. Without these, rights are often are subject of abuse, in spite of their existence in the statute books. So in the existing social set up, the woman may still not enforce these provisions due to the prevailing social norms.

In Uganda, the legal framework for equality and non-discrimination is inadequate because there is a tendency to only protects women within a marriage relationship and orphans and only to the extent of their residence and the land immediately surrounding the residence. While the co-ownership clause would help all women who are married, widowed, divorced, or separated, the legal change alone would not significantly impact rural women unless other steps are taken.

One of the pitfalls for the struggle on co-ownership of the matrimonial home is the general lack of a land policy in Uganda. The land law in Uganda was virtually developed on a piece meal based on a situational response to arising issues. A situation quite apart compared to Tanzania for example, the National Land Policy of 1995, which recognised the existence of discrimination of women in matters related to access and ownership of land.

The law is continuously revolving in the right direction but it should be expected that short of a paradigm shift, the co-ownership clause in its ideal state cannot pass through the hands of the executive and legislature today. However, the advocacy in this department is highly responsible for how soon the dream of co-ownership will come to pass. Based on these cultural practices, in Uganda’s present set up of extended families, the concept of a joint tenancy may

not hold. It is thus more appropriate to advocate for a tenancy in common under the concept of land co-ownership in Uganda.

The co-ownership proposal directly threatens exclusive property rights of individual men 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 land¹⁷. The resistance to such changes is inevitable and activists were not adequately prepared for it, it shocked them profoundly as seen in the little success achieved in efforts for legislative reforms in this area.

5. Other Laws

5.1 The Succession 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.

A wife or husband and male children under 18 years and female children under 21 years who are unmarried normally residing in 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."

5.2 The Divorce Act

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 coverture, 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...".

¹⁷ Ibid

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

5.4 Draft Domestic Relations Bill, 2003

Section 66 (1) provides that any matrimonial property as defined under the Bill shall be owned in common in undivided shares.

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.

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. Obiakol 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

ANNEXES

Annex 1: The Matembe Clause

Co-ownership of land by spouses

- 40A. (1) Land acquired by a person before the marriage of that person the family home or by that person after the marriage of that person shall be and land shall remain in the ownership of that person during the marriage unless, on and after the second day of July 1998-
- (a) It is or becomes during the marriage the principle place of residence of the family; or
 - (b) It is or becomes the principle source of income or sustenance of the family; or
 - (c) That person freely and voluntarily agrees that the land shall be brought within the scope of subsection
- (2) On and after the second day of July 1998, where land acquired by a spouse individuals or by spouses jointly is used as the principle place of residence or becomes the principal source of income or sustenance of the family or where a spouse freely and voluntarily agrees that land to which paragraph (c) of subsection (1) applies shall be treated in accordance with this subsection, there shall be an irrebuttable presumption that such land is and shall accordingly be treated for every purpose thereafter as land owned in common by the Spouses, notwithstanding any statement in any document relating to the acquisition of that land to the contrary.
- (3) On land after the second day of July, 1998 in a polygamous marriage, where: -
- (a) land is used by the husband and one or more of his wives as the principle place of residence of the family or as the principle source of income or sustenance of the family, there shall be an irrebuttable presumption that such land is and shall accordingly be treated for every purpose as land owned in common by that husband and that wife or, as the case may be, those wives, notwithstanding any statement in any document relating to the acquisition of that land to the contrary;
 - (b) Land acquired by the husband is used by a wife as her principle place of residence or as her principle source of income or sustenance, either with or without the husband using that land, there shall be an irrebuttable presumption that such land is and shall accordingly be treated for every purpose as land owned in common by that husband and that wife, notwithstanding any statement in any document relating to the acquisition of that land to the contrary.
- (4) Where land or any interest in land is owned in common or jointly under this section, both or as, the case may be, all parties owning the land or the interest in land must either,
- (a) sign each and every document relating to any transaction with that land or that interest in land; or
 - (b) sign any document, which shall be witnessed by not less than two independent witnesses that he or she understands the nature of the transaction, which is to be entered into and authorises one of the parties to the transaction to sign any document on his or her behalf.
- (5) Any transaction to which subsection (4) applies in respect of which one or more of the parties does not either sign each and every document or sign a document to which paragraph (b) of subsection (4) applies shall be void.
- (6) For the purpose of this section, the principle place of residence of a family shall be taken to be the home where the spouses and their dependant, children, if any are living on. Where the spouses are living a part, the home where the spouses and their dependant children, if any, used to live as a family.
- (7) For the purpose of this section, land shall be taken to be the principle source of income or sustenance of the family when it provides substantially for the livelihood of that family.
- (8) In any case where there is a dispute between the parties as to whether a home is or is not the principle place of residence of the family or that any particular plot of land is or not a principle source of income or sustenance of a family, the burden of proof shall lie on the person who alleges that the home is not the principle place of residence or, as the case may be, the plot of land is not a principle source of income, of the family.¹⁸

Annex 2: Section 40, the Land Act

Restrictions on transfer of land by family members

40. (1) No person shall-

¹⁸ “ Co-ownership of Land by Spouses”, publication by Uganda Land Alliance, April 2000

- (a) *sell, exchange, transfer, pledge, mortgage or lease any land; or*
- (b) *enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land;*
- (c) *give away any land inter vivos, or enter into any other transaction in respect of land-*
 - (i) *in the case of land on which the person ordinarily resides with his or her spouse, and from which they derive sustenance, except with the prior written consent of the spouse;*
 - (ii) *in the case on which a person ordinarily resides with his or her dependant children of majority age, except with the prior written consent of the dependant children of majority age;*
 - (iii) *in the case of land on which a person ordinarily resides with his or her children of minority age, except with the prior written consent of the Committee;*
 - (iv) *in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the Committee.*

(2) *Subsection (1) of this section shall not apply to any transfer of land by a mortgagee in exercise of powers under the mortgage.*

(3) *Where consent is required to be given by a person other than the Committee under subsection (1) of this section, the consent shall be given to the Committee by the person giving the consent.*

(4) *Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) of this section has not been complied with, the transaction shall be void but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction.*

(5) *A consent referred to in subsection (1) shall not be unreasonably withheld.*

(6) *Where the consent referred to in subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the Land Tribunal and the Tribunal shall require the spouse or children of majority age or the Committee as the case may be, to show cause why they cannot give consent and may, in its discretion, dispense with the consent.*

(7) *The spouse or children of majority age, not being the owners of any land to which subsection (1) applies, may lodge a caveat on the certificate of title or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).*

(8) *The Committee may, on behalf of the children below majority age or orphans below majority age and not being owners, take action similar to that described in subsection (7) of this section.*

(9) *In this section-*
“notice” means actual or constructive;
“purchaser” means a grantee, lessee, sub-lessee, assignee, mortgagee, chargee or other person who acquires an interest or right in the land.

Annex 3: Land Act (Amendment) Bill, 2003 – First Draft
Family Land Rights

39A (1) *any person owning a registrable interest in land on which his or her family ordinarily resides and from which they derive sustenance shall include all the persons who constitute his/her family on the certificate of title of the land in issue as registered owners.*

(2) *For the purpose of this section, a family shall be deemed to be a legal person represented by the head of the family, from whom they shall derive their corporate name.*

(3) *In the registration of a family on the certificate of title the corporate name of the family shall be used and the details of the family members shall appear in a schedule to be updated from time to time.*

(4) *Upon registration of the land in issue, the Commissioner shall endorse the certificate of title with the words “no survivorship” and these shall have the same effect as provided for in sections 54 and 55 of the Registration of Titles Act.*

- (5) *A person shall be deemed to have ceased to be a member of the family for the purpose of this section*
- (a) *in the case of a spouse, when the person is divorced or separated under the laws of Uganda; and*
 - (b) *in the case of a child, when the child attains majority age;*
 - (c) *and the person's interest in the property will be deemed to have been automatically extinguished notwithstanding the appearance of the person's name on the certificate of title.*
- (6) *Upon the death of a family member, the land in issue shall be deemed to be vested in the surviving registered proprietors.*
- (7) *Subject to the provisions of this section, any person who is entitled to be included on the certificate of title under subsection (1) shall be deemed to be a registered owner notwithstanding their exclusion from the schedule under subsection (3).*
- (8) *In this section_*
- (a) *"children" include adopted children;*
 - (b) *"family" means a spouse, children below the age of majority, or orphans below the majority age with interest in inheritance of the land on which they reside; and*
 - (c) *"spouse" means a husband or wife as defined under the laws of Uganda.*

Annex 4: Land Act (Amendment) Bill, 2003 – Second Draft

Family Land Rights

- 39A (1) *Any person who ordinarily resides on land with his or her family and from which he or she derives sustenance shall, upon application, be registered on the land certificate of the said land as a family member.*
- (2) *For the purpose of this section, a family shall be deemed to be a legal person represented by the proprietor, from whom they shall derive their corporate name.*
- (3) *In the registration of a family on the land certificate, the corporate name of the family shall be used and the details of the family members shall appear in a schedule to be updated from time to time.*
- (4) *Upon registration of the land in issue, the Commissioner or the Recorder, as the case may be, shall endorse the land certificate with the words "no survivorship" and these words shall have the same effect as provided for in sections 54 and 55 of the Registration of Titles Act.*
- (5) *A spouse's interest as a family member shall be automatically extinguished when the person is divorced under the laws of Uganda, notwithstanding the appearance of his or her name on the land certificate.*
- (6) *In this section-*
- (a) *"children" include adopted children;*
 - (b) *"family" means a spouse, dependant children of majority age, children below the age of majority or orphans below the majority age with interest in inheritance of the land on which they reside; and*
 - (c) *"spouse" means a husband or wife as defined under the laws of Uganda.*

Annex 4: Land Act (Amendment) Bill, 2003 – Final

Family Land Rights

- 39A. (1) *Every spouse shall enjoy security of occupancy on family land.*
- (2) *The security of occupancy prescribed under subsection (1) shall mean a right to have access to and live on family land.*

(3) For the purpose of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in section 40, which may affect his or her rights.

(4) In this section

“family land” means land-

- (a) on which is situated the ordinary residence of a family; or
- (b) on which is situated the ordinary residence of the family and from which the family derives sustenance; or
- (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or
- (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;

“ordinary residence” means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

“land from which a family derives sustenance” means-

- (a) land which the family farms; or
- (b) land which the family treats as the principal place which provides the livelihood of the family; or
- (c) land, which the family freely and voluntarily agrees, shall be treated as the family’s principal place or source of income for food.

(5) For the avoidance of doubt, this section shall not apply to spouses who are legally separated.

Restrictions on transfer of family land

40. (1) No person shall-

- (a) sell, exchange, transfer, pledge, land mortgage or lease any family land; or
- (b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land; or
- (c) give away any family land, inter vivos, enter into any other transaction in respect of family land;

except with the prior consent of the spouse.

(2) The consent required under subsection (1) shall be given under regulations prescribed under this Act.

(3) Subsection (1) of this section shall not apply to any transfer of land by the mortgagee in exercise of powers under the mortgage.

(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) of this section has not been complied with, the transaction shall be void but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction.

(5) A consent referred to in subsection (1) shall not be unreasonably withheld.

(6) Where the consent referred to in subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the Land Tribunal and the Tribunal shall require the spouse to show cause why the spouse cannot give consent and may, in its discretion, dispense with the consent.

(7) A spouse, not being the owner of the land to which subsection (1) applies, may lodge a caveat on the certificate of title, certificate of occupancy or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).

(8) Notwithstanding subsection (2) of section 149 of the Registration of Titles Act, a caveat referred to in subsection (7) shall not lapse while the caveator’s right to security of occupancy subsists.

(9) For purposes of subsection (4)-

“notice” means actual or constructive notice;

“purchaser” means a grantee, lessee, sub-lessee, assignee, mortgagee, chargee or other person who acquires an estate or an interest or right in the land.