

**AN EXAMINATION OF WOMEN'S PROPERTY RIGHTS IN CONTEXT OF
DIVORCE CASES IN UGANDA**

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DECLARATION

I Nyalwa Susan here by declares that the work contained in this dissertation entitled “An examination of women’s property in context of divorce cases in Uganda” with the exception of acknowledged references, ideas and concerns is my original work and it has been submitted for fulfillment of the requirement for any award of education qualification in any ,institution of learning.

Sign 

Date..... 08th/07/16

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CHAPTER ONE

INTRODUCTION

1.1 Background

The law in Uganda recognizes “separate property” as; the law that allows a husband and wife to own property per **Article 26¹ of the 1995** constitution of Uganda which provides that “Every person has a right to own property either individually or in association with others and that no person shall be deprived of property or any interest in or rights of a property of any description”. There are some difficulties in determining who will take the property in case one is the owner and the other one has made improvements on it. The question of marital property raises various situations or a number of points.

There is property that may be acquired by the spouses jointly and for joint use. It may be property owned separately by the spouses. It may also include property acquired by one spouse and the other has no interest in it. Further it may include property in which title is vested in one party but the other carries out improvements on that property. These various dimensions have given rise to cases concerning how such property should be divided particularly when the two parties want to live apart (divorce).

Originally women could not own property in their own names or rights and courts were very strict against women in cases involving claims over marital property. Property sold off for the benefit of the husband². Before challenging the constitutionality of **section 26** Divorce Act. It was strict against women when it comes to property. This was applicable where the woman was the one responsible for the breakdown of the family.

¹ Article 26 1995 constitution

²Section 26 Divorce .Act

Women like any other person can freely own property such as land and can own other property in their own right regardless of their marital status. In the case of **Uganda V Jennina Kyanda**³. The high court of Uganda recognized that a woman regardless of her marital status can own property in her own right. Further in the case of **Moonlight Ssengoba Ssalongo. V Admin. General** .It was held that the English married women's property Act of 1882 which allows women to property in their own right was applicable in Uganda.

Several issues have arisen with regard to property vested in one party but another carries out some improvements on it either by cash payment or by work done on that property. Issues have arisen with regard to matrimonial homes; the issue is if such improvements are effective. Do they have or give any interest to the party undertaking them.

The notion of substantial contribution as a prerequisite of gaining an interest through improvements on homes (matrimonial homes) has been recognized in the case of. **Edita Nakiyingi Vs.merrekizadeki**⁴ the wife contributed to the building and maintenance of the matrimonial home for 12 years. She did some cultivation and bought the roofing of the house, after some disagreements, the husband terminated the marriage, he also sought to evict the wife from the after some disagreements the husband terminated the marriage he also sought to evict the wife from the house but she refused to vacate. It was held that, it was the duty of the husband to provide the wife with the home and if he wanted to evict her, he must find her another \alternative accommodation. Court found that since it's the husband who terminated the marriage, in the eyes of equity, he could not chase the wife from the house to which she had substantially contributed.

³ (1977) HCB 11

⁴(1978) HCB107

Divorce involves the termination of a marriage on the ground of its irretrievable breakdown, by a decree of dissolution of the status of the marriage on the petition of either party. The law relating to divorce is consolidated largely in the divorce Act. It only applies to legally recognized marriages. The procedures of divorce depend on the form of marriage that the parties contracted.

Section 4(1)⁵ of the **divorce Act** provides that a husband may apply by petition to the court for the court for the dissolution of his marriage on the ground that since the, solemnization of the marriage his wife has been guilty of adultery.

Section 4(2) a wife may apply by petition to the court for the dissolution of her marriage on the ground that since the solemnization of the marriage, Her husband has changed his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman; or Has been guilty of Incestuous adultery, Bigamy with adultery, Marriage with another woman with adultery, Rape, sodomy or bestiality, Adultery coupled with cruelty or Adultery coupled with desertion without reasonable excuse, for two years or upwards.

Some human rights activists have argued that the area of divorce in Uganda tend to discriminate against women contrary to the guarantee of equality in the constitution.

That it seems to be a case that whereas the husband can divorce his wife easily by proving adultery alone, the wife has to prove adultery in addition to other matrimonial wrongs generally, However counsel for the petitioners in the case of **Uganda Association of women lawyers&**

⁵ The divorce Act Cap 249

others VAG. Constitution petition⁶ had a contrary view on this matter. He submitted that section 4 of divorce Act violates Articles 21,31 and 33⁷ because it made prescriptions for divorce on the basis of sex it also allows a man to divorce only on proof of one ground whereas women are allowed to prove many grounds. He further argued that this causes hardship to a man who may have other grounds other than adultery. It compels women to have to prove many grounds where as the man is not required to do the same. He argued that the section was discriminatory since it gave only one ground for divorce to the man while the women had seven grounds of divorce.

1.2 Statement of the problem

The constitution of the republic of Uganda provides that All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.⁸ And this is also applicable when it comes to property ownership. But Gender inequalities in property rights are pervasive. Women have less access to property when divorced from their husband's. Women thus risk losing entitlements in case of divorce, the biggest problem is that most of these women have ended up in less or no rights to own property. As a result of this injustice the researcher attempts to analyze the rights of these women in reference to property ownership after divorce.

1.3The objectives of the study

General objective of the study is to create awareness of the fact that the lack of legislation on the property rights of spouses upon divorce is a problem that needs to be dealt with, which often affects women; that the property rights of divorced women needs protection on equal footing

⁶ No.2 /2003

⁷ 1995 constitution of Uganda

⁸ Article 21 of the 1995 constitution

with the property rights of widows. Whether or not Uganda's refusal to make laws on this topic constitutes a breach of the non-discriminatory clause in the CEDAW is also an important question that will be investigated, which could be important for creating awareness of this issue.

Specific objectives

- i) To analyze women's rights to property in the context of divorce under the laws of Uganda.
- ii) To identify the possible laws which protect women property rights in cases of divorce.
- iii) To provide possible recommendations to the challenges of divorce in Uganda.

1.4 Research Question

- i) What are women's property rights in context of divorce under the laws of Uganda?
- ii) What is the concept of international human rights in light of women's rights to an equal share of matrimonial property upon divorce
- iii) What are the possible laws which protect women property rights in cases of divorce in Uganda?

1.5 Scope

It is essential to point out that this dissertation only seeks to discuss the division of matrimonial property upon divorce and is thus within the domain of family law. The rights of women to matrimonial property upon the death of the husband is therefore outside the scope of this study. This is because, upon the death of a spouse, the division of matrimonial property moves from within the domain of family law, into the domain of inheritance law.

1) **Geographical**

This research looks to examine women's property rights in the context of divorce in Uganda focusing on different regions found in Uganda on how women's property rights are tackled.

2) **Time.**

This research is going to be conducted in a period of 6 months

1.6 Hypothesis

The study hypothesizes that divorce has a direct, negative impact on women's property rights hindering them to own property equally with their husbands. Equal- distribution of property is heavily influential on women's socio-economic success.

1.7 Significance of the study

The Significance of the study is to get an in-depth understanding of women's rights to property in the context of divorce under the laws Uganda, based on women education aimed at ameliorating the negative effects of marital and inter- parental conflict on property. The study will disseminate this information to women in intact, divorced families, who are struggling with divorce

1.8.0 Methodology

1.8.1 Research design

The study is aimed at generating and analyzing qualitative data about women's rights to property in the context of divorce under the laws of Uganda.

1.8.2 Primary data collection

Primary data is to be collected using an individual in-depth interview with women from divorced

CHAPTER TWO

LITERATURE REVIEW

2.0 LITERATURE REVIEW

Nyamu-Musembi,⁹ in his article *Ruling out gender equality?* In his study takes a comparative approach to looking at how women have been excluded from property rights, the struggles to transform institutions and practice of exclusion, and the impact of institutional change. He by contrast stated the research on women and property tends to privilege the instrumental value of access to property for women as a pathway to the economic autonomy that is an enabling condition for social and political agency

Kabeer, N¹⁰. In his book *Reflections on the measurement of women's empowerment*. Examines the complexities of definition and measurement of empowerment, and takes empowerment to be a process by which "those who have been denied the ability to make choices acquire such an ability". For this, she makes a case for the indivisible relationship between resources (access to material, human and social resources), agency (the ability to define one's goals and act upon them) and achievements (outcomes which affect well-being). From a perspective of social and political empowerment, we are concerned with the extent to which access to legally secure individual property rights enhances the bargaining power and position of an individual vis-à-vis others in the household, community or wider society, and/or has improved prospects of political voice through access to political participation and political decision-making.

⁹Nyamu-Musembi, C. *Ruling out gender equality? The post-cold war rule of law agenda in sub-Saharan Africa*, *Third World Quarterly*, vol 27 (7), pp. 1193-1207 (2006)

¹⁰Kabeer, N. *Resources, agency, achievements: Reflections on the measurement of women's empowerment*. *Development and Change*, 30, 435-464 (1999)

How realistic does the law protect an African woman? In the case of **Gissing vs. Gissing** the matrimonial home was bought and put in the name of the husband the wife paid for furniture and household expenses. The issue was whether or not the wife was entitled to beneficial interest in the matrimonial home. It was held that there was no common intention that the wife would have any such interest therein. In addition to that, there was no expressed agreement to that effect. Lord Denning observed that the court should not be to look at direct contributions only but also some services that contribute indirectly to the improvements of the family. The court further held that where the contribution is indirect, it's difficult to determine how much is contributed.

Lord Denning made an important observation which may be relevant to realities in developing countries where women generally don't earn salaries and are incapable of making "direct" contributions to improvements to matrimonial homes; their services\contributions must be recognized and rewarded. He further noted that where a person makes substantial contribution to property he\she should acquire interest therein especially women who do a lot indirectly.

In a number of cases, the principle is that interest may be acquired by the party carrying out the improvements if such improvements are substantial in nature. In the case of **Pettit Vs. Pettit**¹¹. The wife bought the matrimonial home and registered it in her name as a result of doing work on that home by the husband, he claimed that he had improved the property's value by over E1000, most of the work done by husband consisted of re-decorating the bungalow in question, making the garden, a wall and some work outside the house. No agreement as to his rights was made. The two subsequently separated and the issue was whether or not the husband had acquired some interest in this property. It was held that he had acquired nothing. The House of Lords was unanimous that he could claim nothing on the ground that he could acquire no interest by doing

¹¹ (1969) 2 ALL ER 385

work of ephemeral nature or “do it yourself jobs” which any husband could be expected to do in his leisure hours. The judges however were divided on the question whether in the absence of an agreement one spouse could acquire an interest in the other’s property by doing work of a more substantial nature on it. This issue was subsequently addressed in *Re Nicholson* where it was held that the installation of a central heating for E189 in premises worth E6, 000 was a substantial contribution but the purchase of the gas fire worth less than E23 was not.

In England the law relating to interest acquired through improvements affected by one spouse to the property of another has been codified in **the matrimonial proceedings & property Act of 1970 section.37** provides that where a husband or wife contributes money or money’s worth to the improvements of real or personal property in which the proceeds of sale of which either or both of them has or have beneficial interest the husband or wife contributing shall, if the contribution is of substantial nature and subject to any agreement to the contrary, expressed or implied be treated as having been acquired by virtue of his or her contribution. This provision applies to improvements to any property and not merely to the matrimonial home. The provision further indicates that the contribution may be in money or in money worth; this means that it does not matter whether the spouse does the work him or herself or pays a contractor to do it. With regard to contribution in money’s worth, one has to prove that his or her contribution is identifiable with the improvements in question. Therefore a general contribution to the family’s finances may give him or her interest in a home only if it is referable to the improvements. The provision applies if the contribution is a substantial nature. Further it applies subject to any agreement to the contrary. This means that if the parties agreed that the improvements should confer no interest in the parties making them, this agreement prevails. Whether the provisions may give law makers in Uganda to improve our laws,

Professor Kivutha Kibwama¹² states in all kinds of marriage, statutory (Christian and civil) Hindu, Islamic and customary, a wife may acquire control, and own property during the subsistence of marriage , However under customary law wives do not enjoy substantial protection in matrimonial property issues. This is because customary laws dominate in regard to family matters and many of them discriminate against women. Thus under customary law, a woman may have a jointly acquired land or any other property with her entire husband and may have spent her entire life cultivating it but she cannot claim ownership[of such property, if the husband dies, the property generally devolves to the son or a customary heir.

There is no law that stipulates that married couples should register their property jointly. Husbands can hold matrimonial property in their names on behalf of the family if the couples where to register their property jointly , then the wife has a direct interest from the point of equity should the husband dies before her, the whole property passes to her as the sole owner.

For his reason the court in **Edita Nakiyingi V Merekizadeki (Supra)**¹³ ,was the view that where the matrimonial home is beneficially owned by the husband and wife jointly, in equity or other shares under a trust for sale, neither party is entitled as of a right to expel the other and this deprive him or her of his or her share.

Omollo Ag. J.A. as he then, observed that where a husband acquired property from his salary and business and registered it in joint names of his wife, without specifying what each proportion is, the court will take it the such property being a family asset is owned in equal shares between the

¹² [http/www. Art matters into web](http://www. Art matters into web) accessed june 2010

¹³ Ibid

partners, if therefore follows in relation to the court holding in **Kivuitu V Kivuitu**¹⁴, that where spouses own property jointly, they are entitled to such property in equal shares.

For a party to claim beneficial interest in matrimonial property, the question will depend on the agreement of the parties which is determined at the time its acquisition. In instance where both spouses contribute to its acquisition in the absence of evidence that they intended to be joint owners and that is so whether the purchaser is in joint names or in the names of one spouse.

Co-ownership of property between family members is a controversial issue in most African countries. Some countries like Tanzania and South Africa have enacted legislation requiring co-ownership of property between married couples. However, in Uganda, in the period leading to the passage of the 2000 amendment to **the land Act Cap 227**, women rights activists and organizations in Uganda lobbied without success for the inclusion of a co-ownership clause in the Land Act.

A woman in Uganda is capable in law to own and own her separate property and separate from her husband and in respect of such separate property the wife is not barred from instituting proceedings against her husband and vice versa as it was observed in the case of **Rwabinumi V Bahimbisomwe**¹⁵. In most instances property is held under the husbands name as the head of the house hold where by under ordinary sense, the wife , is supposed to have some interest in it.'

However there are instance when though the wife may have participated in its purchasing or in its development she is presumed to have no interest in such property

¹⁴ (1991) 2 KR 24

¹⁵ No, 30 of 2007

The core with respect to women's economic equality upon divorce is when they share equally in property accumulated during marriage .Specific issues vary considerably : whether women have the legal capacity to own and manage property , definition of marital property available for division between spouses, recognition of non-financial contribution or marital property, including finance and non-financial investments in development of the husbands economic activity and laws and customs relating to the division of marital property. In addition , laws customs and practices relating to custody and financial support of minor children have an economic impact and women's position on post divorce economic status.

Upon divorce or dissolution of a marriage, a question arises as to what happens to the matrimonial property? The **Divorce Act Cap 249** laws of Uganda, doe not make any provisions for the division of the matrimonial property on divorce, and therefore the discretion is upon the courts to divide such property between the parties. In regard to this **Lord Denning in Hine V Hine**¹⁶ observe red that the courts are encompassed with the discretion to adjust rights to parties to property irrespective of the existing property rights. This transcends all rights legal or equitable and enables court to make such orders as it thinks fit and is to make such appears to fair and just in all circumstances of the case.

Section 7 subject to section 6 (3) of the Kenyan matrimonial Act 2013¹⁷, provides that ownership of matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition and shall be divide between the spouses if the divorce or their married is otherwise dissolved.

¹⁶ (1962)1 WLR 1124

¹⁷ Kenyan Matrimonial Act 2013

Under **Divorce Act Cap 249** laws of Uganda¹⁸ . Where a judicial separation has been decreed, the wife is to be treated as un married with respect of property which she may acquire or which may devolve upon her. Thus a divorced wife is a free to deal with such property as if she were un married and if she died intestate and during the subsistence of the separation, he husband would not be entitled to any portion of that property **section 15**¹⁹ the wife is entitles to any property which she may acquired or may adequately protect the wife's property rights since it only protects property which she acquires after separation but does not ensure that on separation the wife is entitled to any part of matrimonial property

In conclusion, the purpose of this literature survey is to analyze women's property right in context of divorce on the well-being and development of women. It will study the influence of women's 'emotional and economic stability- before, during, and after divorce. In addition, the survey will explore the effects that divorce could have when it comes to ownership of property by women.

¹⁸ Lilian Ekirikubinza Tibatemwa "property Rights institutional credit and the Gendr Question in uganda" East Africa Journal of peace and human Righta (1995) 75.

¹⁹ Section 15 Divorce Act

CHAPTER THREE

THE LEGAL FRAMEWORK REGULATING THE DIVISION OF MATRIMONIAL PROPERTY IN UGANDA

3.0 Introduction.

3.1.1 The 1995 Constitution of Uganda

Contains several provisions on the principle of non-discrimination and equal rights of women and men. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law and shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.²⁰

The Constitution sets the minimum age for marriage at 18 and specifies that “men and women are entitled to equal rights in marriage, during marriage and at its dissolution²¹”

Article 26 of the 1995 constitution provides that every person has a right to own property, either individually or in association with others and that no person shall be compulsorily be deprived of property or any interest in or rights over property of any description in relation to this is the case of **Uganda V Jenina kyanda**²² where by the High court of Uganda recognised the fact that a woman regardless of her marital status can own property on her own. In support of **Article 26**²³ of the constitution is **Article 17** of the Universal Declaration of Human rights, where by everyone has a right to own property alone as well as in association with others

²⁰ Article 21, Of The 1995 Constitution Of Uganda

²¹ Article 31 of The 1995 Constitution Of Uganda

²² (1977) HCB 11

²³ Article 26 of the constitution

3.1.2 Concept and meaning of land rights for women in Uganda

The Land Act Cap227

In light of **Article 237** of the Constitution of Uganda, **section 2(a)** of the Land Act recognizes customary land tenure as one of the land tenure systems in Uganda. **Section 3(b)** further provides that customary land tenure is governed by rules generally accepted as binding and authoritative by the class of persons to which it applies. This provision is subject to **section 27** which allows for customary tenure to be governed by customs, traditions and practices of the community concerned. There is, however, an exception that a decision which denies women access to ownership, occupation or use of any land or imposes conditions which violate **Articles 33, 34 and 35**²⁴ of the Constitution shall be null and void. The Land Act, further prohibits the transfer of land by family members except with consent of a spouse²⁵. These provisions are well intentioned and meant to embrace customary land tenure as one of the land systems in Uganda, while at the same time guaranteeing protection for women. However, much as these statutory protections exist, not many women know about the existence of such legal provisions.

Land rights can be understood as a variety of legitimate claims to land and the benefits and products produced on that land²⁶. Inheritance, transfers from the State, tenancy arrangements and land- living purchase are all constructs of land rights. These rights can be in the form of actual ownership or usufruct the rights of use.

Different scholars state that the women's law theory characterized it in terms of an examination of the complicated interplay between law and life. This interplay arises from the collision

²⁴ Articles 33, 34 and 35 of the constitution

²⁵ Land (Amendment) Act sec 39.

between gender neutrality of law and gender specificity of the reality of women. Women's law, sought to describe, explain and analyze this situation empirically with the aim of contributing to real equality, equal worth and greater freedom for women. The women's law theory arose from the need to analyze the disadvantaged position of women within an ostensibly gender neutral legal system.²⁷

The Ugandan Constitution²⁸ provides that the land in Uganda belongs to the citizens of Uganda and rests in the citizens in accordance with the land tenure systems provided for in the constitution. It can, therefore be deduced from the Uganda Constitution that there should be no discrimination of women in accessing land and enjoying land rights. This position is governed by the land tenure system in Uganda which regulates access to land.

Article 21 of the Banjul charter

Article 21 of the Banjul Charter states that all people shall freely dispose off their wealth and natural resources and such a right shall be exercised in the exclusive interest of people and shall in no case be deprived of it.

3.1.3 The Succession Act cap 162²⁹,

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

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

²⁷ Women's property law: A Methodological Tool.

²⁸ Article 237 (3)

²⁹ The Succession Act cap 162

In **Farasia Rwabaganda V Donato Bahemurwabusha. Butagiraj**, held in terms of **Section 30** of the succession Act cap 162 no spouse of an instate shall take any interest in the estate of an intestate is at the death o the intestate that spouse was separated from the intestate as a member of the same house hold. Since it was found as a fact that the deceased's first wife had separated from and seized to belong to the same house hold as the deceased since 1965 up to the time of the deceased death she would therefore take no interest in the estate of the deceased.

The succession act provides for how property of a deceased person will be distributed. But however **section 27** provides for how the property of a male deceased person will be distributed. This section was challenged in the case of **Uganda Women Lawyers Association Vs. Ag (Supra)**³⁰ where the court held the section was segregate in nature and it should be read interchangeably by both male and female. The succession Act further also provides for children a right to inherit their parents' property irrespective of where they are male or female and it also gives a wife a percentage of inheritance of her deceased husband in case he dies intestate. Therefore the **successions Act** is one of the laws that promotes the rights of women to their inheritance rights.

Property is apportioned among the deceased's family members according to fixed proportions and widows at and to inherit 15% if there is more than one wife, the property is shared. The Act provides that girls cannot inherit their father's property. FIDA-U and other women's organizations successfully petitioned the constitutional court to declare this provision unconstitutional; however, the Attorney General has yet to reform the Succession Act to address this issue.³¹

³⁰ Ibid

³¹ S.27 of the Succession Act

Section 39³² of the Land Act as amended prohibits the sale, transfer, Mortgage among others of land where the family resides or where it derives its livelihood without the consent of the spouse. it safe guards the matrimonial home irrespective of the registered owner parties should ideally agree before marriage where the matrimonial home irrespective of the registered owner parties should ideally agree before marriage where the matrimonial home should be if they fail to agree, court need to look at factors such as who is the bread winner of the family.

Under **Section 16**³³ of the Divorce Act where a judicial separation has been decreed, the wife is to be treated as unmarried with respect to property which she may acquire or which may devolve upon her. Therefore she is free to deal with such property as if she were un married , if she dies intestate and during the subsistence of the separation , her husband would not be entitled to any portion of that property.

In addition **Section 19** of the Divorce Act , attempts to protect the wife's proprietors rights where the husband has deserted her. Under this provision, a wife in whose property the husband has acquired an interest by virtue of the marriage, may be deserted by him, apply to court for an order to protect any property which she may have obtained or may obtain as per the desertion. The essence of such an order is to protect the woman's property against the husband and his creditors.

In **Uganda Association of women lawyers V Attorney General (Supra)**³⁴, where by the court found **section 26** to be discriminatory against women. Under the Divorce Act, in case of divorce on grounds of the woman's adultery the court not with standing the existence of disability of covertures order the whole or any of party of the children of the marriage or both.

³² Section 39 of the Land Act as amended prohibits the sale

³³ Divorce Act Cap 249 section 16 , 19

³⁴ Ibid

The Act does not contain a similar provision in favor of the wife where the divorce is as result of the man's adultery and thus discriminatory therefore contravening the provisions of the constitution.

The constitution of the Republic of Uganda , presents news and fundamental chances which point out the issue of property among others **Article 26(2)** of the 1995 constitution provides that "Every person has a right to own property either individually or in association with others"

Article 31 (1) accords spouses equal rights in marriage and upon its resolution

Article 31 (2) ³⁵ provides that parliament shall make appropriate laws doe the protection of the rights of widows and widower to inherit the property of their deceased spouses and to enjoy parental rights over their children.

The article of the constitution tackles abit of property issues especially the issue of property concerning the heritance of property

Most areas of family law are currently regulated by discriminatory customary and religious laws which include the following.

Section 31 (2) (d) of the **insolvency Act** ³⁶provides for the matrimonial home of the bankrupt and any other property of a value to be prescribed that the court may exempt.

S. 3 (3) provides that "matrimonial home" means a building or part of a building in which a bankrupt and his or her spouse or as the case may be spouses and their children, if any ordinarily reside together and includes

a) where a building and its curtilage are occupied and out buildings on it and

³⁵ Article 31 (2) 1995 constitution

³⁶ The insolvency Act 2011

- b) Where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her in the case of a husband, to his spouse for his, her or their exclusive use.

In *Re Turner*³⁷ (1975) I ALLER 5, where the husband was made a bankrupt and the house was jointly owned with the wife, it was held that the matter was one for the discretion of court, in this case the trustee's claim under statute greater than that of the wife's and an order for sale was made but suspended for two months so that the wife could try to find a solution which could avoid that need for a sale

3.1.4 Position of widows under Customary Law,

Under Customary Law, women do not inherit property. When a man dies, an heir is immediately appointed by the clan. This is usually the first son in the family. He inherits the property of the deceased and takes the responsibility of providing everybody in the home. A widow only holds goods in trust for her sons until they are adults. She continues to work on the same field which means that customary law puts a woman in an unsafe position.

- a. **Limited support from the government.** there emerged various humanitarian organizations like the universal declaration of human rights, Banjul charter, solemn declaration, Goma declaration, convention on the elimination of all forms of discrimination against women, African charter on human people's rights among others with almost similar aims for example protection of women, promotion of their rights, promotion of observance of the human rights

³⁷ Re Turner (1975) ALLER 5

law among others. However these have faced a lot from challenges like limited resources, lack of government support, political challenges among others³⁸.

- b. **Male dominance.** Because of the worldwide prevalence of patrilineal inheritance customs, both productive resources and property such as household goods have ended up in the hands of men and not women. When only men have rights of inheritance or family succession, women have little opportunity to improve their status or living conditions within the family and community. Consequently, they are rendered dependent on male relatives for survival and have little say over how property is used to generate income or to support families. Additionally, within patrilineal communities, there is a strong resistance by men towards endowing women, especially daughters, with rights to land access³⁹
- c. **Difference feminism,** this theory asserts that despite the equal moral status of men and women as persons, there are genuine differences between the sexes and these differences need not to be considered equal. **“In many societies woman are perceived inherently inferior, intellectually deficient physically and emotionally subservient to men”**

According to Carol Gilligan, a proponent of difference feminism, there is a psychological difference between men and women, that while men think about justice, women think about relationships thus an impediment to the realization of rights of women in Uganda.⁴⁰ Resistance to legal reform such thoughts may be easier proposed than implemented. There was very active lobbying by the Uganda Land Alliance for both men and women to be listed in title deeds as co-owners, the bill came to parliament repeatedly and First of all, they require changes in the law. Activists for women’s land rights have tried to have laws passed in many countries, with mixed

³⁸ A N Wandera ‘Case backlog blamed on lazy judicial officers’<http://www.monitor.co.ug/News/National/688334/915282/-/wykvu6/-/index.html> (accessed on 8 September 2010)

³⁹ <http://Wikipedia> women property rights.

⁴⁰ RehmanJavaid, professor of law

results, notes Ms. Izumi. In Uganda, where failed each time. In part, explains Ms. Izumi, there was resistance by the private sector. In Tanzania, where land is owned by the state but assigned on the basis of long-term leases (usually lasting 99 years), businesses argued that collective ownership would make it hard to use land as collateral for bank loans or as a source of income. “They argue that if buyers have to get consent from family members before land can be sold or utilized in a certain way, it will be very difficult. It doesn’t facilitate the land market,” says Ms. Izumi. That argument, Ms. Izumi notes, overlooks the fact that women often do not benefit from such private land transactions or use land as collateral. That is because they generally do not control financial resources in the family and cannot afford to buy land. Even when they do, they still have difficulties getting credit, because in many countries they need the consent of their husbands to apply for loans.⁴¹

Conclusion

In Uganda, women’s access to land largely depends on marriage and this access can be retained provided that the women remain in their husband’s household and he also remains alive. Women are also not well placed to use either customary law or statutory law to claim their rights to land because of the barriers they could encounter, including the cost of suits to enforce property rights, ignorance of their inheritance rights, as well as their being prohibited by law to pursue their own property claims. This discussion has shown that there is still a discrepancy between the de jure and the de facto protection of rights of women and children to access land in Uganda. This, therefore, begs the question, if such is the situation for generally most women what about those in a post conflict setting. What has been shown so far is that women and children are vulnerable to having their rights to access land

⁴¹ ibid

as well as enjoy land rights abused? What is yet to be looked at is whether conflict does aggravate this vulnerability. To a smaller extent women discrimination has been fought against in Uganda as evidenced in **Article 33**⁴² stipulates of various rights of women among other include there protection by the government, having equal rights .more so article **33(6)**⁴³ for the avoidance of any custom to be contrary on the dignity of women. However female genital mutilation still exists in some parts of eastern Uganda. Let the enacted laws be strengthened like the domestic violence Act, penal code to address criminal cases. Much support is needed from the government towards the human rights organization in Uganda with the objectives of protecting women and their rights.

3.2 Matrimonial property.

This includes land, houses, bank accounts, insurance policies, and household properties, marriage deeds. Currently there is no specific statutory law in Uganda governing property acquired by couples before and after marriage. Under common law, the husband acquires a proprietor interest in the property of his wife acquired during the subsistence of the marriage. The wife therefore has no power to dispose off her property during the subsistence of marriage without the husband's consent. (This is the same position with the customary law). In addition, under common law the wife cannot dispose off property after engagement without the consent of the husband to be. If she does this, the transaction will be void on the grounds that it was done fraudulently without the consent of husband.

A good example would be the case of **Kivuitu v. Kivuitu (Supra)** which was acclaimed as a landmark case and it was relied upon in several subsequent applications under the Married

⁴² The constitution of the republic of Uganda 1995

⁴³ *ibid*

Women Property Act seems to suggest that the fact of contribution could be presumed by virtue of a wife's participation in managing the family's affairs. Therefore, in a dispute over property registered only in the name of the husband, the starting point would be the extent of the wife's contribution and what value to attach to it, not whether she contributed at all. Omolo Ag. J.A. (as he then was) candidly made the following observation, partly: Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to court under **section 17** of the Married Women's Property Act 1882, so that the court can determine her interest in the property and in that case the court would have to assess the value to be put in the wife's non-monetary contribution. I can find nothing in

3.3 Common rights of marriage women.

Under common law, a wife acquires no interest in her husband's property but if she survived him, she is entitled to a third of his estate provided she had got a child with him. However, over time courts have developed certain rules to counter injustices resulting from this position.

Section 6 of the mortgage act 2009⁴⁴, provides that where a matrimonial home is the subject of application for a mortgage, a mortgagee shall satisfy himself or herself that the consent of a spouse referred to in section 5 is an informed and genuine consent and that duty is deemed to have been complied with it.

a. The mortgage has:

- i. Explained to the spouse or spouses of an applicant for a mortgage in the presence of an independent person, the terms and conditions of the mortgage which is being applied for or.

⁴⁴ The mortgage act 2009

- ii. In writing , advised the applicant for a mortgage that he or she should ensure that his or her spouse or spouses received independent advise on the terms and conditions of the mortgage which is being applied for and
- b) The spouse or spouse, as the case may be , provide assigned and witnessed document to the effect that they have received independent advice on the mortgage which being applied for and have understood and assented in the terms and conditions of the mortgage or that they have, not with standing the advice from the mortgage waived their right to take independence advice

In **Uganda Association of women Lawyers V Attorney General**⁴⁵, the women Lawyers brought an action against the attorney general on grounds of divorce on behalf of all the women.

In divorce proceedings a husband proves one ground where as a wife proves many grounds .this causes hardship to women in cases of divorce. **Section**⁴⁶ **4 (1)** of the Divorce Act Cap 249, provides that a husband may apply by petition to the court for the dissolution of his marriage on the ground that since the solemnization of the marriage, his wife has bee guilty of adultery.

Section 4 (2) provides that a wife may apply by petition to the court for the dissolution of her marriage on the ground since the solemnization of marriage, her husband , has change his profession of Christianity for the profession of some religion and gone through a form of marriage with another woman or has been guilty of incestuous adultery,

Bigamy with adultery marriage with another woman with adultery , rape, sodomy or bestiality, adultery coupled with desertion without reasonable excuse for two years or up wards

⁴⁵ Case no 2/2003

⁴⁶ Section 4 Divorce Act Cap 249

3.4.0 The concept of the wife separate property.

Where the property have been given to the wife for her separate use, she retain the same right to dispose it off as if was unmarried.

Section 14⁴⁷ of the **succession Act Cap 162** states that by marriage a woman acquires the domiciles of her husband is she had not the same before. **Section 15** states that subject to subsection (2), The domicile of a wife during the marriage follows that of her husband .In the case of **Joy Kigundu V Horrace Awori⁴⁸**. Court framed the issue of domicile that Kampala had jurisdiction in divorce proceedings where the husband of the petitioner was domiciled outside Uganda. Court held that a wife as long as she is not judicially separated from the husband her domicile is that of her husband.

Section 15 (2) of the succession Act state that domicile of a wife no longer follows that of her husband , if they are separated by a competent court .This means that when a divorce edition is successful , the dependent domicile of a wife seizes to exist. she then acquires a domiciles of choice.

In **Robinah Erinah Kagaya Kiyingi V Doctor Aggrey Kiyingi, Domicile⁴⁹** was defined as a country in which a person is or presumed to be permanently resident or person's permanent home.

3.4.1 Restraint upon anticipation.

This was a complementary rule to the first one. It prevents a wife from a signing her beneficial interest in her separate property without her husband knowledge because he is meant to guard the

⁴⁷ Section 14,15 succession Act Cap 162

⁴⁸ [2001] KALR 374

⁴⁹ No 41 /2004

temptation of his wife and other family member from disposing property. These rules were developed by courts but later incorporated in legislation for example. The married home property Act of 1888. This Act provided for the right of married women to retain all their property owned by themselves at the time of marriage as their separate property.

In the case of **Uganda vs. Jane Nachanda** Court held that the married women Property Act recognized the right of women in Uganda to own property on their independent of their husband.

However, this position was challenged in the case of **Wavamuno vs. Uganda motors** where it was held that the married women property Act and other were statutes of general application and therefore no longer applicable in Uganda.

Each party must give consideration to the agreement by foregoing his or her right to the other consortium. Such agreement relating to the maintenance of the wife and children, the custody of the children as well as the division and use property which constitute the matrimonial home. In such cases it is always advisable that such agreement is reduced into writing by way of a "separation deed".

Where a deed is intended to be executed, the parties usually enter into a binding primary building agreement known as Articles of separation

3.4.2 Agreement relating to property

The spouse may make provision with respect to property, which constitute the matrimonial home. However, in practice there is no law regulating matrimonial property in the event of separating or divorce. The issue of property will then depend on the parties involved as well their

financial abilities. This should be subject to **Article 33 of the 1995** constitution of Uganda which provide for equal right during marriage and at its dissolution.

Conclusion

The divorce Act sets pre conditions for one to petition for divorce or a petition to be maintainable in the courts of law. The divorce Act shall authorize the making of any decree of dissolution of marriage unless the petitioner is domiciled in Uganda at the time when the petition is presented.

CHAPTER FOUR

THE CONCEPT OF INTERNATIONAL HUMAN RIGHTS IN LIGHT OF WOMEN'S RIGHTS TO AN EQUAL SHARE OF MATRIMONIAL PROPERTY UPON DIVORCE

4.1 Introduction

In order to answer the question of whether or not Uganda is obliged by international norms to make formal legislation on property settlement upon divorce, the researcher first analyses the connection between the problem statement of this dissertation and the idea and concept of international human rights. This will give a better understanding of the issues that will be raised in this chapter.

Human rights as fundamental rights and freedoms that individuals have in relation to state authorities, and which are as a result of international agreements and practices⁵⁰. Thus, he focuses on the role of the government in relation to the citizens, which includes an obligation to enact necessary legislation in order to protect the rights of the citizens. This is in line with **Article 27**⁵¹ which states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

Article 27 suggests that a state cannot argue that it is waiting for its legislature to pass laws before fulfilling its obligations in a convention it has consented to. Hence, if it is necessary for a negotiating state to a convention to enact new legislation or modify extant laws in order to perform its duties in the convention, the state has to do so before the convention enters into force. Otherwise, the state runs a risk of being in violation of its conventional obligations. This implies that if it is found that Uganda is obliged to legally empower women with regard to their marital property rights upon divorce in light of the CEDAW, a claim by Uganda that she is not

⁵⁰Høstmælingen (2007) p.27.

⁵¹ the Vienna convention on the law of treaties (1969),

in violation of her international human rights obligations because the lack of legislation is the fault of her parliament, will not be upheld.

This chapter tends to concentrate on whether the sources of human rights law applicable to Uganda today, especially the CEDAW, impose upon the country a duty or responsibility to put in place substantive legislative guidelines on the division of matrimonial property upon divorce.

Worthy of observation is that “equality before the law” or “non-discrimination before the law” is emphasized in all the different sources of human rights law such as treaties, court rulings, and literature on human rights, and is often included as a criterion in the definition of the term human rights. Many regard equality or non-discrimination as the core concept of the idea of human rights, and hence the advocacy for women's rights to an equal share of matrimonial property upon divorce can be said to be an important demand for equal treatment before the law.

Uganda has embodied the principle of the equality of men and women with regard to matrimonial property in her national constitution. This is in conformance with article 2 (a) of the CEDAW. The question remains whether this principle is being applied in practice, or whether it is merely a political principle.

It is important at this point to draw attention to the legal fact that the rights enshrined in human rights conventions can only be materialized if they are integrated into the national laws of the state. In some countries like France and Germany, a treaty can be allowed to be part of the national law without legislation after “it has been concluded in accordance with the constitution and has entered into force for the state. In countries like Norway and the United Kingdom on the other hand, treaties do not have any special position in the national constitution. The rights and

obligations provided in them do not have a direct impact on the internal laws of the state unless they are included in the domestic law through legislation.

4.2.0 Matrimonial property rights of women upon divorce in Uganda in relation to the convention on the elimination of all forms of discrimination against women (CEDAW)

4.2.1 Method of Interpreting International Conventions.

The guidelines for interpretation of treaties outlined in the Vienna convention of 1969 are used as a guideline in my effort to interpret the CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) in light of the object of my study. This is because these guidelines “enunciate in essence generally accepted principles of international law” which are applied by international human rights courts in their interpretation of human rights treaties⁵².

A treaty can be interpreted based on the *objective theory of interpretation*, where the emphasis is on the analysis of the text, *the subjective interpretation theory*, where the emphasis is on identifying the will of the contracting parties, and *the teleological theory of interpretation* where the emphasis is on realizing the purpose of the treaty⁵³. These three approaches do not necessarily contradict each other. This is because it can be safely argued that the will of the parties will primarily be expressed in the text of the treaty, and emphasizing on the purpose of the treaty when its text gives room for multiple interpretations is entirely legitimate. Accordingly, these three theories will be applied in the following in my attempt to interpret the CEDAW in light of the lack of formal legislation on property settlement upon divorce in Uganda.

⁵²Golder v. The United Kingdom (1975) para 29.

⁵³Elgesem (2003) p. 3

When interpreting a treaty, the ordinary meaning of its words often serve as the starting point, of **Article 31(1)**⁵⁴ which states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms” The ordinary meaning refers to how the words are generally understood⁵⁵. This is in conformance with the objective theory of treaty interpretation.

Also, the requirements of the treaty are to be understood “in their context and in light of their object and purpose”. The context encompasses the whole treaty including its preamble and annexes and other instruments acknowledged in article 31 (2) (a) and (b) of the Vienna convention. This entails applying the teleological treaty interpretation method.

In the case of **Goodwin v. The United Kingdom**⁵⁶ With regard to the subjective interpretation theory, the European Human Rights Court has observed that, “the very essence of the (European Human Rights) Convention is respect for human dignity and human freedom.”

The European Human Rights Commission also observed in **Wemhoff v. Germany**⁵⁷ that “it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”

Based on this, the European Human Rights Commission has for instance interpreted Article 6 (1)⁵⁸ include the right to court hearing even though this is not explicitly specified? In the case of **Golder v. The United Kingdom**⁵⁹ where the Commission stated that” The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally

⁵⁴ the Vienna convention

⁵⁵Woxholt (2006) at page. 402.

⁵⁶ (2002) para 90

⁵⁷ (1968) para 8.

⁵⁸ European Human Rights Commission

⁵⁹ (1975) para 35

“recognized” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice”. Thus, it was concluded that “it follows that the right of access (to court) constitutes an element which is inherent in the right stated by Article 6 para. 1. This is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention”

From the ruling of the Committee, it can be inferred that the main purpose or function of international human rights conventions in general is to protect the rights of individuals. Secondly, in interpreting the conventions, less emphasis has to be laid on the sovereignty of the state and greater emphasis on an objective interpretation consistent with what the Member States meant when signing a convention.

These are regarded as general principles of interpreting human rights conventions. Accordingly, in my effort to interpret the CEDAW in light of the marital property rights of women in Uganda per today, less emphasis will be laid on Uganda’s sovereignty as a state, whilst the focus will be on the purpose of the CEDAW, which according to the preamble is to “adopt measures to require for the elimination in all its forms and manifestations” and to “achieve full equality between men and women” CEDAW.

4.3 Does the CEDAW require member states to accord indirect contributions such as household chores, the same weight as substantial financial contribution?

The matrimonial property rights of women is enshrined in article 16 (1) of the CEDAW which states that “ States Parties shall take all appropriate measures to ensure on a basis of equality of men and women (h) The same rights for both spouses in respect of the ownership, enjoyment and disposition of property...”

According to the CEDAW committee's general recommendation no. 21⁶⁰, article 16 (1) h encompasses the economic rights of women both during marriage and at its dissolution.

The question is whether the term "same rights" in respect of ownership of property means the equal division of property acquired during marriage, upon divorce. In order to answer this question, Article 16 (1) h has to be interpreted in light of the above-mentioned general principles that have been established for the interpretation of international conventions.

A synonym of the word "same" is "equal". Thus the ordinary meaning of the term "same rights" is "equal rights". Accordingly, considering the ordinary meaning of the words in Article 16 (1) h alone, it could be concluded that the CEDAW only requires the state parties to guarantee women an equal share of marital property upon divorce when the contribution from both spouses during the marriage is the same.

However, as already mentioned several times in this dissertation, many Ghanaian women's contribution to the acquisition of property is often in the form of indirect or non-financial contribution. The question is whether article 16 (1) h could imply that a woman should have the right to an equal share of marital property even if she did not contribute financially to its acquisition. In other words, is indirect non-financial contribution enough to earn women an equal share of marital property according to Article 16 (1) h of the CEDAW?

As already noted, international conventions are to be understood in their context, and the context encompasses the whole treaty, of. Article 31 of the Vienna Convention, and other Articles in the convention are part of the context. According to Article 14 of the CEDAW, States Parties *shall*

⁶⁰ 223 CEDAW Committee's Recommendation no. 21 (2004) Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

take into account the “significant roles, which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy”

The expression “take into account” suggests that the role women play in the non-monetized sector should to some extent be considered as a form of contribution. The Article is silent on how much or to which extent this form of indirect contribution should count. It merely denotes that the non-monetized sector of the economy should not be brushed aside or overlooked of. The expression “the significant role”. It can be argued that the term “take into account” implies that the non-monetized sector of the economy alone does not necessarily have to amount to an equal share in property acquired during the subsistence of the marriage since this is something that just has to be considered. However, Article 14 acknowledges that the role that women play in the non-monetized sector of the economy is what leads to the economic survival of the families. This is because the contribution of the woman in the form of taking care of the children and the home or buy taking care of the family’s consumer expenditure is of great importance since without it, the man cannot go out and work, or save the money he earns in order to acquire properties.

Put differently, the convention recognizes the fact that by taking care of the home and taking care of the family’s consumer expenditure, many women free up time and capital for their husbands to work, earn, and save money. Thus, even though Article 14 of the convention does not state to which extent women’s contribution to the non-monetized sector of the economy should count, the wording of the article indicates that it should not be ignored, and that it should be taken into consideration since the purpose of the CEDAW is to ensure that women and men can enjoy economic rights on an equal basis.

The CEDAW committee's general recommendations no. 21 gives a clear answer to this question by stating clearly that "financial and non-financial contributions should be accorded the same weight"⁶¹ This conclusion was drawn after the committee noted that the great emphasis some countries place on "financial contributions" made with regard to the acquisition of marital property lessens the importance of indirect contributions such as raising children, caring for elderly relatives and discharging household duties."

The committee also observed that "often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets".

From this, it can be deduced that the contribution women provide in the non-monetized sector of the economy is to be considered as contribution, which entitles women to an equal share in marital property upon divorce. Accordingly, states that have signed the CEDAW, including Uganda are required to lay equal emphasis on the indirect contributions of women such as home-making, and substantial financial contribution during property settlement upon divorce.

Though not the main object of investigation in this study, it is noteworthy that 16 (1) does not only apply at the dissolution of marriage, but also during the marriage, thereby giving women access to marital property on an equal basis with men to marital property during the marriage⁶². Accordingly, Uganda is not only obliged to ensure that women are not denied the enjoyment of their property rights during the dissolution of marriage, but is also to ensure that women have the same legal rights to common property as men during the marriage. The legal consequence of this as mentioned by the CEDAW committee is that it will increase women's power to administer

⁶¹ CEDAW Committee's Recommendation no. 21(2004) comment 32

⁶² Article 16 (1) c of the CEDAW

“the disposition of the property or the income derived from it⁶³.” For instance a man cannot sell or dispose of common property (especially the matrimonial home) without the consent of the wife. Based on my interviews and the facts of relevant case law in Uganda, it is my opinion that it may even be much more difficult for women to claim such rights during marriage if they do not have formal legal grounds for it.

Women’s right to an equal share of marital property is also enshrined in Article 7 (d) of the Maputo protocol which states that States Parties shall ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage. It is important to observe that the word “equitable” does not mean, “Equal”. It means “fair and impartial”.

Thus, Article 7 (d)⁶⁴ places the rights of men to a fair share of property on the same level as the rights of women without making any exceptions. This indicates that both men and women are to get a fair share of marital property upon divorce regardless of whether they contributed financially or not to its acquisition.

Accordingly, it can be concluded that article 16 (1) h of the CEDAW may be regarded as a conventional establishment of non-financial contribution as a form of contribution to the acquisition of marital property, which is enough to give women an equal share of marital property upon divorce.

This principle that non-financial contribution should be regarded as contribution on equal basis with financial contribution has been established in some countries that have also ratified the

⁶³ CEDAW Committee’s Recommendation no. 21 (2004) comment 31.

⁶⁴ Maputo protocol

CEDAW, like Norway, Sweden, Denmark⁶⁵ and Hungary. In Norway, the principle was established in *Husmordommen* (the housewife case of 1975), a ruling, which came out even before, the CEDAW entered into force. In *Husmordommen*, a couple had been married for 19 years with three children. Their matrimonial home, which was built in the course of the marriage, was financed solely with the man's income. He also contributed physically to the building of the house. Upon divorce the man claimed sole ownership of the house whilst the woman claimed joint ownership of the house with 50 percent share. The Norwegian Supreme Court ruling in favour of the woman held that "the acquisition of the house was financed with the man's income and that he had physically contributed directly to its construction, but his wife was fully occupied with taking care of the house and their three young children. In my view, this is what made it possible for the man to put so much work into the construction. When spouses practice such a division of labor, it leads to the wife being cut off from paid work and from any great physical participation in the construction business. The wife can be said to have helped the family get their own home, and legally I find it inappropriate to regard this effort as insignificant in relation to the man's efforts in the acquisition of the property."

With this ruling, the principle that women should be entitled to an equal share of matrimonial property even if they have not contributed substantially to its acquisition was established in Norwegian law. Since then, it has been used in many court decisions and in 1991 it was codified in Article 31 (3) of the Norwegian Matrimonial Causes Act. In that case, the court specifically acknowledged "housework" as a form of contribution. The woman provided *indirect contributions* by taking care of their children and the home, making it possible for the husband to

⁶⁵ Electronic journal of comparative law. Available at <http://www.ejcl.org/123/art123-4.pdf>

provide *direct contributions* by building the house and working and earning money in order to provide the materials used for the building.

“Housework” as mentioned in *Husmordommenis* more specific and limited than “non-monetized sector” as stated in Article 14 of the CEDAW. Thus, the convention gives a broader protection since it acknowledges other forms of contribution apart from housework. All the same, housework and other non-financial contributions are still not valued in Uganda and are in light of the latest Supreme Court ruling on the division of matrimonial property, **Quartson v. Quartson**⁶⁶ not enough to establish for the woman an equal share in matrimonial property upon divorce. This indicates that Uganda is not ready to take into account the non-monetized sector of the economy, which many Ugandan women represent, during property settlement upon divorce, thereby violating her obligation in Article 16 (1) h of the CEDAW.

One of the fundamental criteria regulating the initiation and carrying out of legal commitments is “good faith” of Article 31 (1)⁶⁷ of the Vienna convention. Good faith demands that signatories to the treaty are sincere, just and rational in relation to the contents of the treaty. When a convention forbids the “abuse of rights”, it imposes upon the parties to make sure these rights are protected, and thereby prevents a party from shunning its responsibilities.

Accordingly, the fact that many other signatories to the CEDAW recognize non-financial contribution as a form of contribution to property acquisition in conformance with article 16 (1) h of the CEDAW indicates that countries like Ghana that have also ratified the CEDAW but are not conforming to its requirements are not acting in good faith. This is because they are not

⁶⁶ (2012)

⁶⁷ Article 26 on *pactasuntservanda*.

honoring the “legitimate expectations” they may have risen in the other signatories to the convention and the international community.

4.4 Do Women In Uganda Suffer Discrimination During Property Settlement Upon Divorce?

Since it has been established that non-financial contribution under the CEDAW is to be regarded as a form of contribution that entitles the woman to an equal share of marital property, the question remains whether the current rule of law on property settlement upon divorce in Uganda, which leads to many women not getting an equal share of matrimonial property upon divorce because of the demand for proof of substantial financial contribution, qualifies to be described as “discrimination against women” in light of the CEDAW.

In order to answer this question, the definition of “discrimination” in the CEDAW must be clarified. The prohibition of discrimination in the CEDAW is used as the legal basis because it must first be established whether the effect the current rule of law on property settlement upon divorce.

The definition of discrimination against women in Article 1 of the CEDAW can be summed up as:

Any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms.

From this definition it can be deduced that it is the enjoyment of women’s human rights and fundamental freedoms that the convention seeks to protect. The question is whether women’s

right to an equal share of marital property is to be regarded as a human right in light of the CEDAW.

As already noted, the prohibition of discrimination against women during property settlement upon divorce is enshrined in article 16 (1) h of the CEDAW. This indicates that women's right to an equal share of marital property is to be regarded as a human right, since the CEDAW is a human rights convention. This is also in accordance with Article 3 of the ICESCR⁶⁸, which states that the states parties are "to undertake to ensure the equal right of men and women to the enjoyment of all economic rights"

From the above definition of discrimination against women, it can be inferred that an act must fulfill certain conditions in order to qualify as discrimination against women. These conditions will be presented in the following and discussed one after the other.

To begin with, for an act to qualify as discrimination against women, the act must constitute a differential treatment, which is unjustifiable (*distinction, exclusion or restriction*). The differential treatment must be unjustifiable" because, not all not all differential treatments constitute discrimination in light of Article 1⁶⁹. This means that for a person to be able to invoke Article 1 of the CEDAW, there must be a form of treatment of the person, whether through deliberate action or by way of inaction by the authorities⁷⁰. Also, there should be evidence that men in the same situation have been or would have been treated differently. Depending on its object and purpose, the various human rights conventions each have their prohibited grounds for

⁶⁸ International covenant on social, economic and cultural rights

⁶⁹ An example of this is the use of "preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment See CEDAW committee's General Recommendation no. 5(1998) Available at:<http://www.un.org/womenwatch/daw/cedaw/recommendations/>

⁷⁰ Emberland (2006) p. 207

unjustifiable differential treatment. For instance the ICCPR has race, colour, language, religion, political opinion, etc as its prohibited grounds of article 26 of the ICCPR.

Secondly, this differential treatment should be given on the basis of *sex*, which is the prohibited ground for unjustifiable differential treatment according to the CEDAW. This means that the unjustifiable differential treatment should be given to women by virtue of the fact that they are women.

Furthermore, the differential treatment should lead to in women being disadvantaged in the enjoyment of their rights. The enjoyment of their rights should be impaired or nullified *as a result of* this unjustifiable differential treatment.

Finally, the differential treatment does not necessarily need to have the objective of putting women in a disadvantaged position, as long as its *effect* yields the same results. This implies that an act or exclusion that neither has the purpose nor effect of impairing or nullifying the enjoyment of rights by women does not qualify as discrimination. In the same way, an act, law or policy which may not have the purpose of preventing women from enjoying their rights will qualify as discrimination if its *effects* impair the enjoyment of rights by women.

From the wording of Article 1 of the CEDAW, it can be deduced that these conditions are cumulative conditions. This means that an act must fulfill all these four conditions in order to qualify as discrimination against women in light of the CEDAW. The question is whether the current rule of the law on property settlement upon divorce in Uganda, where spouses (in most cases women) must show proof of substantial financial contribution in order to be regarded as co-owners of marital property upon divorce fulfills the above-mentioned conditions.

The words *distinction, exclusion and restriction* denote the denial of access to something. As mentioned earlier, it is mostly women who constitute the non-monetized sector of the Ugandan economy and the CEDAW committee has stated that “financial and non-financial contributions should be accorded the same weight”. However, the current rule of law on property settlement upon divorce does not accord non-financial contribution to the acquisition of marital assets the same relevance as financial contribution. This indicates that the contribution of men is regarded as more important than that of women and therefore constitutes a differential treatment of women during property settlement upon divorce. This differential treatment cannot be said to be justifiable since both financial and non-financial contributions in the family is what sustains the “economic survival of the families” of Article 14 of the CEDAW.

The reason why it is women who are often affected negatively by the demand for proof of substantial financial contribution can be said to be due to the stereotyped gender-roles in the society, which in itself is not in conformance with Article 5 of the CEDAW. This is reflected in the fact that almost all the cases of property settlement upon divorce brought before the courts, are brought by women who have been denied a share in jointly-acquired marital properties, relevant case law shows that where it is the woman who has contributed the most to the acquisition of marital properties, the courts divide the properties equally between them and their husbands. However, if where it is the men who have contributed the most, the women are asked to show proof of their contributions. Thus, it can be concluded that the differential treatment given to women during property settlement upon divorce is done on the basis of sex.

Ugandan women often find it difficult to show proof of the contributions they may have made to the acquisition of marital assets since most of their work cannot be quantified in monetary terms. Also they may not have receipts of all the consumer expenditure they may have taken care of in

the course of the marriage. Furthermore, the only way for women to get an equal share of matrimonial property upon divorce is by going to court. However, many women cannot access the legal system due to factors like economic and institutional barriers. This results in many women being denied an equal share in marital property upon divorce, thereby leaving them economically destitute.

Consequently, a lot of women are often put in a disadvantaged position with regard to the enjoyment of their marital property rights upon divorce. In light of this, the current legal framework on property settlement in Uganda can be described as having the effect of preventing many women from enjoying their marital property rights.

Accordingly, all the four conditions that must be fulfilled for an act to qualify as discrimination against women in light of the CEDAW, can be said to be fulfilled. It would therefore be just to conclude that the fact that Ugandan women in most cases do not get an equal share of matrimonial property upon divorce because of the great emphasis that is laid on proof of substantial financial contribution by the courts, qualifies to be described as discrimination against women in light of the CEDAW. Many Ugandans attribute the persistence of this form of discrimination mainly to the lack of legislation on property settlement upon divorce.

The question then is whether Uganda is obliged by the CEDAW to make legislation on property settlement upon divorce, or whether Uganda has a freedom of choice with regard to which means to use in order to eliminate this form of discrimination. In other words, can Uganda justify the lack of legislation on property settlement by arguing that other means can serve the same purpose?

4.5 Is Uganda obliged to use legislation as the medium to ensure adequate protection of the marital property rights of women according to the CEDAW?

In order to answer the question of whether or not Uganda is obliged to make legislation on property settlement as the means to eliminate discrimination against women during property settlement upon divorce, one has to look at the means for elimination of discrimination against women that are suggested in Article 16 (1) of the CEDAW. This is because it will give a better understanding of whether or not Uganda is using the means she has agreed to use, by ratifying the CEDAW.

According to article 16 (1) of the CEDAW, states are to employ “*all appropriate measures*” in order to ensure the elimination of discrimination against women during property settlement upon divorce.

The use of the term *all appropriate means* suggests that the states have the freedom of choice as to which means to use to eliminate discrimination against women with regard to marital property upon divorce. Thus, in light of the wording of **Article 16 (1)**, the fundamental principle is that Uganda is not obliged to make legislation on property settlement upon divorce. Uganda can use any means she deems fit as long as it will guarantee women the freedom to enjoy their marital property rights on an equal basis with men.

The question then is whether a claim by Uganda that she is not obliged to make legislation if “other appropriate means” can be used to eliminate discrimination against women during property settlement upon divorce, will be upheld. Whether or not Uganda is employing such “other appropriate means” and to which extent these means will actually achieve the intended purpose, are also other questions that may need further investigation.

4.6 Can Uganda Choose To Use Other Appropriate Means Instead Of Legislation?

In order to answer the question of whether a claim by Uganda that she is not obliged to make legislation if other appropriate means can be used to eliminate discrimination against women during property settlement upon divorce, will be upheld, the term “all appropriate means” in **Article 16 (1)** has to be interpreted in light of the object and purpose of the CEDAW, Of. **Article 31 (1)** of the Vienna convention. This is because an interpretation of **Article 16** will give a clearer understanding of whether or not legislation is required even though it is not explicitly mentioned.

As already noted, the overarching purpose of the CEDAW is to eliminate all forms of discrimination against women. According to the CEDAW committee “the elimination of discrimination against women requires States Parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be

4.7 Does the lack of substantive legislative guidelines on property settlement upon divorce in Uganda constitute a breach of the CEDAW?

The notion of “state sovereignty” and the “non-interference” in the internal matters of the state has always been regarded as an essential principle in international relations. Accordingly, a generally accepted doctrine in international relations is that the state is the primary element, not the individual. Some writers use the term realism as an equivalent word for the respect that state interests have, the most important of which are security and state power. The discipline of international human rights has consequently been described as a subject that projects liberalism

into a realist world, a world which has otherwise always been controlled by the collective interests of states.

The principle of state sovereignty implies that sovereign states can choose to submit to binding legal schemes in the form of treaties and other supranational legal instruments. This means the sovereignty principle also includes a state's right to relinquish sovereignty, or place restrictions on its own sovereignty through different kinds of agreements. However, this also implies that every state is sovereign and is only subject to its own will. Thus, each state is only bound by rules it has accepted in accordance with international law.

In this chapter the researcher discusses the extent to which Uganda is meeting her obligations in the CEDAW with regard to the lack of formal legislation on property settlement upon divorce. The first question in this regard is whether this convention demands that Uganda makes legislation on the division of matrimonial property upon divorce in order to ensure the equal treatment of men and women during property settlement upon divorce. If this question is answered in the affirmative, it will mean that Uganda is breaching her obligations in the CEDAW and many of the human rights conventions that she has ratified, which aim at protecting the economic rights of women. A negative answer on the other hand will lead to a question of whether a claim by Uganda that she is not obliged to make such legislation if "other means" can be used to achieve the same purpose, will be upheld, and whether Uganda is actually employing such "other means".

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

The researcher recommends that in order to ensure the effective protection of the marital property rights of women in Uganda, they must first be empowered legally. By making laws in form of written statutes which may provide a more effective protection of marital property rights of women than judge-made laws in the form of case law. The perception of “family”, economic barriers, social norms and conditions, institutional barriers and administrative hindrances are some of the conditions that were mentioned. It was noted that these conditions might also make the effective implementation of a future law on the subject matter quite challenging.

The researcher recommends that matrimonial property rights of women require an investigation into how the rule of law on the subject matter functions in practice. This is because laws, no matter whom or what they aim at protecting “may be misapplied or ignored in practice”. This happens especially if the laws do not favor the customary practices that the people are used to. The law can also be inefficient because of many other factors including economic and social barriers.

The researcher recommends that there should be access to legal information on statutory laws on property settlement upon divorce as established under the laws for effective implementation of future statutory laws to achieve the desired results, it would require educating the women on these rights in addition to making them easily accessible.

The researcher recommends that there should be awareness, advocacy and capacity building addressed to the Government in order to ensure the effective implementation of any future

statutory laws on property settlement upon divorce in Uganda. This is because “a fully functional and equitable property rights system requires effective regulation and oversight by the State authorities to ensure that asymmetries in property ownerships do not create opportunities for exploitation and marginalization.

5.2 CONCLUSIONS

5.2.1 Introduction

The purpose of this study was to contribute to scholarly findings about women’s matrimonial property rights upon divorce in Uganda, in light with legal empowerment. In order to achieve this purpose, the researcher aimed at answering the following questions:

- i. What is the rule of law regarding the division of matrimonial property upon divorce in Uganda?
- ii. Does this rule of law constitute an unjustifiable differential treatment of women?
- iii. Can judge-made non-statutory laws provide adequate protection of the marital property rights of women upon divorce?
- iv. Does the lack of legislation on property settlement upon divorce in Uganda constitute a breach of the international human rights conventions?

This chapter is more or less an abridgement of my dissertation. It is divided into two parts. The first part is a presentation of my observations after conducting my research. In the second part, I suggest ways in which social-legal realities in Uganda can make the effective implementation of future statutory laws on property settlement upon divorce challenging. I end this dissertation by calling for further research in this field.

5.2.2 Findings in the various chapters of the thesis

The researcher, found out there are no substantive laws on the division of matrimonial property upon divorce in Uganda. Because of this, the researcher made an attempt to find out what the law on the division of matrimonial property upon divorce in Uganda today by analyzing relevant rulings from the courts in the course of the years. It was found that in the course of the years, four principles have being laid down by the courts with regards to the division of matrimonial property upon divorce. These are *the customary law principle, the substantial contribution principle; the equality is equity principle and the jurisprudence of equality principle.*

According to *the customary law principle*, a wife has a domestic responsibility to help her husband in his work, but property acquired with the assistance of a wife was regarded as the sole property of the husband. Thus according to this principle, a woman cannot claim any interest in any property she helped her husband to acquire. With time, the customary law principle was abraded and the courts in **Yeboah v. Yeboah**⁷¹ introduced a new principle, which is *the substantial contribution principle*. According to this principle, even though Customary Law does not encourage the joint acquisition of properties by spouses, where it was clear that a spouse has contributed substantially to the acquisition of property, she was regarded as a co-owner of the property. Factors that were considered by the courts in this regard was agreement between the spouses or their intentions with regard to the acquisition of the property, and the amount of contribution made by each spouse.

The substantial contribution principle reigned until the principle of “equality is equity” was introduced by the Supreme Court in the case of **Mensah v. Mensah**⁷² According to this

⁷¹ (1974)

⁷² (1998).

principle, the courts divided marital property based on what according to their discretion would provide fairness. According to the courts, this principle “sung the death knell to the substantial contribution principle”. The equality is equity principle is presumably in accordance with **Article 21** of the 1995 Constitution, which provides for equality distribution of matrimonial property upon the dissolution of marriage. The substantial contribution principle and the equality is equity principle, unlike the customary law principle seemingly gave a better protection to women than the customary law principle. However, this presupposed that they had contributed substantially to the acquisition of the properties.

However, when another case (**Quartson v. Quartson** 2012) on property settlement upon divorce was brought before the court, the court based its decision on the substantial contribution principle (in the words of the court, it used the *equality is equity principle*, but it is clear from the arguments that they meant the substantial contribution principle) stating that “The decision in **Mensah v. Mensah**, (2012) is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case.” Consequently, the woman in this case was only given some compensation in the form of cash instead of her prayer for an equal share of the matrimonial home, which she built alone with her husband’s money.

It is concluded that there is no clear rule of law on property settlement upon divorce in Uganda today. This is because the jurisprudence of equity principle cannot be regarded as the rule of law on property settlement upon divorce. The conclusion of the courts in **Quartson v. Quartson**(2012) indicates that proof of substantial financial contribution is still required of women if they want to be regarded as co-owners of property acquired during marriage.

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