



AFRICA YOUTH FOR MAPUTO PROTOCOL ESSAY COMPETITION 2021

WINNING ESSAY

Defending Women's Rights to Matrimonial Property at Annulment, Separation or Divorce in

Uganda

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Introduction

Uganda ratified the Maputo Protocol [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa] in July 2010, an agreement drawn under the African Charter on Human and Peoples' Rights in line with Article 66 of the same, to foster, buttress and encourage the observance, respect, and protection of the rights of women across African countries. Uganda is now part of the 42 African countries that have ratified the treaty, albeit with reservations. Since this ratification, there have been steps taken in Uganda that honor the obligations the government undertook¹ to protect women's rights. These steps have also been observed in preservation and championing of women's property rights. There remains however, so much to do in as far as protecting women's interests in matrimonial property is concerned.

The Legal Framework on the Division of Marital Property

Uganda does not have a law that exclusively expresses the legal principles on matrimonial property. Instead, these principles are enshrined in different laws, primarily in the Divorce Act (Chapter 249, Laws of Uganda) and in judicial decisions.

It is however key to note that the Divorce Act has long been majorly defunct as a majority of its provisions have been rendered unconstitutional through litigation. These were sections 4(1),5,22,23 and 24 as well as 26 which all highlighted inequality between men and women and discrimination in as far as rights to matrimonial property are concerned. It is even more frustrating that the proposed Marriage and Divorce Bill 2013 has not been approved by parliament, nine years after its tabling. The bill seeks to remedy multiple defects in the laws on marriage and divorce, incorporate all amendments made to these laws over time, as well as

¹ Maria Nassali et al, The Politics of Putting Asunder: The Family, Law and Divorce in Uganda: Chapter 6, Pg 197-209

reconcile and harmonize these laws with the 1995 Constitution of Uganda. Such is the predicament of Ugandan women as the state continues to ignore its obligation to implement legislative measures² as stipulated in the General Comment No. 6 on Article 7 (d) of the Maputo Protocol.³

The Maputo Protocol's Intervention

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol, guarantees a number of rights for women which include the right to equality with men, rights on reproductive health, social and political participation of women and other rights thereunder.

Relevant to this discussion is Article 6 and 7 of the Protocol as well as the General Comment No. 6 on Article 7(d) of the Maputo Protocol. The General Comment puts forward practices that member states can undertake to protect women's rights to property at divorce. Part 3 of the General Comment pinpoints the right to equality in marriage and the division of marital property as well as protecting women's rights in divorce. It is important to note under part 3 is the notion of considering the equitable sharing⁴ through the lens of substantive equality. The General Comment then puts forward the fact that substantive equality recognizes that women are in an unequal position and hence state parties are required to implement special measures to safeguard their property rights at the annulment of marriage, divorce or separation. Part 4 highlights the use of legislative measures, provision of access to remedies and justice, awareness raising, capacity building and training, provision of adequate financial resources and compliance with submission of periodic reports. All these offer guidance to member states on how to protect women's property rights and the need for such protection.

In light of all this, the lack of legal reforms in the area of matrimonial property at separation, annulment and divorce in general remains a missed opportunity in securing the rights of Ugandan women. These rights are however indelible and are accorded to women under the Constitution. These include the equal status of women and men⁵, equal rights to property for men and women⁶, affirmative action⁷, as well as enhancing the political participation of women with the aim of attaining greater democracy.

Understanding Marital Property

² Paragraph 51 of the Maputo Protocol

³ General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property during Separation, Divorce or Annulment of Marriage (Article 7(D))

⁴ Paragraph 40 of General Comment 6 on Article 7(d)

⁵ Article 33 of the 1995 Constitution of Uganda

⁶ Article 26(1) of the 1995 Constitution

⁷ Article 32(1) of the 1995 Constitution

Considering Ugandan law, there have been many attempts to define matrimonial property under common law, in different judicial decisions, and statutes. For the purposes of this essay, reference is drawn to the definition given in the Marriage and Divorce Bill 2013. Clause 115 of the Bill defines matrimonial property as a *“matrimonial home, household property in the matrimonial home, any property, movable or immovable acquired before or during the subsistence of a marriage deemed to be matrimonial property by express agreement which is separate property but which a spouse has made contributions towards, except where the property relates to the sale of family land and any seed money provided by a spouse for the establishment of a business”*.

To compliment this, the Insolvency Act 2011⁸ defines a matrimonial home to mean *“any building or part of a building in which a bankrupt and his or her spouse or spouses as the case may be, and their children, if any ordinarily reside. This also includes any agricultural or pastoral land or any land allocated by one spouse to his or her spouse for their exclusive usage.”*

Defending Women’s Property Rights

Over the years, different judicial decisions have set the pace for the development of women’s property rights by pronouncing themselves firstly on the general property rights of women, and different contentious cases to determine property rights for couples at separation and divorce.

The two cases that have perhaps notably broken ground for the observation of women’s rights are the popular ***FIDA Uganda case*** as well as ***LAW(U) V AG***. In ***FIDA⁹ Uganda***, the Constitutional Court of Uganda declared a number of provisions that promoted inequality by providing men with a more favorable position in divorce proceedings as void. While women had to prove multiple grounds to be granted divorce, men merely had to prove adultery by their female spouses. Notably, the provision that made it possible for a woman to lose her rights to property if the male spouse successfully obtained a decree of dissolution of marriage on account of adultery by the wife was also declared unconstitutional.¹⁰ The plea of the applicants was that such gender inequality and discrimination was contrary to Uganda’s international human rights law obligations.

The Constitutional Court in ***LAW(U) V AG¹¹*** on its part declared unconstitutional a number of sections of the Succession Act on the basis that they discriminated against women and inhibited the rights of women to inherit property.

⁸ The Insolvency Act 2011 Section 3(3)(a) and (b)

⁹ Uganda Association of Women Lawyers v the Attorney General (Constitutional Petition No.2 of 2003)

¹⁰ Section 26 of the Divorce Act 1904

¹¹ Law and Advocacy for Women Uganda v Attorney General (Constitutional petition No.13 of 2005 and 5 of 2006)

Even though the changes occasioned by both cases have not yet been fully crystallized in statute, they are laudable for taking a stand against discriminatory laws whose effects are expressed in the general comment.¹²

The case of ***Julius Rwabinumi v Hope Bahimbisomwe***¹³ is a very significant one as regards the division of property. In this case, specific aspects concerning division of marital property were clarified. Marital property was defined, the right to individual ownership of property was reiterated, and the boundaries for joint ownership of property were also laid out. The decision also reflected the equitable sharing of property¹⁴ by divorced couples.

These decisions clearly demonstrate judicial commitments to give meaning to the rights guaranteed by the Maputo Protocol, indicating a progressive realization of such rights even with the gaps in Ugandan laws on marriage, separation, annulment and divorce.

A Way Forward

In Uganda, there is a dire need to pass a law on the division of matrimonial property. This law should firstly succinctly define matrimonial property, then lay down the technicalities of equitably dividing properties attained during or before marriage. Many other African states that have ratified the Maputo Protocol have indeed taken this step and created laws in pursuit of the same. Kenya, for example, enacted ***the Matrimonial Property Act in 2013***. This law defines marital property, spells out the respective divisions of marital property for spouses and most notably, recognizes the non-monetary contribution to marital property. This is also the very first state obligation expressed under part 4 (a) of the General Comment.

The importance of enacting laws that protect the matrimonial property rights of women cannot be dismissed because even with positive decisions such as in ***the Julius Rwabinumi*** case above, these decisions are always left at the whim of judicial discretion. Judicial discretion leaves a gap for the violation of these rights to continue to occur as the uncertainty and unpredictability in decisions is not done away with. The case of ***Nakalule v Kakooza***¹⁵ shows the danger of relying on judicial discretion. In this divorce case, the trial magistrate ruled against women's rights to property when she denied the mother and her children any access and occupation of the marital home. Encouraging registration of marriages as well as approaches to encourage cohabiting couples to formally marry is a crucial ingredient to promoting and protecting the matrimonial property rights of women. Cohabitation is detrimental to the realization of matrimonial property rights by women. Articles 6 and 7 of the Maputo Protocol only cover the rights of women in duly recognised and registered marriages, and many states incorporate this approach in their national laws.

¹² Paragraph 4 of part 1 of General Comment No.6 on Article 7(d)

¹³ Civil Appeal No.10 of 2009

¹⁴ Paragraph d of part 3 of General Comment No.6 on Article 7(d)

¹⁵ HCCA No.47 of 2008

Governments can go about encouraging marriages in different ways such as by lowering registration fees for both religious, traditional and civil wedding ceremonies and encouraging the registration of marriages through raising awareness on its benefits. Uganda's statistics show that over 60% of Ugandan couples are living in cohabitation.¹⁶ Affording cohabiting couples the same protections afforded to married couples will go a long way in sparking a realization of rights for women's property rights in such relationships.

Domestic work and indirect contribution should also be recognized as contribution during the equitable division of property. Multiple women in Uganda are not enrolled in the formal sector and as such, their contribution towards monetary expenses and acquisition of assets in homes may be limited. The notion of taking into account monetary contributions in dividing marital property may overlook their supportive and crucial roles in management of assets and domestic work. Such division of property is not equitable as far as recognition of the role that women play as partners in marriages.¹⁷ *Haji Musa Kigongo v Olive Kigongo*¹⁸ is a notable case in this aspect. Even in the absence of a marriage, the judge held that the woman had acquired an interest in the house where the couple had lived for 26 years. Her indirect contribution in caring for the children of the couple and domestic work was the basis of preventing the plaintiff from denying that she had an interest in the house.

Conclusion

The implementation of the Maputo Protocol to more effectively promote and protect women's matrimonial property rights is twofold: the state has an obligation to fill in the gaps identified in its laws and practices to conform with the treaty. Moreover, the state also has a role to play in incorporating more forward looking provisions to address the incumbent challenges that have persisted even with its implementation.

¹⁶ Uganda Bureau of Statistics Report 2012

¹⁷ Paragraph 9 of General Comment 6 on Article 7(d) of the Maputo Protocol

¹⁸ HCCS No.295 of 2015