

**EXAMINING THE USE OF POST NUPTIAL AGREEMENTS: AN ANALYSIS OF THE
INCORPORATION OF POST NUPTIAL AGREEMENTS IN THE MATRIMONIAL
PROPERTY REGIME OF UGANDA.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws
Degree, Strathmore University Law School

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[January 2024]

Word count [17,276]

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ACKNOWLEDGEMENTS

I would like to thank the Almighty God for helping me throughout this law school journey. I would also like to thank him for the wisdom and resilience He has helped me to push myself and ensure that I get my degree after four years.

I would also like to thank my family and friends for encouraging and providing me with moral, financial, and emotional support during my studies.

Finally, I would like to thank my supervisor, Dr. Jennifer Gitahi, for her continued support, guidance, and advice as I carried out research for my dissertation. I would not have been able to get to the final stage of my Law degree without her guidance and patience. I am eternally grateful.

DECLARATION

DECLARATION

I, MATOVU JENNA HAYRA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Matovu Jenna

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This dissertation has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

The right to own property has been recognized and protected under the Constitution of Uganda under Article 26 as well as other international instruments. The specific area to be discussed is matrimonial property. The allocation of matrimonial property is regulated by Article 31 of the Ugandan Constitution, along with other international agreements and legal precedents. Due to the absence of guidelines, the discretion exercised by the court has been abused by judicial officers in certain situations and this has led to injustices. In view of this, the court's discretion needs to be guided so that more fair and equitable decisions are rendered by the courts. The paper builds a case for post nuptial agreements to bridge the gap in the matrimonial property regime of Uganda. The study recognises that these agreements act as guiding principles for courts which would prevent the abuse of their discretion without ousting their jurisdiction.

Keywords: Matrimonial Property, Post nuptial agreements, Uganda

LIST OF ABBREVIATIONS

UK- United Kingdom.

Cap- Chapter

UDHR- Universal Declaration of Human Rights

CEDAW- Convention on the Elimination of All Forms of Discrimination Against Women.

ICESCR- International Covenant on Economic, Social and Cultural Rights.

ACHPR-African Charter on Human and Peoples' Rights (ACHPR)

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Convention on the Elimination of All Forms of Discrimination against Women, (18 December 1979).
Customary Marriage (Registration) Act, Chapter 248 Laws of Uganda.
Divorce Act, Chapter 249 Laws of Uganda.
Evidence Act, Chapter 6 Laws of Uganda.

Hindu Marriage and Divorce Act, Chapter 250 Laws of Uganda.

International Covenant on Civil and Political Rights (16 December 1966).

International Covenant on Economic, Social and Cultural Rights, (16 December 1966).

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Marriage of Africans Act, Chapter 253 Laws of Uganda.

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(1 July 2003).

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The Registration of Titles Act, 1924 (Chapter 230) Laws of Uganda.

Universal Declaration of Human Rights (10 December 1948).

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

The family unit is fundamental within society and it should be protected by both the citizens and the state.¹ The family is the first institution in man's culture.² An institution is an organization made up of persons united by social bonds.³ Therefore a family is given legal and formal status as it forms the basis of a society.⁴ A family results from a marriage which is a partnership between a man and a woman, excluding any involvement from others.⁵

Even in the absence of a defined term for 'marriage' under Ugandan law, ⁶ various types of marriages are acknowledged within the state, encompassing customary marriages regulated by the Customary Marriage (Registration) Act (Cap 248), Muslim marriages governed by the Marriage and Divorce of Mohammedans Act (Cap 252), Hindu marriages under the Hindu Marriage and Divorce Act (Cap 250), as well as Church and Civil marriages falling under the purview of the Marriage Act (Cap 251) and the Divorce Act (Cap 249).⁷ In addition, there is a Marriage of Africans Act (Cap 253) that governs marriages of Christian and Mohammedan Africans in Uganda. The Government of Uganda is obliged to register all marriages however non-registration of a marriage does not necessarily invalidate it hence a marriage can still be valid even when it has not been registered.⁸

Given the institution's importance, the state strives to preserve its sanctity. In Uganda, one of the ways this is observed is through the value attached to totemic rules whereby getting married to

¹ Objective XIX of the Preamble, *Constitution of the Republic of Uganda* (1995).

² Nassali M, 'The winding trail to justice: Evolution of divorce law in Uganda' in Nassali M (ed) *The politics of putting asunder: The family, law and divorce in Uganda*, Fountain Publishers, Kampala, 2017, 10.

³ Oxford Advanced Learner's Dictionary, 10 ed.

⁴ Nassali M, 'The winding trail to justice,' 10.

⁵ *Hyde v Hyde* (1866), The English Court of Probate and Divorce, United Kingdom.

⁶ Nampewo Z, Atim P, Musoke H and Kange V, *Uganda*, Kluwer Law International, Netherlands 2020, 59.

⁷ Justice Centers Uganda, *Marriage and Divorce in Uganda*, March 2021, 1-16.

⁸ Section 34, *Marriage Act*, Uganda (2014)

someone within your clan is considered unethical and illegal.⁹ In addition, Uganda permits only heterosexual marriages because they promote continuity of the family.¹⁰

Despite the efforts to preserve the family, some couples come to the realization that a lifelong partnership may not be sustainable for them, and this prompts them to either dissolve or annul their marriages. Divorce is defined as the legal dissolution of a marriage by a Court or a complete severance of ties between people who were once united¹¹ and it is governed by the Divorce Act Cap 249. Uganda has a fault-based divorce system.¹² There are several grounds that a party can rely on before a court of competent jurisdiction to end a marriage by divorce and these include cruelty, desertion, and adultery. These grounds are available to both parties in marriage.¹³

Following the dissolution of a marriage, property is meant to be distributed between the parties. Matrimonial property is not defined in any of the Ugandan statutes. However, Justice Bbosa in *Kintu v Kintu*¹⁴ attempted to define it as jointly contributed property obtained during a marriage, excluding separate property acquired by each spouse prior to or during the marriage. It includes property acquired before a marriage if the parties jointly contributed to its acquisition, but this applies on a case-to-case basis.¹⁵

There is no statutory law that governs the division of matrimonial property in Uganda therefore, courts mostly rely on precedence.¹⁶ and statutes such as the 1995 Constitution, the Registration of Titles Act (Cap 203), the Land (Amendment) Act (Cap 227) as well as regional and international instruments or treaties. Whereas the Constitution of Uganda guarantees equal treatment of spouses once the marriage dissolves,¹⁷ it does not propose an equal division of property upon the dissolution of marriage. Instead, it grants the parties the right to individual ownership of property, as stipulated in Article 26(1) of the Constitution of Uganda.¹⁸ The court allocates property based

⁹ *Bruno Kiuwua v Ivan Serunkuma and Juliet Namazzi* (2006), High Court of Uganda.

¹⁰ Nampewo Z *et al*, *Uganda*, 60.

¹¹ Black's Law Dictionary, 11 ed.

¹² Nampewo Z *et al*, *Uganda*, 120.

¹³ *Uganda Association of Female Lawyers and Others v Attorney General* (2004), Constitutional Court of Uganda.

¹⁴ *Kintu v Kintu* (2001) High Court of Uganda.

¹⁵ *Ambayo Joseph v Aserua Jackline* (2022), Court of Appeal of Uganda.

¹⁶ Atim P, 'The shield is still porous: The protection of spousal interest in matrimonial property In Uganda' in Nassali M (ed) *The politics of putting asunder: The Family, Law and Divorce in Uganda*, Fountain Publishers, Kampala, 2017, 196.

¹⁷ Article 31(1), *Constitution of Uganda* (1995).

¹⁸ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

on the contributions made by each spouse, which can take the form of monetary and direct contributions or non-monetary and indirect contributions¹⁹ and these principles have been applied in cases like *Kivuitu v Kivuitu*²⁰ and *Muwanga v Kintu*.²¹

Despite all these efforts by the courts, it is hard to determine the figures attached to these contributions since it all depends on the court's interpretation since the law is silent in such matters.²² This provides a context where discretion can be abused by the courts which has resulted in inconsistencies within the decided cases used as precedence.²³ As stated in my hypothesis, this discretion should be guided and this can be achieved with the incorporation of post nuptial agreements since they attempt to distinguish between separate property and joint property, and reduce injustices and future misunderstandings between spouses when determining ownership.²⁴

1.2 PROBLEM STATEMENT

Uganda has no statute that governs the division of matrimonial property upon divorce. The Courts rely on the doctrine of precedent and consider the contribution of each spouse before the property is distributed. This contribution can either be direct and monetary or indirect and non-monetary. However, the quantification of contribution is solely determined by the courts. This gives room for abuse of discretion which results in injustices.²⁵

Unjust decisions set a negative precedent, particularly impacting divorced couples in the long run as they often resort to courts for property division. This in turn affects judges of lower courts who are bound by such decisions since there is no specific statute that governs division of matrimonial property in Uganda. This study thus seeks to propose post-nuptial agreements as a means of property distribution upon divorce in Uganda because they can act as a guide to the courts hence producing more favorable and predictable outcomes.

¹⁹ Nampewo Z *et al*, *Uganda*, 148.

²⁰ *Kivuitu v Kivuitu* (1991), Court of Appeal of Kenya.

²¹ *Muwanga v Kintu* (1997), High court of Uganda.

²² *Ayiko Mawa v Annet Ayiko* (2017), High Court of Uganda.

²³ Lubega F, 'A critical analysis of the legal framework governing the division of matrimonial property upon dissolution of a marriage in Uganda' Published LLB Thesis, Uganda Christian University, Mukono, 2020, 33.

²⁴ Kimia K, 'Understanding the benefits of postnuptial agreements' Firm Publications, 2021, 3.

²⁵ Atim P, 'The shield is still porous' 237.

1.3 RESEARCH OBJECTIVES

- 1 a, To explore the historical progression of matrimonial property distribution upon divorce.
 - b, To analyze the contemporary legal framework addressing this issue in Uganda.
2. To evaluate case law and determine whether absence of guidelines for courts lead to injustices in matrimonial property distribution.
3. To determine whether the law in Uganda ought to recognize post nuptial agreements as a means of property distribution upon divorce.

1.4 RESEARCH QUESTIONS

- 1 a, What is the historical evolution of the distribution of matrimonial property in Uganda?
 - b, What is the current law on the distribution of matrimonial property upon divorce in Uganda?
2. Does the absence of guidelines for courts lead to injustices in matrimonial property distribution?
3. Should the law in Uganda recognize post nuptial agreements as a means of property distribution upon divorce in Uganda?

1.5 HYPOTHESIS

The law in Uganda should recognize post nuptial agreements as a means of property distribution. These agreements recognize principles of equality, fairness, and party autonomy and this allows people to play an active role in the distribution of their own property upon divorce.

Such agreements reduce the arbitrariness in court decisions since courts receive guidance during this process and this reduces the risk of abuse of discretion. As a result of this, divorced couples receive favorable results, and this also creates good precedence as well as reducing the risk of unjust decisions.

1.6 JUSTIFICATION

The division of matrimonial property is an inevitable process for all divorced couples. In the event of a split, courts mandate spouses to demonstrate their contributions to property acquisition during the marriage, influencing the allocation of assets. Entrusting these matters to the sole discretion of courts without guidance can lead to inequitable and inconsistent rulings. There is academic work that focuses on identifying the gap in the division of matrimonial property created by the current system, but there is no work that focuses on proposing solutions for this gap.²⁶

This study seeks to assess whether the recognition of post nuptial agreements will promote fairness and consistency during the division of matrimonial property in Uganda. It will offer guidance to adjudicators on how to treat postnuptial agreements in the foreseeable future and determine their validity.

This study will also serve as a guiding framework for lawmakers in Uganda, helping them incorporate postnuptial agreements into the legislation governing matrimonial property in a bid to safeguard the interests of all parties involved.

The findings of this study will also provide valuable insights for researchers in this field, particularly those who intend to investigate and write about postnuptial agreements in Uganda.

1.7 CONCEPTUAL FRAMEWORK

Autonomy of a person is a contract law principle which grants people the ability to make their life choices, and this is applicable to agreements pertaining to marital property as well as business arrangements.²⁷ Anne Sanders states that spouses have the freedom to arrange a marriage according to their desires so they should also have a choice to plan for their financial affairs in

²⁶ See for example Atim P, 'The shield is still porous: The protection of spousal interest in matrimonial property in Uganda' in Nassali M (ed) *The politics of putting asunder: The family, law and divorce in Uganda*, Fountain Publishers, Kampala, 2017, 192, Lubega F, 'A critical analysis of the legal framework governing the division of matrimonial property upon dissolution of a marriage in Uganda' Published LLB Thesis, Uganda Christian University, Mukono, 2020,3, Namaganda R, 'An examination of the law on matrimonial property in Uganda, Published LLB Thesis, Kampala International University, Kampala, 2019, 18.

²⁷ Sanders A, 'Private autonomy and marital property agreements' 59 *International and Comparative Law Quarterly* 1, 2010,572.

case of a divorce.²⁸ The foundation of post-nuptial agreements lies in individual autonomy. Therefore, courts should show deference to these agreements, considering that the involved parties carefully contemplate their current circumstances and the potential occurrence of unpredictable future events when drafting such agreements.²⁹ This is observed in *White v White*³⁰ where it was stated that marital property agreements enable parties to a marriage to decide for themselves what would be fair if the parties were to divorce.

Immanuel Kant states that autonomy and self-determination are important aspects of humanity and questioning them often undermines the dignity of a person.³¹ The dignity of a person is upheld in Uganda's Constitution,³² and other treaties ratified by Uganda such as the Universal Declaration of Human Rights³³ and the International Covenant on Civil and Political Rights.³⁴ The American case of *Strong v Dublin* (2010) illustrated that good public policy favours individuals who order and decide their interests through contractual arrangements such as post nuptial agreements.³⁵

Kenneth Norie states that autonomy provided by these marital agreements overrides both property rules in marriage and property distribution rules upon divorce hence the parties' terms should always take effect.³⁶ Party autonomy is recognized in many matrimonial property regimes because it brings out certainty, predictability, simplicity and satisfies the fundamental interests of the parties³⁷ and courts cannot stray far from the interests of the parties unless the agreement is clearly unconscionable.

This concept of autonomy of a person in marriage is essential because it shows that parties to a marriage have the freedom to plan for the division of their financial assets in case of a divorce through post nuptial agreements. This concept also indicates that the autonomy exhibited in drafting post nuptial agreements produces certain and predictable outcomes which align the

²⁸ Sanders A, 'Private autonomy and marital property agreements' 572.

²⁹ *Radmacher v Granatino* (2010), United Kingdom Supreme Court

³⁰ *White v White* (2001), United Kingdom House of Lords.

³¹ Kant I, *Immanuel Kant: Groundwork of the metaphysics of morals: A German English version*, Cambridge University Press, England, 2011, 23.

³² Objective XXIV of the Preamble, *Constitution of the Republic of Uganda* (1995).

³³ Article 1, *Universal Declaration of Human Rights* (1948)

³⁴ The Preamble, *International Covenant on Civil and Political Rights* (1966).

³⁵ *Strong v Dublin* (2010), Appellate Division of the Supreme Court of New York, First Department

³⁶ Norrie K, 'Marital agreements in Scotland' Strathprints Institutional Repository, 2012, 16.

³⁷ Oprea A, 'Party autonomy and the law applicable to the matrimonial property regimes in Europe' 10 *Transnational Law notebooks* 2, 2018, 582.

parties' interests. This will be useful in determining whether the law in Uganda ought to recognize post nuptial agreements as a means of property distribution which grants people the ability to make decisions regarding their property and guides the discretion given to courts in such personal matters.

However as each principle of law is subjected to certain restraints, the application of party autonomy therefore has to be reconciled with other principles of law such as public order, respect for certain public values and protection of weaker parties.³⁸ In *Milne v Milne*,³⁹ it was held that party autonomy cannot oust the jurisdiction of the court especially if the agreement affects other parties such as children.⁴⁰ Anne Sanders also emphasized the importance of the court's discretion since marriages require extra protection.⁴¹ Limiting party autonomy in post nuptial agreements can protect vulnerable groups such as children and women who can easily be affected by such agreements and need extra protection from the law.⁴²

Amanda Barratt stressed the significance of party autonomy in the division of matrimonial property but also underscored the importance of adhering to principles of equality and non-discrimination. This approach aims to prevent gender-based discrimination and highlights the continued necessity of court intervention which is to protect people from their autonomy.⁴³

The limitation of autonomy indicates that marital agreements cannot fully exclude the jurisdiction of courts. This underscores the necessity for postnuptial agreements to undergo court scrutiny and potential adjustments to ensure they do not have adverse effects on individuals or conflict with legal statutes.

³⁸ Fenwick M, Jurcys P, 'Party autonomy in international family law: A note from an economic perspective' SSRN Electronic Journal, 2013, 7.

³⁹ *Milne v Milne* (1989), Superior Court of Pennsylvania.

⁴⁰ *Milne v Milne* (1989), Superior Court of Pennsylvania.

⁴¹ Sanders A, 'Private autonomy and marital property agreements' 591.

⁴² Sanders A, 'Private autonomy and marital property agreements' 602.

⁴³ Rains R, 'The perils and pitfalls of marital agreements in multiple legal systems reviewed work(s): Marital agreements and private autonomy in comparative perspective by Jens M. Scherpe' 46 *Family law Quarterly* 3, 2012, 385.

1.8 LITERATURE REVIEW

This section of chapter one provides a view on the scholarly work and authors who have written about the topic in Uganda and other parts of the world as well as their arguments on the topic of study. The intention of this is to prevent duplication and give credit to other researchers as well as identify the research gap which is that lack of guidance gives room for courts to abuse their discretion.

Nampewo Zahara states that there is no established statutory law in Uganda that governs the distribution of property between spouses upon divorce therefore, ownership, management and distribution of property between spouses and cohabiting spouses has always been a controversial issue.⁴⁴ The shelved Marriage and Divorce Bill 2009- now the Marriage Bill 2017- has recognized that a man and a woman can execute an agreement in relation to ownership of separate property of each spouse, property acquired during marriage and distribution of property acquired during the marriage through prenuptial agreements⁴⁵ since their enforcement has been recognized by courts.⁴⁶ Despite their recognition, courts have a right to inquire into these agreements to prevent issues of elements of fraud, misrepresentation, duress and undue influence.⁴⁷

Frank Lubega recommends post nuptial agreements as a means of property distribution after a divorce considering people deserve to oversee their assets. However, they should be guided by the court to eliminate cases of coercion, fraud, and undue influence.⁴⁸ He states that inconsistencies within the decided cases can happen if courts are guided through the distribution process by means of post nuptial agreements. However, this work goes an extra mile to recommend a matrimonial property statute that will not only acknowledge post nuptial agreements but also guide the courts on how to handle these agreements.

Patricia Atim states that court flexibilities and the costly litigation process can be avoided if parties agree on a distribution formula of the matrimonial home like in *Hough v Hough* (High Court Divorce Cause No. 1 of 2006), a case where the property was distributed according to what the

⁴⁴ Nampewo Z et al, Uganda, 162.

⁴⁵ Nampewo Z et al, Uganda, 162.

⁴⁶ *Margaret Hough v David Hough* (2006), High Court of Uganda.

⁴⁷ Nampewo Z et al, Uganda, 162.

⁴⁸ Lubega F, 'A critical analysis of the legal framework governing the division of matrimonial property upon dissolution of a marriage in Uganda' Published LLB Thesis, Uganda Christian University, Mukono, 2020, 33.

parties had executed the pre-marital agreement.⁴⁹ She states that judicial decisions are frequently based on judicial discretion which can be abused depending on the judge's beliefs and perspectives.⁵⁰

Alison Wanjira advocated for the recognition of post-nuptial agreements in the Kenyan law because they reduce the backlog of cases in relation to division of matrimonial property, and parties suggest how they want jointly acquired property to be split in case of divorce.⁵¹

Other authors like Sean Hannon state that post nuptials react to the immediate issues of the spouses compared to prenuptial agreements.⁵² It is difficult to anticipate events such as the number of children one will have, an unexpected job offers and loss of employment⁵³ and with post nuptial agreements, one does not need to predict future circumstances hence making them more realistic.

Neil Brown and Katherine Fister argue that marital agreements safeguard marriages because postnuptial agreements address controversial issues within the arrangement such as money.⁵⁴ Disagreements over finances reduce the stability levels of marriages and couples can avoid this if they decide to draft an agreement addressing such contentious issues during the marriage.⁵⁵

Natasha Wasil states that post nuptial agreements will allow married couples to deal with unforeseen circumstances, reflect the current finances within the marriage and not be bound by their assumptions at the beginning of the marriage.⁵⁶ In addition to this, each spouse should be given a full disclosure of the amount, character and value of the property owned separately and jointly, the financial obligations of each spouse and their income so that the agreement is fair since both parties have all the necessary information.⁵⁷

⁴⁹ Atim P, 'The shield is still porous' 236.

⁵⁰ Atim P, 'The shield is still porous' 237.

⁵¹ Wanjira A, 'The use of marital property agreements for the division of matrimonial property upon divorce in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi, 2017, 51.

⁵² Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 22 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

⁵³ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 22 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

⁵⁴ Fister K and Browne N, 'The intriguing potential of post nuptial contracts modifications' 23 *Hasting Women's Law Journal* 2, 2012,199.

⁵⁵ Browne N, 'The intriguing potential of post nuptial contracts modifications' 199.

⁵⁶ Wasil N, 'Ohio's love-hate relationship with marital agreements: Why Ohio should lift Its prohibition on postnuptial agreements 69 *Cleveland State Law Review* 2, 2021, 535.

⁵⁷ Wasil N, 'Ohio's love-hate relationship with marital agreements, 523.

Siyuan Chen advocates for postnuptial agreements because courts often wield substantial discretion, and their acknowledgment should be coupled with legal counsel provided to both parties and the court.⁵⁸ This aims to enhance the overall utility and effectiveness of these agreements.⁵⁹

Other authors are against post nuptial agreements for example Jens Scherpe who states that such agreements grant parties the power to ignore principles concerning compensation of a partner, fairness and sharing which may result in unconscionable bargains.⁶⁰ According to Mark Fenwick and Paulius Jurcys, post nuptial agreements grant spouses freedom to alter financial arrangements which can be detrimental to the interests of the weaker party in the marriage which leaves them vulnerable with no one to protect them but the law.⁶¹

While other states in the United States of America enforce post nuptial agreements, some do not like Ohio because it believes that they are against public policy. This is because they promote divorce and increase the risks of exploiting one another in such arrangements.⁶²

Edward Sarnowski⁶³ and Anne Sanders⁶⁴ encourage court intervention so that the terms of such agreements are scrutinized to include the interests of the children whose rights could easily be violated in the process.

Previous studies have focused on identifying the gap in matrimonial property distribution in Uganda, criticizing the current system put in place to navigate the gap but none of them have discussed credible solutions to that gap. This study will be unique since it introduces the element of post nuptial agreements as a viable means of matrimonial property distribution upon divorce, a concept that has been silent in Uganda, yet it can guide the courts as they make the property

⁵⁸ Siyuan C, 'Mediated postnuptial agreements and ancillary matters' 8 *Singapore Law Blog* 1, 2014, 2.

⁵⁹ Siyuan C, 'Mediated postnuptial agreements and ancillary matters,' 2.

⁶⁰ Scherpe J, 'Marital agreements private autonomy and fairness' 70 *The Cambridge Law Journal* 1, 2011, 31.

⁶¹ Fenwick M, Jurcys P, 'Party autonomy in international family law: A note from an economic perspective' SSRN Electronic Journal, 2013, 8.

⁶² Wasil N, 'Ohio's love-hate relationship with marital agreements, 530.

⁶³ Sarnowski E, 'Permitting post-nuptial agreements to contain no-challenge clauses that restrict the rights of parents, children, and Florida's courts: How *morris v. morris* implicitly defies public policy' 8 *Florida Coastal Law Review* 2, 2007, 236.

⁶⁴ Sanders A, 'Private autonomy and marital property agreements' 591.

distributions. Post nuptial agreements can also cater for people who are not able to draft such agreements at the onset of the marriage.

This study will contribute to the discussion surrounding matrimonial property distribution and post nuptial agreements in general, an issue that has mostly been dealt with in the United States, Australia, and the United Kingdom. My research project will also complement the works of Patricia Atim who has written extensively about matrimonial property in Uganda. It will also complement the works of scholars like Amanda Barrett, Anne Sanders, and Sean Williams.

1.9 METHODOLOGY

The nature of this research will be qualitative. The main sources of data will be primary sources such the Constitution of Uganda 1995, the Registration of Titles Act (Cap 203), the Land (Amendment) Act (Cap 227) and relevant case law.

There will also be use of secondary sources such as opinions of judges, books, and journal articles. In general, a deductive method will be used throughout the chapters where conclusions will be drawn from putting premises together in a logical way.

The study will discuss the historical evolution of the distribution of matrimonial property in Uganda as well as current law regarding the same. This shall be done through a historical analysis by showing how this concept has evolved over time and whether it has developed in a way that is beneficial to contemporary society. A doctrinal analysis of the court decisions regarding distribution of matrimonial property will also be employed. This will help us understand how the current law came to be and scholarly work interpreting the cases which shows the gap and faults of the current system.

The study will then proceed to discuss whether the absence of guidelines for courts can result in inconsistent decisions and injustices due to reliance on precedence and this shall be done through a doctrinal analysis of case law and scholarly work. Finally, the study will assess whether the law in Uganda ought to recognize post nuptial agreements and this shall be done through a doctrinal analysis of decided case law as well as books and scholarly work that highlights the benefits of post nuptial agreements and this will help us determine whether they will be beneficial in Uganda.

1.10 CHAPTER BREAKDOWN

Chapter one serves as the introductory section of the study, and it discusses provisions and legal instruments that are relevant to matrimonial property in Uganda. This chapter will also encompass research objectives, research questions, a literature review that will show what other scholars have written about the topic and a hypothesis that suggest post-nuptial agreements as a response to the problem statement.

Chapter two aims to analyse the historical evolution of matrimonial property distribution in Uganda as well as the current law regarding the same. It will show how the concept of property distribution upon divorce has evolved over the years, and how women's property rights have been acknowledged in the current law. It will also discuss how courts have managed to ensure equitable distribution of property due to absence of a statute.

Chapter three will discuss Ugandan case law that exhibits the abuse of discretion by courts which results in injustice. By showing that court decisions regarding matrimonial property distribution are inconsistent, the study aims to argue for recognition of post-nuptial agreements.

Chapter four will delve into the question of whether Ugandan law should officially recognize postnuptial agreements as a method for property distribution in divorce cases. This will involve assessing the significance of postnuptial agreements and their potential to address gaps in the division of matrimonial property in Uganda. Additionally, it will explore how these agreements could contribute to generating more consistent and equitable outcomes while guiding the discretion of courts. Chapter Five concludes the study and will present a summary of findings and possible recommendations.

CHAPTER 2: TRACING THE DEVELOPMENT OF UGANDA'S MATRIMONIAL PROPERTY LEGAL SYSTEM

2.1 INTRODUCTION

Matrimonial property is indissolubly related to the concept of marriage.⁶⁵ The only kind of marriages recognized in Uganda are heterosexual marriages hence marriage between people of the same sex is prohibited.⁶⁶ This was confirmed after the President signed the Anti-homosexuality Bill.⁶⁷ This Act prohibits any form of sexual relations between people of the same sex or recognition of sexual relations between people of the same sex.⁶⁸ Therefore, the concept of matrimonial property is not recognized in same sex marriages since they are invalid in Uganda.⁶⁹

There are five kinds of marriages recognized in Uganda and these include customary marriages, Muslim marriages, Hindu marriages, Christian marriages, and Civil marriages.⁷⁰ The common denominator of these marriages is the law's silence on issues concerning distribution of matrimonial property. Due to this, courts apply Common law doctrines when it comes to determination of such matters given the fact that Uganda inherited most of its general laws from Britain in 1902.⁷¹

To fully appreciate the evolution of the matrimonial property legal system in Uganda, it is important to understand how the society viewed women's property rights at different times.⁷² It is impossible to separate matrimonial property law in Uganda from women's property rights since the two issues are intertwined.⁷³

⁶⁵ Atim P, 'The shield is still porous' 210.

⁶⁶ Section 10, *The Anti-homosexuality Act* (2023).

⁶⁷ *The Anti-homosexuality Act*, No. 6 of 2023 Laws of Uganda.

⁶⁸ The Preamble, *The Anti-homosexuality Act* (2023).

⁶⁹ Article 31(3), *Constitution of Uganda* (1995).

⁷⁰ Justice Centers Uganda, *Marriage and divorce in Uganda*, March 2021, 1-16

⁷¹ Section 3(3), *Divorce Act*, 2000.

⁷² Bugembe D, 'Matrimonial property in Uganda' WordPress, 2015, 1.

⁷³ Bugembe D, 'Matrimonial property in Uganda' WordPress, 2015, 1.

2.2 THE MATRIMONIAL PROPERTY REGIME IN THE COLONIAL ERA (1894-1962)

Before the 1960s, customary law protected the rights of spouses in property, especially land since it was the main source of income at the time.⁷⁴ Customary and women's rights were reconcilable since there were certain aspects of customary law that empowered women in Uganda.⁷⁵ For instance, women were allowed to use land for production of food which was sufficient to sustain their families. They were also guaranteed land to continue with their farm work after the death of their husbands even though they could not inherit it.⁷⁶

The courts at the time also interpreted customary law in a way that was favorable to women.⁷⁷ They received land through the principle of 'gifting' and the courts made it difficult for a man to repossess property once he had given it to a woman.⁷⁸ However, the efforts made by customary law were eventually diminished by the legal regime of the colonial times since patriarchy became the norm and the women were prohibited from owning property.⁷⁹

The Uganda Order in Council (1902) enforced English laws that belittled women in all areas of personal laws.⁸⁰ Land was the most important asset by the time the 1900 Buganda Agreement was signed, but women were not allocated land since it was mostly given to men based on patriarchy.⁸¹ Owning land brought power to women and this was not essential for social order and stability at the time, so men believed that seizing their land was the only way to restore balance within the community.⁸²

During this time, there was also a shift from communal land tenure system where men and women could use land jointly to individual ownership which put an end to women's land rights through

⁷⁴ Atim P, 'The shield is still porous' 184.

⁷⁵ Twinomugisha B, 'African customary law and women's human rights in Uganda' in Fenrich J, Galizzi P and Higgins T (eds) *The future of African customary law*, Cambridge University Press, Cambridge, 2011, 448.

⁷⁶ Atim P, 'The shield is still porous' 184.

⁷⁷ Khadiagala L, 'Negotiating law and custom: Justice doctrine and women's property rights in Uganda' 46 *Cambridge University Press* 1, 2002, 2.

⁷⁸ Khadiagala L, 'Negotiating law and custom: Justice doctrine and women's property rights in Uganda,' 2.

⁷⁹ Wengi Okumu, 'Dispossession and management of common property: Women and inheritance in East Africa,' Voices from the Commons, Sixth Biennial Conference of the International Association for the Study of Common Property at Berkeley, California, June 5-8, 1995, 5.

⁸⁰ Wengi Okumu, 'Dispossession and management of common property: Women and inheritance in East Africa,' 5.

⁸¹ Wengi Okumu, 'Dispossession and management of common property: Women and inheritance in East Africa,' 5.

⁸² Asiimwe J, 'Making Women's land rights a reality in Uganda: Advocacy for co-ownership by spouses' 4 *Yale Human Rights and Development Journal* 1, 2001, 174.

inheritance or marriage.⁸³In *Julius Rwabinumi v Hope Bahimbisomwe*,⁸⁴Justice Amos Twinomujuni asserted that, ‘A woman was regarded as a property of the man and totally incapable of holding property of her own independently of the man in the colonial era.’⁸⁵ As a result of this, earlier court decisions stated that women in matrimonial relationships could not hold or acquire real property.⁸⁶ This strengthened the patriarchal practices of the colonial masters and weakened customary law that attempted to protect women’s property rights, especially land.⁸⁷

2.3: THE MATRIMONIAL PROPERTY REGIME AFTER INDEPENDENCE (POST 1962)

After independence, the adoption of the Married Women’s Property Act (1882) ushered in a transition in judicial reasoning.⁸⁸ The Married Women’s Property Act was a legal framework introduced to govern non-Africans since customary law applied to Africans only, however this Act became part of Uganda’s law after independence.⁸⁹

The Married Women’s Property Act recognised a woman’s right to own property and her ability to invoke equity principles in common law.⁹⁰ The application of this Act was recognised in Ugandan courts in the case of *Moonlight Ssengoba v Administrative General*⁹¹ where the judge held that the woman was allowed to inherit insurance benefits arising out of a policy taken by her husband. As a result of this, judges acquired jurisdiction to determine ownership of property.⁹²

The Married Women’s Property Act (1882) granted women autonomy as they had the right to acquire property individually or jointly with their spouses.⁹³ In the case of *Uganda v Jemimah Kyanda*,⁹⁴ the accused was convicted of repossessing land that had been given to her by her

⁸³ Naybor D, ‘Land as fictitious commodity: the continuing evolution of women’s land rights in Uganda’ 22, *Gender, Place & Culture*, 6, 2015, 887.

⁸⁴ *Julius Rwabinumi v Hope Bahimbisomwe* (2013), Supreme Court of Uganda.

⁸⁵ *Julius Rwabinumi v Hope Bahimbisomwe* (2013), Supreme Court of Uganda.

⁸⁶ Bugembe D, ‘Matrimonial property in Uganda’ WordPress, 2015, 1.

⁸⁷ Atim P, ‘The shield is still porous’ 186.

⁸⁸ Atim P, ‘The shield is still porous’ 213.

⁸⁹ Wengi Okumu, *Women’s law and grassroots justice in Uganda*, LawAfrica Publishing Limited, Nairobi, 2011, 47.

⁹⁰ Wengi Okumu, *Women’s law and grassroots justice in Uganda*, 47.

⁹¹ *Moonlight Ssengoba v Administrative General* (1974), H C B.

⁹² *Moonlight Ssengoba v Administrative General* (1974), H C B.

⁹³ Atim P, ‘The shield is still porous’ 213.

⁹⁴ *Uganda v Jemimah Kyanda* (1977), H C B.

husband under Section 101(h) of the Penal code.⁹⁵ The High court judge quashed the conviction and stated that, “a woman in Uganda is able in law to hold and to own her own separate property, separate from her husband and in respect of such property the wife is not barred from instituting proceedings against her husband and vice-versa.”⁹⁶

This proves unequivocally that Ugandan courts had acknowledged women's right to possess property by 1977. However, disputes arose when a partner or spouse tried to claim a share of the property that belonged to the other partner or spouse, yet they were not married. This invoked the use of Common Law principles on issues regarding indirect and non-monetary contribution of a spouse, proof of direct and significant financial contributions and application of the resulting trust doctrine.⁹⁷

2.3.1: USE OF COMMON LAW DOCTRINES IN UGANDAN COURTS

Lord Diplock in *Gissing v Gissing*,⁹⁸ stated that a resulting, implied or constructive trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.⁹⁹ Application of the resulting doctrine trust in Ugandan courts was seen in the case of *Edita Nakiyingi v Merekicadeke*,¹⁰⁰ where the court upheld a wife's interest in matrimonial property premised upon the fact that she had contributed both materially and indirectly (by tending the garden) to the development of the *kibanja* (a form of customary land tenure).¹⁰¹

Judge Ssekandi in the case of *Edita Nakiyingi v Merekicadeke* stated that the doctrine of equitable estoppel may apply if a wife has incurred expenditure on the property in belief ‘encouraged by the husband’ that she already owned or will be given some proprietary interest in it. He further stated

⁹⁵ *Uganda v Jemimah Kyanda* (1977), H C B.

⁹⁶ *Uganda v Jemimah Kyanda* (1977), H C B.

⁹⁷ Atim P, ‘The shield is still porous’ 213.

⁹⁸ *Gissing v Gissing* (1970), House of Lords of the United Kingdom.

⁹⁹ *Gissing v Gissing* (1970), House of Lords of the United Kingdom.

¹⁰⁰ *Edita Nakiyingi v Merekicadeke* (1978), H C B.

¹⁰¹ *Edita Nakiyingi v Merekicadeke* (1978), H C B.

that the court may impose a trust whenever it would be equitable for the estate owner to claim the property as his own.

In addition to this, it is not necessary to establish any express or implied agreement or common intention that the wife made contributions to the family property with a view of acquiring an interest.¹⁰² The court relied on the decision made in the English case of *Heseltine v Heseltine*,¹⁰³ where the court held that the home was acquired through joint resources of a husband and wife, but it was registered in the husband's names, so the court imputed a trust under which the husband held the house for the benefit of both parties jointly.¹⁰⁴

On the issue of proving direct financial contribution, the court in *Mayambala v Mayambala*¹⁰⁵ relied on the precedent set by *Nakiyingi v Merekicadeki*.¹⁰⁶ The court found that although the property was registered in the husband's sole name, the wife had made substantial financial contributions to the construction of the matrimonial home situated in Ntinda, evidenced by receipts.¹⁰⁷

As such, a trust had arisen because of the wife's contribution and her interest in the property was estimated at 70%. The court further noted that in situations where the house is sold, the wife would get 70% of the proceeds of sale at the market price and it further ordered the registrar of titles to amend the relevant parts of the register of titles to reflect the petitioner's 70% interest in the said property.¹⁰⁸

In addition to this, Justice Rwamisazi-Kagaba in *Teopista Mugenzi v Pascal Mugenzi*,¹⁰⁹ upheld the right of the wife to the matrimonial home which had been sold off by the husband without her consent and yet she had made substantial monetary contributions to it.¹¹⁰ She adduced evidence of her financial contribution towards the purchase of the land plots, the construction of their home

¹⁰² *Edita Nakiyingi v Merekicadeki* (1978), H C B.

¹⁰³ *Heseltine v Heseltine* (1970), England & Wales Court of Appeal.

¹⁰⁴ *Heseltine v Heseltine* (1970), England & Wales Court of Appeal.

¹⁰⁵ *Mayambala v Mayambala* (1998), High Court of Uganda.

¹⁰⁶ *Edita Nakiyingi v Merekicadeki* (1978), H C B.

¹⁰⁷ *Mayambala v Mayambala* (1998), High Court of Uganda.

¹⁰⁸ *Mayambala v Mayambala* (1998), High Court of Uganda.

¹⁰⁹ *Teopista Mugenzi v Pascal Mugenzi* (2003), High Court of Uganda.

¹¹⁰ *Teopista Mugenzi v Pascal Mugenzi* (2003), High Court of Uganda.

and the funding of the petrol station business.¹¹¹ The court stated the man cannot take this facility from his wife and children because it is their right and he becomes a trustee for and on their behalf. The wife in this case was not merely exercising a common law right over the property.¹¹²

The concept of indirect and non-monetary contribution of a spouse was not catered for under the doctrines of Common Law and this was not fair to women who often contributed to the development of certain properties but were not the registered owners.¹¹³ Indeed many women in Uganda were engaged in the informal sectors of the economy while others were housewives who only had the capacity to make an indirect non-monetary contribution that guaranteed the wellbeing of the family and this relieved husbands of certain household duties.¹¹⁴ This could be seen as indirect contributions to the general wellbeing of a family even though they could not easily be computed into money.¹¹⁵ And therefore injustice would need to be taken into account.

The landmark decision by Justice Bboosa in *Kintu v Kintu*¹¹⁶ introduced a new perspective into Uganda and it was inspired by the precedent set by the Kenyan case, *Kivuitu v Kivuitu*.¹¹⁷ In *Kintu v Kintu*,¹¹⁸ the parties got married under customary law and petitioned for divorce under the Customary Marriage and Registration Act (2000) on grounds that the appellant (husband) was cruel, adulterous, and had deserted the wife for at least two years.¹¹⁹

The issue for determination before the court was whether the wife was entitled to matrimonial property and the argument before the court was that the wife (respondent) should not have an interest in the property because she did not make a direct financial contribution to it.¹²⁰ The court dismissed the appeal and reasoned that an ordinary housewife who stays at home and prepares the

¹¹¹ *Teopista Mugenzi v Pascal Mugenzi* (2003), High Court of Uganda.

¹¹² *Teopista Mugenzi v Pascal Mugenzi* (2003), High Court of Uganda.

¹¹³ Atim P, 'The shield is still porous' 224.

¹¹⁴ Kabonesa C, 'Gender relations and women's rights to land in Uganda: A study of kabarole district, western Uganda' 8 *East African Journal of Peace and Human Rights* 2, 2002, 230.

¹¹⁵ *Miller v Miller* (2005), England & Wales Court of Appeal, *McFarlane v McFarlane* (2004), England & Wales Court of Appeal.

¹¹⁶ *Kintu v Kintu* (2001), High Court of Uganda.

¹¹⁷ *Kivuitu v Kivuitu* (1991), Court of Appeal of Kenya.

¹¹⁸ *Kintu v Kintu* (2001), High Court of Uganda.

¹¹⁹ *Kintu v Kintu* (2001), High Court of Uganda.

¹²⁰ *Kintu v Kintu* (2001), High Court of Uganda.

food for the family while generally keeping the house going has contributed to the acquisition of the property even though such a contribution is not in monetary terms.¹²¹

Furthermore, in cases where property was registered under the husband's sole name, the wife would have the right to file a lawsuit to establish her interest in the asset.¹²² Since many women found it difficult to find work, the court would have to determine the value to be placed on the wife's non-monetary contribution because it would be unfair to evaluate monetary contributions.¹²³

Therefore, the Married Women's Property Act (1882) could be applied to customary marriages if the non-monetary contributions of housewives were taken into consideration.¹²⁴ Similarly, in the case of *Paul Kagwa v Jackline Muteteri*,¹²⁵ even though the court declared the parties' alleged marriage to be void, it nevertheless recognized Muteteri's entitlement to the Kabale family property, where she lived and earned a living.

Therefore, one could argue that the court in this instance seems to have acknowledged the cohabiting parties' entitlement to acquire an interest in and a portion of the family property obtained during the alleged marriage.¹²⁶ This showed a shift from the limited application of direct financial contribution to a system that protected the spousal rights in relation to property, especially women emerged.

2.4: THE CURRENT MATRIMONIAL PROPERTY REGIME

2.4.1: DOMESTIC FRAMEWORK

As the supreme law of the land, the 1995 Constitution prohibits any customs that are inconsistent with any of its provisions.¹²⁷ The right to own property both individually and jointly is provided for in the Constitution¹²⁸ and this prevents people from being deprived of their property.¹²⁹ Article

¹²¹ *Kintu v Kintu* (2001), High Court of Uganda.

¹²² Section 17, *Married Women's Property Act* (1882).

¹²³ Section 17, *Married Women's Property Act* (1882).

¹²⁴ *Karanja v Karanja* (1970) eKLR.

¹²⁵ *Paul Kagwa v Jackline Muteteri* (2006), High Court of Uganda.

¹²⁶ Atim P, 'The shield is still porous' 228.

¹²⁷ Article 2(2), *Constitution of Uganda* (1995).

¹²⁸ Article 26(1), *Constitution of Uganda* (1995).

¹²⁹ Article 26(2), *Constitution of Uganda* (1995).

26(1) of the Constitution guarantees spousal rights to property, and this includes women as seen in Article 31 that provides for equal rights in marriage, during marriage and at its dissolution.¹³⁰ In addition to this, women are granted the same dignity that had been accorded to men¹³¹ and the state is entitled to provide opportunities that enable women to realise their full potential.¹³² Such provisions uphold women's rights to acquire matrimonial property which had been undermined for a long time.¹³³

In *Uganda Association of Women's Lawyers v The Attorney General*,¹³⁴ the court declared certain provisions of the Divorce Act unconstitutional for instance Section 26 of Divorce Act (Cap 249). It states that 'where a decree of dissolution of marriage or judicial separation is pronounced on account of adultery by the wife, the wife's share of the property will be settled for the benefit of the husband, or of the children of the marriage.'¹³⁵ The court held that Section 26 was discriminatory since it did not contain a similar provision in favour of a wife where divorce or judicial separation is as a result of a man's adultery. It was also inconsistent with Articles 21, 31 and 33 of the Constitution which preserved a woman's right to property.¹³⁶

Besides the constitution, other legislation that safeguards the right to own property include the Registration of Titles Act (Cap 230). Section 54 of the Act provides for the registration of documents to successfully convey an interest in land, and the registration procedure is open to all persons, regardless of gender.¹³⁷ The person to whom the interest passes becomes the proprietor upon such registration, and as such, they are eligible to a certificate of title under Section 55 of the Act.¹³⁸ Such a certificate is solid evidence of title, according to the Act.¹³⁹ As a result, this enables women to purchase land and register as independent proprietors, regardless of their marital status: this is in line with Article 26 of the Constitution which guarantees the right to own property.¹⁴⁰

¹³⁰ Article 31(1), *Constitution of Uganda* (1995).

¹³¹ Article 33(1), *Constitution of Uganda* (1995).

¹³² Article 33(2), *Constitution of Uganda* (1995).

¹³³ Atim P, 'The shield is still porous' 200.

¹³⁴ *Uganda Association of Women Lawyers v Attorney General* (2004), Constitutional Court of Uganda.

¹³⁵ Section 26, *Divorce Act*, 2000.

¹³⁶ *Uganda Association of Women Lawyers v Attorney General* (2004), Constitutional Court of Uganda.

¹³⁷ Section 54, *The Registration of Titles Act*, 1924.

¹³⁸ Section 55, *The Registration of Titles Act*, 1924.

¹³⁹ Section 59, *The Registration of Titles Act*, 1924.

¹⁴⁰ Article 26, *Constitution of Uganda* (1995).

The Land (Amendment) Act, 2004 has also ensured that property rights are respected. With regards to transactions in relation to land that is used as the marital residence or as a source of family income, Section 19 of the Land (Amendment) Act stipulates that spouse approval is necessary.¹⁴¹ It states that a spouse cannot deal with family land in any way without first receiving permission from their husband or wife to sell, trade, transfer, pledge, mortgage, lease, or enter into any other type of agreement.¹⁴² By guaranteeing each spouse's right to enter and dwell in their marital residence, the law essentially establishes security of occupancy.¹⁴³

“Family land” is defined in Section 19 of the Land (Amendment) Act as land that is the location of a family's ordinary residence and/or land from which the family obtains sustenance, or as land that the family voluntarily and freely decides should be classified as such.¹⁴⁴ Having effectively specified the limitations within which land transactions require spousal permission, the legislation mandates that, unless there is a judicial judgment to the contrary, the registrar of lands shall not register any transaction until the consent required by the Land Act is obtained.¹⁴⁵

Hon. Justice Bashaija in the case of *Enid Tumwebaze v Mpeirwe Stephen and Another*¹⁴⁶ concluded that even transacting on family land with a banana plantation would demand spousal approval because it was part of the land on which the person normally resides.”¹⁴⁷ The jurisprudence in the various areas discussed has improved the matrimonial property regime in Uganda.

2.4.2: REGIONAL FRAMEWORK

The African Charter on Human and Peoples' Rights (ACHPR) guarantees non-discrimination and equal legal protection.¹⁴⁸ It requires the state to eliminate all forms of discrimination against women and to defend their rights within the family institutions.¹⁴⁹ The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) is an

¹⁴¹ Section 19, *The Land (Amendment) Act*, 2004.

¹⁴² Section 19, *The Land (Amendment) Act*, 2004.

¹⁴³ Atim P, ‘The shield is still porous’ 203.

¹⁴⁴ Section 19, *The Land (Amendment) Act*, 2004.

¹⁴⁵ Regulation 64(1), *The Land Regulations*, 2004.

¹⁴⁶ *Tumwebaze v Mpeirwe* (2013), High Court of Uganda.

¹⁴⁷ *Tumwebaze v Mpeirwe* (2013), High Court of Uganda.

¹⁴⁸ Article 3, *African charter on human and peoples’ rights*, 1 June 1981.

¹⁴⁹ Article 18(3), *African charter on human and peoples’ rights*.

instrument that protects the rights of women.¹⁵⁰ The Protocol calls on state parties to ensure that spouses have the freedom to engage into marriage and choose their matrimonial regime,¹⁵¹ as well as to allow a woman to acquire, manage, and hold property during her marriage.¹⁵²

The Protocol also requires state parties to ensure equal rights for men and women upon divorce, separation, or annulment of marriage, as well as fair division of marital property.¹⁵³ It protects widows' property rights and emphasizes that they are entitled to an equitable portion of their husband's property inheritance as well as continuing occupancy of the marriage house (whether one chooses to remarry or not).¹⁵⁴

States have a responsibility to adopt human rights concepts found in international and regional treaties into domestic law. Furthermore, as a party to all these instruments, Uganda is responsible for taking all necessary steps to meet its responsibilities. Ratification of the documents should serve as a foundation for amending, promulgating, and implementing existing law in Uganda pertaining to women's property rights.¹⁵⁵

2.4.3: INTERNATIONAL LEGAL FRAMEWORK

Uganda is a signatory to a number of international and regional treaties that ensure the protection of women's property rights.¹⁵⁶ One of them being the Universal Declaration of Human Rights (UDHR) which provides that every individual is entitled to all rights and freedoms without discrimination.¹⁵⁷ Article 17 states that everyone has the right to own property and that it cannot be taken away arbitrarily.¹⁵⁸ This provision safeguards property rights and there are remedies put in place in case a violation occurs.¹⁵⁹

¹⁵⁰ Article 2(1), *Protocol to the African charter on human and people's rights on the rights of women in Africa*, 1 July 2003.

¹⁵¹ Article 6(e), *Protocol to the African charter on human and people's rights on the rights of women in Africa*.

¹⁵² Article 6(j), *Protocol to the African charter on human and people's rights on the rights of women in Africa*.

¹⁵³ Article 7, *Protocol to the African charter on human and people's rights on the rights of women in Africa*.

¹⁵⁴ Article 21(1), *Protocol to the African charter on human and people's rights on the rights of women in Africa*.

¹⁵⁵ Namyalo H, 'An illusionary shield? gender governance and the role of customary law in protecting the rights of widows in Uganda', Human Rights and Peace Centre, School of Law, Makerere University in HUR�PEC Working Paper Number 27, 2010, 4 <https://huripec.mak.ac.ug/publications/> on 29 October 2023.

¹⁵⁶ Atim P, 'The shield is still porous' 197.

¹⁵⁷ Article 2, *Universal declaration of human rights*, 10 December 1948.

¹⁵⁸ Article 17, *Universal declaration of human rights*.

¹⁵⁹ Article 8, *Universal declaration of human rights*.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) on the other hand protects the right to property in so far as it provides for non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶⁰ The International Covenant on Economic, Social, and Cultural Rights (ICESCR) also requires state parties to take actions, to the best of their ability, to achieve gradual full realization of the covenant's rights and these include property rights.¹⁶¹

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ensures that men and women are equal before the law.¹⁶² In addition to this, it states that spouses shall have equal rights in respect of ownership, acquisition, management, administration, enjoyment, and disposition of property.¹⁶³ CEDAW also requires states to take affirmative measures to eliminate all forms of discrimination against women, including any customary practices that exacerbate discrimination against women.¹⁶⁴

State parties are required to take adequate measures to change men's and women's social and cultural patterns of behavior to eliminate biases and customary practices based on the idea of inferiority or stereotypical roles for men and women.¹⁶⁵ Article 5 of CEDAW is significant in furthering women's property rights because it recognizes the history of women's inferiority to men based on African cultural norms that spread the assumption, among other things, that all property, particularly land, belonged only to the males in a household.¹⁶⁶

In addition to this, the General Recommendation No. 21 of the CEDAW Committee emphasizes equality in marriage and family relations.¹⁶⁷ Paragraph 13 states that the shape and notion of the family might differ from state to state, and even within a state.¹⁶⁸ Whatever its form, and whatever the country's legal system, religion, custom, or tradition, the treatment of women in the family,

¹⁶⁰ Article 2(2), *International covenant on economic, social, and cultural rights*, 16 December 1966, UNTS 993.

¹⁶¹ Article 2(1), *International covenant on economic, social, and cultural rights*.

¹⁶² Article 15(1), *Convention on the elimination of all forms of discrimination against women*, 18 December 1979, UNTS 1249.

¹⁶³ Article 16(h), *Convention on the elimination of all forms of discrimination against women*.

¹⁶⁴ Article 5, *Convention on the elimination of all forms of discrimination against women*.

¹⁶⁵ Article 5, *Convention on the elimination of all forms of discrimination against women*.

¹⁶⁶ Atim P, 'The shield is still porous' 198.

¹⁶⁷ *CEDAW General Recommendation No.21, Equality in marriage, and family relations*, 1994, 1.

¹⁶⁸ *CEDAW General Recommendation 21*, 4.

both at law and in private, must conform to the principles of equality and justice for all, as Article 2 of the Convention requires.¹⁶⁹

2.5 CONCLUSION

The Matrimonial property regime of Uganda has evolved into a system that ensures that the interests of both spouses with regards to matrimonial property are protected and respected.¹⁷⁰ With the promulgation of the 1995 Constitution, certain provisions were enacted that prompted the courts to protect the rights of women.¹⁷¹ Courts did remarkable work as both monetary and non-monetary contributions were recognised. However, their decisions should be subjected to scrutiny since the discretion they possess can be subjected to abuse and this will be discussed in Chapter three.

¹⁶⁹ *CEDAW General Recommendation 21*, 4.

¹⁷⁰ Atim P, 'The shield is still porous' 197.

¹⁷¹ Article 31, *Constitution of Uganda* (1995).

CHAPTER THREE: THE DISCRETION OF COURTS IN THE MATRIMONIAL PROPERTY REGIME

3.1 INTRODUCTION

Courts have made progress in the matrimonial property regime in Uganda. This includes the recognition of non-financial contributions made by wives.¹⁷² As discussed in chapter two, Ugandan courts have established a principle that acknowledges the contribution of each spouse to the acquisition of property. Such contributions may take a direct form, involving monetary input, or an indirect form, where a spouse provides domestic services, such as cleaning and taking care of the children.¹⁷³

However, despite these gains, there are weaknesses in the legal system that can be exploited.¹⁷⁴ Judicial decisions are based on judicial discretion, which can be abused depending on the judge's or judicial officer's beliefs and perspectives and this uncertainty might lead to serious unfairness for a claimant.¹⁷⁵

The cases to be discussed are *Edith Nakiyingi v Merekizedeki*,¹⁷⁶ *Ambayo Joseph v Aserua Jackline*,¹⁷⁷ *Julius Rwabinumi v Hope Bahimbisomwe*,¹⁷⁸ *Kasingye v Kasingye*¹⁷⁹ and *Kana v Ezatiru*.¹⁸⁰ The purpose for choosing these cases is to highlight scenarios where the discretion of court is abused, and the affected parties suffered from injustice because of the court's decisions.

3.2 EDITH NAKIYINGI v MEREKICADEKI (1978)

In the case of *Edith Nakiyingi v Merekizedeki*, the defendant and plaintiff had been married for many years. During their marriage, the wife's father gave the husband a "kibanja" (property) on which a house was built with both parties' contributions. The wife cared for the "Kibanja" and grew crops on it. The husband attempted to evict her when their marriage ended. The husband

¹⁷² *Kagga v Kagga* (2005) High Court of Uganda.

¹⁷³ *Kagga v Kagga* (2005) High Court of Uganda.

¹⁷⁴ Atim P, 'The shield is still porous' 237.

¹⁷⁵ Atim P, 'The shield is still porous' 237.

¹⁷⁶ *Edith Nakiyingi v Merikicadeki* (1978), H C B

¹⁷⁷ *Ambayo Joseph Waigo v Aserua Jackline* (2022), Court of Appeal of Uganda.

¹⁷⁸ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁷⁹ *Kasingye v Kasingye* (2019), High Court of Uganda.

¹⁸⁰ *Kana v Ezatiru* (2015), High Court of Uganda.

acknowledged the wife's contributions to the construction of the house and the development of the "kibanja". However, he stated that the contributions were made by her as his wife and that this did not entitle her to anything and both lower courts ruled in the husband's favour.¹⁸¹

When the wife appealed to the High Court, it was decided that the husband could not bar her from taking advantage of their joint endeavours. This is because "the house and "kibanja" (Land) were beneficially owned by the husband and wife under a trust for sale, which resulted from the wife's significant contribution to the land's development and the house's construction.¹⁸²

When a wife makes a significant financial contribution to the construction of a married home, the courts make the conclusion that the home is beneficially owned by the husband and wife jointly in equity. Consequently, neither party had the legal right to exclude the other and take away their portion of the property.¹⁸³

By 1978, the courts had adopted the use of common law doctrines in Uganda. Therefore, non-financial contributions were recognised which explains why the High court overturned the lower court's decision in *Edith Nakiyingi v Merekizedeki*. Therefore, judges did not exercise their discretion in a just manner and this affected the wife. A law passed by Parliament to address Uganda's conditions and circumstances and grant proprietary rights to spouses separate from registered title rights would be necessary to address some injustices like this one involving property rights between husband and wife.¹⁸⁴

3.3 AMBAYO JOSEPH WAIGO v ASERUA JACKLINE (2022)

In *Ambayo Joseph v Aserua Jackline*, the wife had not finished her primary level education by the time she started cohabiting with her husband, but the husband supported and financed her return to formal schooling. Consequently, the wife achieved significant formal academic accomplishments. She successfully completed her primary education at Nakasero Primary School and attained a Certificate in tailoring along with a Diploma in designing and dressmaking. Additionally, she acquired driving skills, and at the commencement of the divorce proceedings,

¹⁸¹ *Edith Nakiyingi v Merekicadeke* (1978), H C B.

¹⁸² *Edith Nakiyingi v Merekicadeke* (1978), H C B.

¹⁸³ *Edith Nakiyingi v Merekicadeke* (1978), H C B.

¹⁸⁴ *Ayiko Mawa v Annet Ayiko* (2017), High Court of Uganda.

she had established herself as a self-employed professional, engaging in activities such as seamstress work, tailoring, and baking.¹⁸⁵

The parties jointly acquired a matrimonial home; however, the purchase agreement for the plot was exclusively registered in the name of the husband as the buyer. The dispute revolved around determining the respective contributions of each party to the purchase and development of the property. After hearing the evidence presented by both parties, the matter came under consideration. The trial judge, Hon. Lady Justice Catherine Bamugemereire, held that whereas the contract upon which the matrimonial home stands was in the husband's names, the house nonetheless belonged to the couple jointly in equal shares. She ordered that the house should be sold, and fifty percent of the value granted to the respondent. Having been dissatisfied by the decision, the appellant appealed to the Court of Appeal.¹⁸⁶

Justice Muzamiru of the Court of Appeal delved into the transformative impact of education, emphasizing how it can fundamentally change an individual's perspective and engagement with the world. In this case, the wife underwent a notable transformation, evolving from complete dependency on her husband to becoming self-employed as a seamstress, tailor, and baker by the time the marriage disintegrated. Justice Muzamiru highlighted that education broadens life opportunities, influencing one's social circles and interactions. The husband's investment in his wife's education was viewed as a form of compensation, akin to payment for her contributions, which, in turn, lessened the extent of her claim for unpaid care work. The Court of Appeal determined that the trial judge made an error in overlooking this form of payment. Upon a re-evaluation of the evidence, the court ruled that the respondent was entitled to a 20% share of the property.¹⁸⁷

Overlooking the husband (appellant)'s role in his wife's transformative journey was a grave injustice and an erroneous use of discretion. The level of judicial activism exercised by the Court of Appeal is commendable however it also presents challenges for married couples, such as maintaining precise and transparent records of these out-of-pocket expenses. What happens if one

¹⁸⁵ *Ambayo Joseph Waigo v Aserua Jackline* (2022), Court of Appeal of Uganda.

¹⁸⁶ *Ambayo Joseph Waigo v Aserua Jackline* (2022), Court of Appeal of Uganda.

¹⁸⁷ *Ambayo Joseph Waigo v Aserua Jackline* (2022), Court of Appeal of Uganda.

partner loses these proof documents entirely; and will one partner be less willing to invest in the other if they fear they will be worth less or nothing in the event of a divorce?¹⁸⁸

3.4 JULIUS RWABINUMI v HOPE BAHIMBISOMWE (2013)

In *Julius Rwabinumi v Hope Bahimbisomwe*, the appellant and respondent were married on August 30, 2003, at Our Lady of Africa Mbuya Catholic Church, according to the case's summary facts. The parties had lived together before to being married, and on March 28, 2003, a son named Edison Rubarema was born. During the first year of their marriage, the husband and the wife had major disagreements that led to the husband pushing the wife and her young boy from their Kisasi village home in Kampala.¹⁸⁹

Following that, on February 14, 2005, the respondent filed for divorce under Divorce Cause No. 4 of 2005, citing the appellant's adultery and cruelty as the reasons why her marriage could not be saved. The Petition was heard by judge Kasule of the High court, who entered a Decree Nisi dissolving the marriage.¹⁹⁰

In addressing the matter of property contribution, Justice Twinomujuni of the Court of Appeal drew upon Article 31 of the Constitution of Uganda. The article stipulates that "Men and women of eighteen years and above have the right to marry and to form a family and are entitled to equal rights in marriage, during marriage and its dissolution." Justice Twinomujuni asserted that the principle of equality in marriage, as reflected in Genesis Chapter 2 verse 24, and the obligations imposed on individuals entering marriages under the Marriage Act are explicitly articulated in the Ugandan Constitution.¹⁹¹

He relied on this to conclude that marital property is jointly owned by the husband and wife and, in the event of a divorce, should be divided equally between them, regardless of who covered what costs and by how much. Justice Twinomujuni further stated that women often find a wealthy and

¹⁸⁸ Mukiibi P and Atim P, 'Is Ambayo Joseph Waigo's decision by the Court of Appeal any different from earlier decisions on similar issues of law?' *The ULS Legal Insights*, 2023, 8.

¹⁸⁹ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹⁰ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹¹ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

well-to-do husband with plenty of property and if the man owns the property at the time of the church vow exchange, it becomes joint property.¹⁹²

The appellant, dissatisfied with the decision of the Court of Appeal, proceeded to the Supreme Court, seeking a second appeal. One of the grounds for appeal was that the Justices of the Court of Appeal made a legal error in their interpretation of Article 31 of the 1995 Constitution of Uganda. The appellant contended that the Court of Appeal incorrectly applied Article 31 to equality in the distribution of property independently owned by the appellant.

Honorable Dr. Esther Kisaakye, a Justice of the Supreme Court, stated that it was erroneous for the Court of Appeal to conclude that all separately owned property by individuals entering religious marriages under the Marriage Act (Cap 251) automatically transforms into matrimonial property upon marriage, becoming joint property of the couple.¹⁹³

The Court of Appeal had also stated that in accordance with the marriage vows and Article 31(1) of the Ugandan Constitution (1995), property should be divided equally upon divorce. This was irrespective of whether the claimant proves direct money contribution or indirect non-monetary contribution.¹⁹⁴

Justice Kisaakye while deciding on the case stated that the Constitution protects both an individual's freedom to own property alone and their right to possess property jointly with others, such as their spouse, children, siblings, or even business partners. In addition to this, the framers of the Constitution would have made it clear if they truly intended to deny married individuals the ability to possess separate property in their own names.¹⁹⁵

Therefore, she acknowledged the validity of the points presented by the appellant's counsel and concurred that the learned Justices of the Court of Appeal made a legal mistake in their interpretation of Article 31 of the 1995 Constitution of Uganda. This error was in applying Article 31 to the equality in the distribution of property independently owned by the appellant. She

¹⁹² *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹³ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹⁴ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹⁵ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

emphasized that marriage vows do not establish proprietary rights in property individually owned by spouses before marriage or in property acquired during the marriage.¹⁹⁶

Lady Justice, in her opinion, called upon Parliament to pass legislation that precisely outlines what qualifies as matrimonial property versus individually owned property of married individuals. She emphasized the need for a law that articulates the principles guiding courts in resolving disputes related to the division of property when marriages are dissolved.¹⁹⁷

The absence of a law on matrimonial property grants courts the discretion to decide on matters as they see fit. This is reasonable; however, some judges have different opinions and interpretations of laws. This could benefit some people but also affect others negatively as seen in the case above where discretion put the appellant (husband) at a disadvantage since the judge misinterpreted the essence of Article 31 of the Constitution of Uganda.

3.5 KASINGYE v KASINGYE (2019)

In *Kasingye v Kasingye*, the individuals involved in the appeal entered legal matrimony on March 1, 1992, at St. Stephens Church of Uganda Nsambya in Kampala District. Throughout their marriage, they were blessed with four children. Initially residing in Nsambya Railway Quarters, they later established their matrimonial home in Nasuti Mukono Town Council. Subsequently, the wife initiated legal proceedings seeking judicial separation on grounds of cruelty, failure to provide maintenance, physical assault, abandonment of the marital bed, and denial of conjugal rights. Additionally, she requested an order for maintenance and custody of the couple's children.¹⁹⁸

Upon scrutiny, the trial magistrate determined that the marriage had reached an irreparable breakdown and issued an order for its termination. Custody of the children resulting from the marriage was awarded to the respondent, and the sale of the matrimonial home was ordered, with each party entitled to an equal share in it and any other jointly owned properties. Dissatisfied with

¹⁹⁶ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹⁷ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

¹⁹⁸ *Kasingye v Kasingye* (2019), High Court of Uganda.

this decision, the husband escalated the matter to the High Court, seeking an appeal on various grounds.¹⁹⁹

One of the grounds for appeal was that the trial magistrate made a legal and factual error by ordering the sale of all matrimonial property, including their home, without taking into account the welfare principle. The welfare principle stipulates that in any decision concerning the upbringing of a child, the management of a child's property, or the utilization of any income derived from it—whether determined by the state, a court, a local authority, or any individual—the paramount consideration shall be the child's welfare.²⁰⁰

Both parties acknowledged joint ownership of a property in Nasuti (Plot 762 Block 190) and another in Nakabago (Plot 1203 Block 107 Kyaggwe Central, East Buganda). Judge Eva Luswata of the High Court observed that the matrimonial property, to which each spouse is entitled, includes the property they consider as their home and contribute to jointly, as established in the case of *Muwanga v Kintu*. She also emphasized that if a spouse makes a significant contribution to a property, it will be regarded as matrimonial property. Such contribution can be either direct and monetary or indirect and non-monetary, as illustrated in the case of *Julius Rwabinumi v Hope Bahimbisomwe*.²⁰¹

In this case, Judge Eva Luswata determined that the trial Magistrate lacked a valid reason to terminate the marriage since the couple had undergone judicial separation, not divorce—an aspect misunderstood by the magistrate. Consequently, the court had no grounds to issue consequential orders concerning matrimonial property, including the marital home. Judge Eva Luswata asserted that the decisions to appraise and sell the marital residence, as well as permitting each spouse to retain separately acquired assets, were erroneous. Consequently, the foundation of the appeal was deemed successful since the parties were still legally married.²⁰²

Similarly, as discussed in the case of *Julius Rwabinumi v Hope Habimbisomwe* (2013), there was also a misinterpretation of law by the trial magistrate in this case. The discretion exercised by the

¹⁹⁹ *Kasingye v Kasingye* (2019), High Court of Uganda

²⁰⁰ First Schedule, *Children Act* (2016).

²⁰¹ *Julius Rwabinumi v Hope Habimbisomwe* (2013), Supreme Court of Uganda.

²⁰² *Kasingye v Kasingye* (2019), High Court of Uganda.

trial magistrate in *Kasingye v Kasingye* also brought about an unjust result on the part of the husband, but this was later rectified by the High court judge.

3.6 KANA v EZATIRU (2015)

This appeal stems from a judgment and ruling by the Chief Magistrate in Arua, where the marriage between the appellant (husband) and respondent (wife) was terminated. A key point of contention was the division of jointly acquired property during their marriage. The Chief Magistrate granted exclusive possession of the disputed residential house in Onzivu village, Oluko sub-county, Arua District, to the wife and her father's children. Additionally, a permanent injunction was issued, prohibiting the husband from interfering in any manner with the affairs of that house.²⁰³

The appellant, dissatisfied with the decision, proceeded to the High Court in Arua. The grounds for appeal included the assertion that the Chief Magistrate, in the trial, made factual and legal errors by failing to grant the husband his rightful share and acknowledgment of contribution in the land and house in question. The appellant argued that the Chief Magistrate arrived at an incorrect decision, asserting that the wife purchased the land and house on behalf of her father's family. Furthermore, the appellant contended that the Chief Magistrate erred in fact and law by inadequately evaluating the evidence on record, leading to an erroneous conclusion that the land and house in question did not constitute part of the matrimonial property of both the appellant and the respondent.²⁰⁴

Judge Vincent Okwanga concluded that the evidence upon which the trial judge based the ownership decision of the disputed residential house was flawed, as outlined in the Evidence Act (Cap 6). The parties were not subjected to any oath or affirmation to compel them to truthfulness and adherence to their conscience. Moreover, substantial evidence indicated that both the wife and husband collaborated in contributing funds, supplies, and labor towards the construction of the house in Onzivu village, Oluko sub-county, Arua, Pakwach road.²⁰⁵

Additionally, there was proof that the husband purchased materials to fix the ceiling and glass windows, hired workers, and worked on the house. The wife confirmed this in her court

²⁰³ *Kana v Ezatiru* (2015), High Court of Uganda.

²⁰⁴ *Kana v Ezatiru* (2015), High Court of Uganda.

²⁰⁵ *Kana v Ezatiru* (2015), High Court of Uganda.

appearance, but she requested to reimburse the petitioner's contribution with time. The High Court judge concurred with the husband's arguments, asserting that had the evidence been appropriately assessed, the trial Chief Magistrate would have discovered that both parties jointly contributed funds, labor, supervision, and the supply and transportation of materials for constructing the disputed residential house during their marriage. Consequently, the appellant was recognized to have a legitimate interest in the property.²⁰⁶

The High Court held that, 'Having contributed in different ways, such as by providing wood, building the ceiling, painting, adding glass windows, and supervising laborers he hired to work on the residential property under dispute, the husband (appellant), is entitled to a 50% share in the property.'²⁰⁷

Additionally, the High Court judge instructed an independent valuer to provide an impartial evaluation of the present value of the house, aiming to facilitate a fair distribution of joint interests in the property. The directive emphasized that contributions to the property were not solely confined to financial input; even a spouse who played a more "passive" role, such as sending money or engaging in supervisory tasks, transportation of materials, running errands related to the construction, or providing household support, was entitled to a share in the property.²⁰⁸

For the court to find that the couple contributed jointly, no prior formal agreement is required hence each party's role during the purchase of the property might be seen as their contribution. Undermining the husband's contribution was an abuse of discretion because direct financial contributions had been acknowledged by this time. Therefore, the absence of a matrimonial property state leaves room for injustices such as this because of the erroneous exercise of discretion.

²⁰⁶ *Kana v Ezatiru* (2015), High Court of Uganda.

²⁰⁷ *Kana v Ezatiru* (2015), High Court of Uganda.

²⁰⁸ *Kana v Ezatiru* (2015), High Court of Uganda.

3.7 CONCLUSION

The judiciary has been very active in the matrimonial property regime however the Parliament must also play its role.²⁰⁹ The five cases discussed above show a failure to exercise discretion judiciously in the trial courts which eventually caused injustice to the litigants in these cases. Since the courts are not guided by any act of Parliament, the discretion granted to courts is bound to be exercised erroneously sometimes. The justices in the Courts of Appeal found the decisions made by the trial courts unfair and this warranted them to overturn these decisions. These injustices occur due to absence of guidelines so the discretion of courts can be abused by judicial officers.²¹⁰ As will be discussed by Chapter four, post nuptial agreements can attempt to guide the courts and produce more fair and predictable results in Uganda.

²⁰⁹ Mukiibi P and Atim P, 'Is Ambayo Joseph Waigo's decision by the Court of Appeal any different from earlier decisions on similar issues of law?' The ULS Legal Insights, 2023, 9.

²¹⁰ Atim P, 'The shield is still porous' 237.

CHAPTER FOUR: POST NUPTIAL AGREEMENTS AS A MEANS OF PROPERTY DISTRIBUTION UPON DIVORCE

4.1 INTRODUCTION

A post-nuptial agreement is a marital property agreement drafted after the wedding in which couples govern affairs relating to property and maintenance after the breakdown of a marriage.²¹¹ Post nuptial marital contracts are drafted in different ways depending on the couples' preference and this includes handwritten letters.²¹² Others are drafted in a formal way²¹³ and all kinds of post nuptial agreements are enforceable due to their contractual nature.²¹⁴

These agreements can benefit both the richer and poorer spouse in the couple²¹⁵ and this is because courts try to ensure that they lead to equitable distributions.²¹⁶ It has been established in the previous chapters that Uganda does not have a matrimonial property Act. As a result of this, courts handle these matters, however the discretion they possess can be exercised erroneously as seen in chapter three. Therefore, there is need for Ugandan courts to be guided while they make these distributions, and this can be done through post-nuptial agreements as discussed in the next section of this chapter.

4.2 PARTY AUTONOMY IN POST-NUPTIAL AGREEMENTS

Couples should be able to plan for their financial future in the event of a divorce, just as they are allowed to structure their marriage as they see fit.²¹⁷ Since the parties take into account both the current situation and the potential for an uncertain future occurrence when drafting such agreements, courts should respect the individual autonomy that is the basis of post-nuptial agreements.²¹⁸ Marital property agreements like post-nuptial agreements enable parties to a marriage to decide for themselves what would be fair if the parties were to divorce.²¹⁹ Party

²¹¹ Sanders, *Private autonomy, and marital property agreements*, 573.

²¹² *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²¹³ *Nesmith v Berger* (2001), The Court of Appeal of Texas.

²¹⁴ *D N K v K M* (2021) eKLR.

²¹⁵ *In re Marriage of Friedman* (2002), The Superior Court of Santa Barbara.

²¹⁶ *Pacelli v. Pacelli* (1999), The Superior Court of New Jersey.

²¹⁷ Sanders A, 'Private autonomy and marital property agreements' 572.

²¹⁸ *Radmacher v Granatino* (2010), United Kingdom Supreme Court.

²¹⁹ *White v White* (2001), United Kingdom House of Lords.

autonomy respects the right to human dignity,²²⁰ one that is upheld in the Constitution of Uganda²²¹ as well as the Universal Declaration of Human Rights²²² and the International Covenant on Civil and Political Rights.²²³

The autonomy provided by these marital agreements creates certainty, predictability and it reflects the interests of the parties²²⁴ which courts cannot ignore unless the agreement was obtained through duress, coercion, and undue influence. In the Kenyan case of *O K N v M P N*, the judge discussed the issue of property rights of parties whose marriage has been invalidated.²²⁵ The learned Judge pointed out that the court could determine the division of property upon annulment of a marriage under section 28 of the Matrimonial Causes Act, (now repealed).²²⁶ The court could also make decisions regarding the application of the whole or any part settled for the benefit of the parties or the children after declaring a decree of nullity or divorce and looking into the existence of any pre- or post-nuptial agreements made by the parties.²²⁷

The element of party autonomy in post-nuptial agreements grant parties a certain degree of freedom when it comes to division of their financial assets. This guides the court's discretion since it minimizes conflict and produces fair outcomes when parties divide their assets during the marriage.

4.3 EQUITABLE DISTRIBUTION

Post-nuptial agreements are a relatively new concept, but they may be given more recognition in matrimonial property because of their advantages.²²⁸ Despite this, there are still inconsistent judicial decisions surrounding the enforceability of such agreements.²²⁹ This is due to the

²²⁰ Kant I, Immanuel Kant: Groundwork of the metaphysics of morals,' 23.

²²¹ Objective XXIV of the Preamble, *Constitution of the Republic of Uganda* (1995).

²²² Article 1, *Universal Declaration of Human Rights* (1948).

²²³ The Preamble, *International Covenant on Civil and Political Rights* (1966).

²²⁴ Oprea A, 'Party autonomy and the law applicable to the matrimonial property regimes in Europe,' 582.

²²⁵ *O K N v M P N* (2017) eKLR.

²²⁶ *O K N v M P N* (2017) eKLR.

²²⁷ *O K N v M P N* (2017) eKLR.

²²⁸ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 2 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²²⁹ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 2 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

misconception that they always favor one party, but courts do not enforce agreements that result in inequitable distributions.²³⁰

The American case of *Bratton v Bratton* shows that courts ensure that the agreements drafted by parties result in equitable distributions. Mrs. Bratton requested her husband to sign a post-nuptial agreement while he was in medical school.²³¹ If he was the cause of the marriage's demise, he was meant to give her 50% of his present belongings and 50% of his future earnings.²³² She believed that he was likely to leave once he graduated from medical school, so she drafted a legal binding agreement to protect herself from that possibility.²³³ The trial court ruled in favour of Mrs. Bratton however Mr. Bratton appealed and the Court of Appeal stated that the agreement lacked consideration and therefore was not enforceable.²³⁴

The Court of Appeal held that post-nuptial agreements should be able to protect parties from fraud, coercion, and undue influence due to the nature of such relationships.²³⁵ Since this agreement lacked consideration, it could not be enforced. This means that people could not use such agreements to their advantage.²³⁶

There is also case law on the recognition of post-nuptial agreements in Kenya which has a similar divorce system to Uganda. The Matrimonial Property Act (2015) of Kenya, Sections 7 and 6(3), Urges the court to consider any agreements made by the parties during the course of the marriage regarding the division of matrimonial properties.²³⁷ In the Kenyan case of *D N K v K M*, the court determined the validity of the post-nuptial agreement by confirming the clear intentions of both the Plaintiff and Defendant to execute both the Agreement and the Addendum.²³⁸

²³⁰ *Pacelli v. Pacelli* (1999), The Superior Court of New Jersey.

²³¹ *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³² *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³³ *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³⁴ *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³⁵ *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³⁶ *Bratton v Bratton* (2004), The Tennessee Supreme Court.

²³⁷ *D N K v K M* (2021) eKLR.

²³⁸ *D N K v K M* (2021) eKLR.

The Defendant transferred the title deed for the 12 acres and fulfilled the obligation of paying half the value of the Mombasa apartment to the Plaintiff, as stipulated in the Agreement and the Addendum. Moreover, the Defendant failed to establish the defense of economic duress, a requirement outlined in Section 107 of the Evidence Act.²³⁹ Therefore the property was divided according to what was indicated in the post-nuptial agreement drafted by the parties.

In the absence of fraud and undue influence, courts are still open to enforcing the interests and rights of the parties who draft such agreements since they guide the court on what is fair based on the terms of the couple. The element of equitable distribution that these agreements possess eases decision making and reduces on the lengthy and costly court proceedings.²⁴⁰

4.4 INCREASED FLEXIBILITY AND CERTAINTY

With regards to flexibility, marital contracts like post-nuptial agreements do not have default rules since the nature of such contracts is to accommodate different relationship dynamics.²⁴¹ Couples adhere to different rules so traditional nuclear families and large extended families cannot be treated the same way and this makes the default state contracts less efficient.²⁴²

Some couples may wish to customize their rights and obligations and marital agreements allow them to do that²⁴³ even though it isn't guaranteed that courts will enforce such clauses.²⁴⁴ In *Diosdado v Diosdado*,²⁴⁵ Manuel Diosdado had an affair with another woman and once his wife Donna heard of this, the parties separated but did not divorce.²⁴⁶ They decided after the separation to draft a post-nuptial agreement that indicated that the party in breach of the obligation to sexual fidelity will pay the other party a sum of \$50,000 irrespective of any property settlement imposed by law during the divorce proceedings.²⁴⁷

²³⁹ *D N K v K M* (2021) eKLR.

²⁴⁰ Atim P, 'The shield is still porous,' 236.

²⁴¹ Silbaugh K, 'Marriage contracts and the family economy' 93 *North Western University Law Review* 1, 1998, 72.

²⁴² Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 19 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁴³ *Laudig v Laudig* (1993), The Superior Court of Pennsylvania.

²⁴⁴ *Diosdado v Diosdado* (2002), The Court of Appeal, Second District, California.

²⁴⁵ *Diosdado v Diosdado* (2002), The Court of Appeal, Second District, California.

²⁴⁶ *Diosdado v Diosdado* (2002), The Court of Appeal, Second District, California.

²⁴⁷ *Diosdado v Diosdado* (2002), The Court of Appeal, Second District, California.

When Donna sought to enforce the agreement in court, it was held that the contract was unenforceable because it was against the public policy of California's no fault divorce based system.²⁴⁸ Even though the court did not enforce this agreement, it is clear that some parties prefer to customize their agreements and post-nuptial agreements may be more favorable in this case since most couples are more optimistic while drafting pre-nuptial agreements.²⁴⁹

Courts usually divide assets acquired during marriage and provisions for spousal support or maintenance based on broad notions of fairness and equity.²⁵⁰ Even though the default rules applied in matrimonial property division become predictable after some time, post-nuptial agreements give parties a chance to choose a discretionary regime where they can create their own terms for property distribution upon divorce.²⁵¹ This allows parties to take part in the decision that will be rendered by the court hence guiding their discretion. This could also result into better outcomes for both spouses since there is a framework followed by the courts based on an agreement drafted by the couple.²⁵²

4.5 ADVANTAGES OF POST NUPTIAL AGREEMENTS COMPARED TO PRE-NUPTIAL AGREEMENTS

This section will deal with post nuptial agreements are better at guiding the court's discretion compared to pre-nuptial agreements. A pre-nuptial agreement is an agreement made by a couple before they get married in which they say how their money and property is to be divided if they get divorced.²⁵³ Both post-nuptial agreements and pre-nuptial agreements allow couples to customize their marital contracts and manage their finances.²⁵⁴ However post-nuptial agreements

²⁴⁸ *Diosdado v Diosdado* (2002), The Court of Appeal, Second District, California.

²⁴⁹ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 20 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵⁰ Kirkman C, 'The theory of marital residuals: Applying an income adjustment calculus to the enigma of alimony' 24 *Havard Women's Law Journal* 28, 2001, 23.

²⁵¹ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 20 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵² Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 20 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵³ Oxford Advanced Learner's Dictionary, 10 ed.

²⁵⁴ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 21 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

are bound to be more common since couples are not likely to avoid them due to optimism as opposed to pre-nuptial agreements.²⁵⁵

Most people usually avoid asking their partners for prenuptial agreements because it indicates that they are uncertain about the future.²⁵⁶ Post-nuptial agreements may suffer the same fate however they are affected less by the effects of optimism and difficulties of future financial crises. This is because the difficulties faced by couples make the future of their marriage uncertain and this forces them to make realistic contingency plans in case of a divorce.²⁵⁷

In addition to this, most prenuptial agreements cannot predict how events will unfold in the future and for a person to be able to draft a valuable marital contract, they should be able to anticipate their reactions to certain unexpected future circumstances such as losing a child, losing a job, or getting an unexpected job opportunity.²⁵⁸ However, people are not good at predicting their future nor are they good at predicting how they would react to certain events in the future.²⁵⁹

There are so many factors to consider before drafting a marital contract especially a pre-nuptial contract which will allow the contract to seem more realistic.²⁶⁰ Post-nuptial agreements do not usually suffer from such situations since they react to the immediate concerns of spouses.²⁶¹ Therefore, they seem to be more suited to guide the discretion of courts because people make them at a time when they have acquired property together and sired children so they cater to realistic and immediate life situations.

²⁵⁵ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 21 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵⁶ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 22 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵⁷ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 22 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁵⁸ Baker L and Emery R, 'When every relationship is above average: Perceptions and expectations of Divorce at the time of marriage,' 17 *Law and Human Behavior* 1, 1993, 448.

²⁵⁹ Baker L and Emery R, 'When every relationship is above average: Perceptions and expectations of Divorce at the time of marriage,' 439.

²⁶⁰ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 20 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

²⁶¹ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 20 -<<https://ssrn.com/abstract=983531>> on 10 December 2023.

4.6 THE BARGAINING POWER THEORY IN POST NUPTIAL AGREEMENTS.

The bargaining power within post nuptial agreements is a controversial issue. The bargaining power theory states that a party with more bargaining power receives a better deal than a party with less. It shows that courts, commentators, and other authors have exaggerated the likely disparity in bargaining power between richer and poorer spouses.²⁶² This creates an element of gender inequality when post nuptial agreements are created. Sean Hannon remarks that it has been assumed that women suffer more when such arrangements are made, however a stay-at-home mother in a traditional family can also have significantly more bargaining power than her working husband.²⁶³

Gary Becker states that each spouse has an equal opportunity to maximize his or her utility which could be monetary gain or happiness.²⁶⁴ Sean Hannon states that courts rarely favor such agreements because it is assumed that they put women at a disadvantage since they are more risk-averse compared to men.²⁶⁵ However, the exact dynamics of the postnuptial bargaining process are not shown because it focuses on the outcome of monetary gain yet men and women tend to be risk-seeking when the outcome is concerned with monetary loss.²⁶⁶

Authors like Evan Moore, Catherine Eckel²⁶⁷ and Renate Schubert²⁶⁸ suggest that women are more risk-seeking than men when dealing with losses while other authors show that there is no significant difference between men and women while they are dealing with such situations.²⁶⁹

²⁶² Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 24 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁶³ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 24 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁶⁴ Becker G, *A Treatise on The Family* Harvard University Press, Boston, 1993, 112.

²⁶⁵ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 30 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁶⁶ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 30 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁶⁷ Moore E and Eckel C, 'Measuring ambiguity aversion' *Semantic Scholar*, 2006, 56.

²⁶⁸ Schubert R and Gysler M, 'Gender specific attitudes towards risk and ambiguity: An experimental investigation' *Swiss Federal Institute of Technology*, 2000, 2.

²⁶⁹ Kruse J and Thompson M, 'Valuing low probability risk: Survey and experimental evidence' 50 *Journal of Economic Behavior & Organization* 4, 2003,501.

Overall, there is no clear correlation between risk aversion and gender so it is safe to assume that women do not automatically suffer more losses during post nuptial bargaining.²⁷⁰

There are several factors that affect the bargaining power of spouses in post nuptial agreements that have no relation to gender such as outside options. Outside options are advantages that a spouse acquires if they decide to get divorced or remarried.²⁷¹ Examples of these are the source of income; more women interrupt their careers to make time for children compared to men, so their earning pattern gets disrupted with time.²⁷²

The value of the spouse on the remarriage market is another important factor. This tends to favor men more since their fertility is not affected with age nor is their sex appeal²⁷³ which in turn influences the bargaining process since a husband cannot bargain for more than what he is valued at on the outside.²⁷⁴

We can assume that the bargaining process in post nuptial agreements has little to do with someone's gender.²⁷⁵ However, Rebecca Glass presents an opposing viewpoint, suggesting that financially stronger spouses may exploit those who are financially weaker due to their superior bargaining power. This could potentially be accomplished by leveraging the threat of ending the marriage if the less powerful party does not agree. Such calculated exploitation results in unfairness.²⁷⁶ Other authors like Ted Bergstrom discourages marital contracts because they encourage spouses to take advantage of each other which makes a particular gender (usually women) suffer due unequal bargaining power.²⁷⁷

²⁷⁰ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 34 -<<https://ssrn.com/abstract=983531>> on 6 March 2023

²⁷¹ Muthoo A, 'Bargaining theory with applications' 113 *Public Choice* 1, 2002, 137.

²⁷² Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 36 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁷³ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 36 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁷⁴ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 36 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁷⁵ Hannon S, 'Postnuptial agreements' *Wisconsin Law Review*, 2008, 34 -<<https://ssrn.com/abstract=983531>> on 6 March 2023.

²⁷⁶ Glass R, 'Trading up: Postnuptial agreements, fairness, and a principled new suitor for California' 92 *California Law Review* 1, 2004, 256.

²⁷⁷ Bergstrom T, 'Economics in a family way' 34 *Journal of Economic Literature* 4, 1996, 1920.

4.7 CONCLUSION

Introducing post nuptial agreements as a guide for the courts does not intend to oust their jurisdiction in such matters. It creates a shift from a system with default rules to a system with discretionary rules that favours both the courts and the parties involved. The workload of the courts is reduced, and most parties are satisfied by the results. This would be an advantage to the Ugandan matrimonial property regime since there is no matrimonial property statute, so parties solely rely on the discretion of the courts. The existence of post-nuptial agreements as a guiding tool can prevent the abuse of that discretion.

CHAPTER FIVE: RECOMMENDATIONS AND FINAL CONCLUSION

5.1 CONCLUSION

As the paper comes to an end, there is need to provide solutions or an approach that can improve the matrimonial property regime of Uganda. As discussed in the previous chapter, post-nuptial agreements are a viable solution that can fill the gap created by the absence of a statute. By adopting these marital property agreements, the courts will be provided with guidelines which will help them distribute property in a manner that aligns or closely aligns with the interests of the parties while ensuring that these agreements are not unconscionable.

5.2 SUMMARY OF FINDINGS

Post-nuptial agreements barely have jurisprudence in Uganda. There is also no statute governing the distribution of matrimonial property in Uganda, so parties solely rely on the court's discretion when it comes to determination of such matters. However, the shelved Marriage Bill of 2017 recognizes pre-nuptial agreements as a means of property distribution and in addition to this, case law shows that courts have considered the existence of pre-nuptial agreements in Uganda.²⁷⁸ The courts subject these agreements to high scrutiny and if post-nuptial agreements are acknowledged, they can be subjected to the same scrutiny since they are only meant to guide the court and prevent the abuse of discretion.

The current law governing matrimonial property is Article 31 of the Constitution of Uganda that guarantees equal protection of rights for both men and women during and after the marriage has been dissolved. Article 33 centers around human dignity. In addition to this, Uganda has ratified treaties such as the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights as well as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These treaties protect the property rights of both men and women and ensure that both spouses have equal protection before the law. The courts that determine matrimonial property matters rely on these laws before they decide how they will distribute property between spouses.

²⁷⁸ *Margaret Hough v David Hough* (2006), High Court of Uganda.

The justification for post-nuptial agreements as guidelines for the courts has been demonstrated through the paper especially in Chapter three where cases with inconsistent judicial decisions are analyzed. These marital property agreements are meant to prevent courts from abusing their discretion which could cause injustice to litigants. This will also reduce the backlog of cases and save parties from the lengthy court procedures.

The essence of post-nuptial agreements is not to oust the jurisdiction of the court. The courts still have the power to vary such agreements especially if they are unconscionable or unfair to one of the parties. Post-nuptial agreements simply grant parties the freedom to distribute their financial assets so that they do not have to constantly rely on the court.

5.3 RECOMMENDATIONS

There is need to clarify on the interpretation of Article 31 of the Constitution of Uganda. This is because courts rely on it when it comes to distribution of matrimonial property in Uganda. Some judges interpret it as an equal distribution of property while others interpret it as an equitable distribution of property. The intention of this is to create a uniform interpretation of this section so that there are less cases of parties being affected by misinterpretation of law by the judges.

In addition to this, Uganda Courts should acknowledge post nuptial agreements as a means of property distribution upon divorce. This will help to guide the court's discretion when it handles such matters so that they can make decisions that are favorable to parties. They will also reduce the workload of courts since they would not have to divide matrimonial property if parties have post nuptial agreements that are free of duress, fraud, and coercion.

The shelved Marriage Bill 2017 ought to be amended to include post nuptial agreements alongside pre-nuptial agreements as a proposal to matrimonial property distribution. These agreements can also guide the court's discretion when it comes to determination of such matters.

Uganda also needs to enact a matrimonial property Act so that courts are guided by a statute. They would not have to solely rely on their discretion, which lessens their work. This law should also be able to guide the courts on how to handle post nuptial agreements once they encounter them. It

can take a while to ensure that a bill being enacted navigates political dynamics, receives support from lawmakers, resolves competing interests, and complies with legal and constitutional requirements, so this is not a simple process.

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